



April 14, 2020

VIA E-FILING

Jonathan P. Nase

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jnase@cozen.com

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, Second Floor North
Harrisburg, PA 17120

Re: Tanya J. McCloskey, Acting Consumer Advocate v. Hidden Valley Utility Services, L.P. – Water, and Tanya J. McCloskey, Acting Consumer Advocate v. Hidden Valley Utility Services, L.P. – Wastewater; Docket Nos. C-2014-2447138 and C-2014-2447169

Motion for Stay of Hidden Valley Utility Services, L.P. and for Expedited Treatment

Dear Secretary Chiavetta:

Enclosed for filing with the Pennsylvania Public Utility Commission (“Commission”) please find the Motion for Stay of Hidden Valley Utility Services, L.P. and for Expedited Treatment. Copies are being served in accordance with the attached Certificate of Service.

Please contact me if you have any questions regarding this filing.

Sincerely,

COZEN O'CONNOR

By: Jonathan P. Nase
Counsel for *Hidden Valley Utility Services, L.P.*

JPN
Enclosure

cc: Administrative Law Judge Katrina L. Dunderdale
Per Certificate of Service
James Kettler

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Tanya J. McCloskey, Acting Consumer Advocate	:	
	:	
v.	:	Docket No. C-2014-2447138
	:	
Hidden Valley Utility Services, L.P. – Water	:	
	:	
and	:	
	:	
Tanya J. McCloskey, Acting Consumer Advocate	:	
	:	
v.	:	Docket No. C-2014-2447169
	:	
Hidden Valley Utility Services, L.P. – Wastewater	:	

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing **Motion for Stay of Hidden Valley Utility Services, L.P. and for Expedited Treatment**, upon the parties, listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

DUE TO THE COVID-19 EMERGENCY, SERVICE IS BEING MADE VIA E-MAIL ONLY:

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Consultant for *Office of Consumer Advocate*



DATED: April 14, 2020

Jonathan P. Nase, Esquire
Counsel for *Hidden Valley Utility Services, L.P.*

VERIFICATION

I, JAMES KETTLER hereby state that the facts set forth above are true and correct to the best of my knowledge, information and belief and that I expect 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 unsworn falsification to authorities).

April 14, 2020

James Kettler

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**ADMINISTRATIVE LAW JUDGE
KATRINA L. DUNDERDALE**

Tanya J. McCloskey, Acting Consumer Advocate :
v. : Docket No. C-2014-2447138
Hidden Valley Utility Services, L.P. – Water :

and

Tanya J. McCloskey, Acting Consumer Advocate :
v. : Docket No. C-2014-2447169
Hidden Valley Utility Services, L.P. – Wastewater :

**MOTION FOR STAY OF
HIDDEN VALLEY UTILITY SERVICES, L.P.
AND REQUEST FOR EXPEDITED TREATMENT**

AND NOW COMES Hidden Valley Utility Services, L.P. (“HVUS” or the “Company”), pursuant to 52 Pa. Code § 5.103, to file this motion (“Motion”) requesting that the Honorable Administrative Law Judge Katrina L. Dunderdale (the “ALJ”) stay this proceeding pending disposition of the related proceedings in *Jonathan Nase v. Pennsylvania Public Utility Commission*, Pennsylvania Office of Open Records Docket No. AP 2019-2652 (the “OOR Proceeding”). Due to the short time frames in the current procedural schedule in this matter, HVUS respectfully requests that the ALJ direct all other Parties to file an Answer this Motion within ten days of the date it was served, and to issue a decision expeditiously.

I. Introduction and Summary

Jonathan Nase, counsel for HVUS, filed a Right to Know Law request on October 30, 2019, seeking public documents from the Pennsylvania Public Utility Commission (“Commission”) that are relevant to this proceeding. Those documents are unavailable to HVUS through other forms of discovery. To be considered in the instant proceeding, those documents would need to be entered into the record. This case, however is scheduled to go to trial on May 19-20, 2020.

Due to circumstances beyond the control of HVUS, the OOR Proceedings have been repeatedly delayed. On April 10, 2020, the Appeals Officer stayed the OOR Proceeding indefinitely due to the inability to conduct an *in camera* review of the documents in dispute while out of the office due to the Coronavirus (“COVID-19”) Emergency. See **Exhibit 1**. Considering that the OOR Proceeding now is unlikely to be concluded before the record closes in the instant proceeding, HVUS respectfully requests that the ALJ stay this proceeding until such time as the OOR Proceeding is concluded. HVUS should be required to provide status reports to the ALJ and the Parties every sixty days until that case is resolved, and should be required to notify the ALJ and the Parties within ten days after that case is resolved.

II. Background

A. Procedural History of the Instant Case

1. This proceeding arises out of the Petition of Hidden Valley Utility Services, L.P. for an Amendment of the Opinion and Order entered May 3, 2018 (“Petition”). The Petition requested an extension of the one-year deadline established in Ordering Paragraph 8(1) of that Order for building a water treatment plant or interconnecting to an alternative source of water. HVUS alleged that the engineer’s report that it filed on April 18, 2018 demonstrated that such a project could not be completed within one year.

2. In an Opinion and Order entered January 17, 2019 (“January 2019 Order”), the Commission denied the Petition and ordered hearings to be held regarding the evidentiary basis for HVUS’s request for an extension.

3. HVUS subsequently filed a Petition for Review in the Commonwealth Court of Pennsylvania.

4. In *Hidden Valley Utility Services, L.P. v. Pa. Pub. Util. Comm’n*, 187 C.D. 2019 (May 15, 2019), the Commonwealth Court quashed HVUS’s appeal and directed that hearings be held regarding the sufficiency of the engineer’s report and the one-year compliance deadline.

5. On February 7, 2020, the PUC notified the Parties to this proceeding that a Prehearing Conference would be held on February 25, 2020.

6. HVUS timely filed a Prehearing Memorandum, in which it stated “HVUS reserves the right to request a modification of the procedural schedule in this matter if it is unable to obtain timely access to relevant evidence through the OOR [P]roceeding.” HVUS Prehearing Memorandum p. 9.

7. At the Prehearing Conference, the ALJ and the Parties agreed to a litigation schedule. According to that schedule, hearings will be held on May 19-20, 2020.

8. In accordance with that litigation schedule, HVUS served its Direct Testimony on April 3, 2020. The Direct Testimony of Non-Company Parties is due on April 24, 2020. The Rebuttal Testimony of all Parties is due on May 8, 2020. Both the Bureau of Investigation and Enforcement (“I&E”) and the Office of Consumer Advocate (“OCA”) have already advised the ALJ that they do not intend to submit Direct Testimony and they may need an extension of the procedural schedule to file Rebuttal Testimony because they are out of their offices due to the COVID-19 Emergency.

B. Procedural History of the OOR Proceeding

9. On October 30, 2019, Jonathan Nase, Counsel to HVUS, submitted a request for public documents from the Commission pursuant to the Right to Know Law. **Exhibit 2, Attachment C.**

10. On November 5, 2019, the Commission's Right to Know Officer notified Counsel to HVUS that additional time was necessary to respond to the Right to Know Law request. On December 6, 2019, the Commission granted the request for documents, in part, and denied it, in part. **Exhibit 2, Attachments E and F.**

11. On December 30, 2019, Counsel for HVUS filed an appeal with the OOR, contending that the Commission should have released additional documents, in part or in whole. **Exhibit 2.** The OOR acknowledged the filing in a letter dated December 31, 2019, and notified the parties to that proceeding that a Final Determination was due from the OOR by February 28, 2020. **Exhibit 3.**

12. On January 10, 2020, Counsel for HVUS filed his Evidence and Legal Argument supporting his appeal with the OOR. **Exhibit 4.** The PUC filed its Position Statement and Affidavit on January 13, 2020. **Exhibit 5.**

13. On February 20, 2020, the Appeals Officer directed the Commission to file a Privilege/Exemption Log by March 6, 2020 and extended the deadline for the OOR to issue its Final Determination until March 25, 2020. **Exhibit 6.** However, counsel for the Commission requested an extension to file the Privilege/Exemption Log. The Appeals Officer granted that request and required the Commission to file the Privilege/Exemption Log by March 20, 2020, and stated that the OOR would issue its Final Determination by April 17, 2020. **Exhibit 6.**

14. On March 6, 2020, Governor Tom Wolf issued a Proclamation of Disaster Emergency, due to the spread of COVID-19 in the Commonwealth. Subsequently, many state agencies (including the OOR) closed their offices, requiring employees to work remotely, and are expected to remain closed through at least April 30, 2020.

15. The Commission filed its Privilege/Exemption Log on March 20, 2020.

16. On April 10, 2020, the Appeals Officer notified the parties to the OOR Proceeding that an *in camera* review of the requested documents was required. Such a review, however, is impossible due to the present COVID-19 Emergency. The Appeals Officer therefore stayed the OOR Proceeding indefinitely. Upon returning to the office after the expiration of the COVID-19 Emergency, the Appeals Officer will notify the parties of the date for submitting records for *in camera* review and for a Final Determination. **Exhibit 1.**

C. Relevance of the OOR Proceeding for this Case

17. The documents in dispute in the OOR Proceeding include communications concerning HVUS between and among PUC Commissioners and Commissioner's Assistants. **Exhibit 2, Attachment A.**

18. HVUS could not obtain the documents in dispute in the OOR Proceeding by serving discovery requests on any of the Parties to the instant proceeding. I&E is the only Party to this proceeding from the Commission, and that Bureau would not have access to communications between and among PUC Commissioners and Assistants to PUC Commissioners.

19. Counsel for HVUS has made clear in his OOR filings that the documents are being sought as a form of discovery on behalf of HVUS in upcoming proceedings (including the instant case). **Exhibit 4 p. 5.** Nevertheless, the Commission has refused to turn over the disputed

documents, in part or in whole. Any delay resulting from that refusal is therefore attributable to the Commission, not to HVUS.

20. At this time, it is unclear whether the OOR will order any of the disputed documents to be made public, and, if so, what will be in those documents. Nevertheless, it is significant to note that the Commission has turned over the power point presentation that Commissioner Norman J. Kennard gave at the NAWC annual meeting on May 7, 2019 (before the Commonwealth Court quashed HVUS's appeal of the January 2019 Order). In that power point, **Exhibit 7** p. 6, the Commissioner stated that HVUS is already in a proceeding whereby the Commission can order it to be sold pursuant to Section 529 of the Pennsylvania Public Utility Code ("Code"). 66 Pa. C.S. § 529. That statement is not simply factually erroneous; it suggests that the Commissioner prejudged this case and decided that he would deny HVUS's Petition, regardless of the evidence presented in this proceeding.

21. Commissioner Kennard is no longer serving on the Commission, but other Commissioners and Commissioner's Assistants who were involved in prior HVUS cases remain in their positions. Communications between and among these persons could be relevant to this proceeding.

III. Legal Standard

22. The criteria for obtaining a stay are set forth in *Pennsylvania Public Utility Commission v. Process Gas Consumers Group*, 502 Pa. 545, 467 A.2d 805 (1983) ("*Process Gas*"). Under those criteria, a stay is warranted if:

a. The Petitioner makes a strong showing that it is likely to prevail on the merits;

b. The Petitioner has shown that without the requested relief, the Petitioner will suffer irreparable injury;

c. The issuance of a stay will not substantially harm other interested parties in the proceedings.

d. The issuance of a stay will not adversely affect the public interest.

23. In addition, appropriate circumstances, the Commission has exercised flexibility, granting a stay even though all four *Process Gas* criteria were not satisfied in a particular case. *See, e.g., Pa. Pub. Util. Comm'n v. Pennsylvania Electric Company*, Docket Nos. M-2008-2036188 et al. (Opinion and Order entered March 25, 2010).

IV. The Commission Should Stay these Proceedings Pending Disposition of the OOR Proceedings

A. The *Process Gas* Criteria are Satisfied

1. Counsel for HVUS has Made a Strong Showing that the OOR Should Order the Commission to make Additional Documents Available to the Public

24. Pursuant to *Process Gas*, a petitioner need not demonstrate that it will win the case; it need only demonstrate that it has raised significant legal issues and made a substantial case on the merits. 502 Pa. at 554, 467 A.2d at 809.

25. In his Right to Know Appeal, Counsel for HVUS has raised significant legal issues and made a substantial case on the merits, **Exhibits 2 and 3**, particularly since the Commission withheld many documents in their entirety, rather than disclosing redacted versions of those documents. This is inconsistent with the minimum redaction mandate of the Right to Know Law. *Mission Pa., LLC v. McKelvey*, 212 A.3d 119 (Pa. Cmwlth. Ct. 2019) *petitions for allowance of appeal granted, McKelvey v. Pa. Dept. of Health* (Pa., Nos. 393, 394 and 396 MAL 2019, filed January 28, 2020).

26. The Commission did not initially submit a Privilege/Exemption log in the OOR Proceeding, but the Appeals Officer subsequently ordered the Commission to produce such a document. The Appeals Officer then ordered the Commission to produce the disputed documents for *in camera* review. These developments conclusively demonstrate that counsel for HVUS has raised a significant legal issue and made a substantial case on the merits.

2. Hidden Valley would be Irreparably Harmed if a Stay is Not Granted.

27. Counsel for HVUS filed his Right to Know Law request with the Commission months before this proceeding started, and the OOR Proceedings were expected to be completed before the end of February. The delays in resolving the OOR Proceeding were not within HVUS's control.

28. At this time, it is unlikely that the OOR Proceedings will be complete before the record closes in the instant proceeding.

29. The OOR Proceedings are a form of discovery to enable HVUS to prepare its case in the instant proceeding. The documents that could be turned over to HVUS could be relevant evidence in this proceeding. HVUS would be irreparably harmed if it would be forced to try this case before it has an opportunity to complete the discovery necessary to present its case. Forcing HVUS into a trial prematurely raises significant due process concerns.

30. There is no statutory deadline for completing this proceeding.

3. The Other Interested Parties Will Not be Substantially Harmed if a Stay is Granted.

31. I&E and OCA have already indicated that they do not intend to file Direct Testimony and may need a modification of the procedural schedule to file their Rebuttal Testimony.

32. At this time, the PUC's offices are closed due to the COVID-19 Emergency. It is unclear how long this situation will continue.

33. Granting a stay at this time would not substantially harm any other Party to this proceeding. All other parties would be able to continue to prepare their cases during the stay, and will have the opportunity to present their cases fully when the stay is lifted.

4. The Public Interest will not be Adversely Affected if a Stay is Granted.

34. The public interest favors giving all persons a fair trial, regardless of the allegations they face and their past history. If a stay is denied, HVUS would be denied a fair trial because it would be required to go to trial before completing discovery through no fault of its own.

35. The public interest favors efficiency in administrative proceedings. If a stay is not granted, and the OOR subsequently orders relevant documents to be disclosed to counsel for HVUS, HVUS would need to file a motion to reopen the record or a motion for a rehearing. The ALJ or the Commission could deny such a motion. Even if the ALJ or the Commission would grant such a motion, the result would be a substantial waste of resources for all Parties and the Commission because HVUS would need to file Supplemental Direct Testimony, the other Parties would need to file Supplemental Rebuttal Testimony, etc. The better approach would be to stay this case and allow HVUS to file Supplemental Direct Testimony when the OOR Proceedings are completed. That would permit the other Parties to the case to file Rebuttal Testimony that addresses both HVUS's Direct Testimony and its Supplemental Direct Testimony. It would be particularly wasteful to rush to trial, and then need to reopen the record in order to introduce more evidence and hold a second trial.

36. HVUS is currently in the process of constructing a water treatment plant while this case is pending. HVUS can proceed with the construction of its water treatment plant while this

case is stayed (subject, of course, to the Governor's orders regarding utility construction during the COVID-19 Emergency).

37. Any capable public utility (as defined in Section 529) – and any entity that is not a capable public utility – wishing to purchase HVUS can make an offer while this case is stayed.

B. Even if the *Process Gas* Criteria are Not Satisfied, the ALJ Should Exercise Flexibility and Grant a Stay Based on the Facts of this Particular Case

38. Even if the ALJ concludes that Hidden Valley has failed to satisfy all four prongs of the *Process Gas* test, the ALJ should exercise the flexibility discussed in *Pennsylvania Electric Company, supra*, and grant the request for a stay pending disposition of the OOR Proceedings.

39. Counsel for HVUS has made a strong case on the merits in the OOR Proceeding. He has made clear that his discovery request seeks to protect HVUS's due process rights in this and other upcoming proceedings. The ALJ should exercise her discretion to protect those rights where, as here, there would be no material adverse impact on the rights of the other Parties to this case or the public interest.

V. Request for Expedited Treatment

40. HVUS filed this Motion within a reasonable time after the Appeals Officer issued the Stay in the OOR Proceeding.

41. Answers to motions are ordinarily required to be filed within twenty days of the date the motion is served. 52 Pa. Code § 5.103(c).

41. Twenty days from the date of service of this Motion would be shortly before the date Rebuttal Testimony is due in this proceeding.

42. In order to permit the ALJ to issue a decision on the Motion prior to the date Rebuttal Testimony is due in this proceeding, HVUS requests that the ALJ direct the other Parties to this proceeding to file their Answers within ten days of service of the Motion.

VI. Conclusion

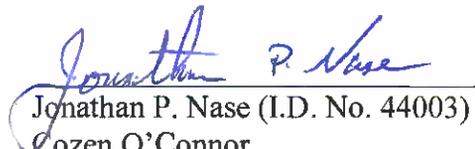
WHEREFORE, for all of the above reasons, Hidden Valley Utility Services, L.P. respectfully requests that the Honorable Administrative Law Judge Katrina L. Dunderdale:

(1) direct the other Parties to this proceeding to file Answers to this Motion within ten days of the date the Motion was served;

(2) expeditiously grant a stay of this matter pending disposition of the related case of *Jonathan Nase v. Pennsylvania Public Utility Commission*, Pennsylvania Office of Open Records Docket No. AP 2019-2652. HVUS should be required to provide the ALJ and all Parties to this proceeding with a status report on that proceeding every sixty days, and to notify the ALJ and all Parties to this proceeding within ten days after the OOR issues its decision in that proceeding.

Respectfully submitted,

Cozen O'Connor


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Fax: (215) 372-2340
Email: jnase@cozen.com

Counsel for *Hidden Valley Utility Services, L.P.*

Date: April 14, 2020

EXHIBIT 1



pennsylvania

OFFICE OF OPEN RECORDS

ORDER

IN THE MATTER OF	:	
	:	
JONATHAN NASE,	:	
Requester	:	
	:	
v.	:	Docket No: AP 2019-2652
	:	
PENNSYLVANIA PUBLIC UTILITY	:	
COMMISSION,	:	
Respondent	:	

Due to the efforts to contain the spread of the coronavirus (COVID-19),¹ the Office of Open Records (“OOR”) takes note that many agencies have reduced or ceased operations and the OOR is teleworking. This appeal requires *in camera* review to complete the record. In order to ensure the agency has had a full and fair opportunity to participate in this appeal, the OOR hereby ORDERS that this appeal be stayed indefinitely, so that *in camera* review may proceed following OOR protocol. Upon resuming regular operations, the OOR will establish *in camera* record submission and final determination deadlines for the parties. This Order shall not be deemed a Final Determination for purposes of Section 1101 and 1102 of the Right-to-Know Law, 65 P.S. §§ 67.1101-1102. Parties with access to email will be provided immediate notice of this Order; for all other parties, a copy of this Order will be mailed to those parties as soon as is possible.

¹ See Governor’s Proclamation of Disaster Emergency, available at <https://www.governor.pa.gov/wp-content/uploads/2020/03/20200306-COVID19-Digital-Proclamation.pdf>.

ORDER ISSUED: April 9, 2020

/s/ Erin Burlew

ERIN BURLEW, ESQ.
APPEALS OFFICER

Sent to: Jonathan Nase, Esq. (via email only);
Scott Thomas, Esq. (via email only);
John Herzog, Esq. (via email only);
Hayley Dunn, Esq. (via email only);
Rosemary Chiavetta, Esq. (via email only);
Doreen Trout (via email only)

EXHIBIT 2



December 30, 2019

VIA HAND DELIVERY

RECEIVED

Jonathan P. Nase

Direct Phone 717-773-4191

Direct Fax 215-372-2340

jnase@cozen.com

Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101-2234

DEC 30 2019

OFFICE OF OPEN RECORDS

Re: Appeal of Jonathan Nase of Partial Denial of Right to Know Request Directed to the Pennsylvania Public Utility Commission

Dear Sir or Madam:

Enclosed please find an appeal of the partial denial by the Pennsylvania Public Utility Commission ("Commission") of a Right to Know Request dated October 30, 2019, pursuant to the Pennsylvania Right to Know Law ("RTKL").

We request that the Commission be ordered to disclose all records requested (with appropriate redactions, if necessary). We further request an opportunity to provide additional briefing and support for the appeal, and we request that the Appeals Officer conduct an *in camera* review of the withheld documents before issuing a final determination in this proceeding.

A copy of the appeal has been served on the Commission as indicated on the enclosed certificate of service.

Should you have any questions, please contact me. Thank you.

Sincerely,

COZEN O'CONNOR

By: Jonathan P. Nase

JPN

Attachments

cc: Rosemary Chiavetta, Secretary (Right to Know Law Officer)
Renardo Hicks, Chief Counsel
James Kettler, President, Hidden Valley Utility Services, L.P.



RECEIVED

DEC 30 2019

RIGHT-TO-KNOW LAW ("RTKL")
APPEAL OF DENIAL, PARTIAL DENIAL, OR DEEMED DENIAL

OFFICE OF OPEN RECORDS

Office of Open Records ("OOR")

Email: openrecords@pa.gov
Fax: (717) 425-5343

333 Market Street, 16th Floor
Harrisburg, PA 17101-2234

Today's Date: December 30, 2019

Requester: Jonathan Nase

Company (if applicable): Cozen O'Connor

Address/City/State/Zip: 17 North Second Street, Suite 1410, Harrisburg, PA 17101

Email: jnase@cozen.com Phone: (717) 773-4191

Request Submitted to Agency Via: X Email [] Mail [] Fax [] In-Person (check only one)

Date of Request: October 30, 2019 Date of Response: December 6, 2019 [] Check if No Response

Agency: Public Utility Commission

Name & Title of Person Who Denied Request (if available): Rosemary Chiavetta, Secretary

Address/City/State/Zip: Commonwealth Keystone Building, 400 North Street, Harrisburg, PA 17120

Email: rchiavetta@pa.gov Phone: (717) 787-8009

Records at Issue in this Appeal (use additional pages if necessary): Please see Attachment A.

I requested the listed records from the Agency named above. By submitting this appeal, I am appealing the Agency's denial, partial denial, or deemed denial because the requested records are public records in the possession, custody or control of the Agency; the records do not qualify for any exemptions under § 708 of the RTKL, are not protected by a privilege, and are not exempt under any Federal or State law or regulation; and the request was sufficiently specific.

Please complete the following:

- X I have attached a copy of my request for records.
X I have attached a copy of all responses from the Agency regarding my request.
X I have attached any letters or notices extending the Agency's time to respond to my request.
X I hereby agree to permit the OOR an additional 30 days to issue a final determination.
[] I am interested in resolving this issue through OOR mediation. This stays the initial OOR deadline for the issuance of a final determination by 7 business days. If mediation is unsuccessful, the OOR has 30 days from the conclusion of the mediation process to issue a final determination.

Attachment A

Attachment A – Access to the Following Records was Denied, in Part

All e-mails or other documents to or from a Commissioner, or any member of a Commissioner's staff, mentioning Hidden Valley Utility Services, L.P. during the period 2013 – present.

All e-mails or other documents to or from any employee in the Bureau of Technical Utility Services mentioning Hidden Valley Utility Services, L.P., during the period 2013-present.

RECEIVED

DEC 30 2019

OFFICE OF OPEN RECORDS

Attachment B

Attachment B – Reasons for Appeal

I. Introduction

1. The requester in this case requested specific records (“Requests”) from the Pennsylvania Public Utility Commission (“Commission”) relating to Hidden Valley Utility Services, L.P. (“Hidden Valley”), a public utility subject to Commission jurisdiction. A copy of the Request is included as **Attachment C**.

2. Hidden Valley was a party to several matters before the Commission during the period 2014-2019, and will shortly be subject to additional Commission proceedings. Those proceedings included:

(a) *Tanya J. McCloskey, Acting Consumer Advocate v. Hidden Valley Utility Services, L.P. – Water and Wastewater*, Docket Nos. C-2014-2447138 and C-2014-2447169 (Initial Decision issued September 9, 2016; Opinion and Order entered January 18, 2018; Opinion and Order on Petition for Clarification, Reconsideration and Amendment entered May 3, 2018; Opinion and Order on Petition for Amendment entered January 17, 2019). **Attachment D** is a copy of the Commission’s Order entered May 3, 2018 in this proceeding. That Order provides, *inter alia*, that the Commission will begin certain proceedings in the future (e.g., a penalty proceeding and a proceeding to order the sale of the company pursuant to Section 529 of the Pennsylvania Public Utility Code, 66 Pa. C.S. § 529) if Hidden Valley does not comply with the Commission’s Order by the deadlines set forth in that Order. *See* ¶¶ 20 and 21. The penalty proceeding and the Section 529 proceeding are expected to begin in the near future.

(b) *Pennsylvania Public Utility Commission v. Hidden Valley Utility Services, L.P. – Water and Wastewater*, Docket Nos. R-2018-3001306 *et al.* (Recommended Decision issued January 25, 2019; Opinion and Order entered March 14, 2019; Opinion and Order on Motion to Extend the Time Period for Completing an Independent Financial Audit entered August 29, 2019).

(c) *Hidden Valley Utility Services, L.P. v. Pennsylvania Public Utility Commission*, 187 C.D. 2019 (appeal quashed by Order entered May 15, 2019).

3. In response to the Requests, the Commission’s Right to Know Law Officer (“RTKL Officer”), after an extension (a copy of which is included as **Attachment E**), granted three of the five Requests in full, and denied two of the five Requests in part. A copy of the Commission’s responses to the Requests is included as **Attachment F** (the Commission turned over a large number of documents, which are included on an attached CD).

4. This appeal concerns the partial denial of Requests 1 and 3. The RTKL Officer, *inter alia*, refused to provide certain documents, claiming that they fall under certain exemptions and privileges contained in the RTKL, including the attorney-client privilege, the attorney work product doctrine, the deliberative process privilege, the pre-decisional deliberation exemption and the notes and working papers exemption. The RTKL Officer did not provide a privilege log for the documents that allegedly fall within the RTKL’s exemptions and privileges.

II. Reasons for Appeal

5. Conclusory Denials are Insufficient. The Commission did not meet its burden of proving by a preponderance of the evidence that the records requested are exempt from disclosure under the RTKL. 65 P.S. § 67.708(a). The Commission merely concluded summarily that certain requested records are not subject to disclosure, without providing any other analysis. Mere conclusory statements like the ones the Commission provided in response to the requests are insufficient to meet the Commission's burden of proof. *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Cmwlth. 2013) (“[A] generic determination or conclusory statements are not sufficient to justify the exemption of public records.”).

6. The Blanket Assertion of the Attorney-Client Privilege is Improper. The Commission denied requests on the basis that the requested documents are protected by the attorney-client privilege. The attorney-client privilege requires “(1) that the asserted holder of the privilege is or sought to become a client; (2) that the person to whom the communication was made is a member of the bar of a court, or his or her subordinate; (3) that the communication relates to a fact of which the attorney was informed by the client, without the presence of strangers, for the purpose of securing an opinion of law, legal services, or assistance in a legal matter; and (4) that the claimed privilege has not been waived by the client.” *See Chambersburg Area School District v. Dorsey*, 97 A.3d 1281, 1289 (Pa. Cmwlth. 2014). The Commission did not meet its burden of proving that this exemption applies to any of the requested public records.

a. As the OOR concluded in *Davis v. Payne Commission*, Docket No. AP 2011-0754 (OOR Final Determination Issued June 27, 2011), the Commission here did not describe the documents that contain such communications or the content of the communications in order to substantiate that each and every record withheld from disclosure was made for the purpose of securing or providing legal advice.

b. Similarly, the Commission employs staff members who serve in various capacities, even if they are lawyers, and do not necessarily provide legal advice, opinions, services, or assistance; therefore, the attorney-client privilege does not attach to their communications.

c. Moreover, the Commission did not address whether the privilege has been waived for any responsive records through disclosure to a third party, including (without limitation) whether any communications by and among the Commissioners and all their respective assistants, along with any documentation resulting therefrom, results in a waiver of any privilege and therefore are not subject to protection. *See Chambersburg*. In other words, communications among the assistants of each of the Commissioners are not privileged; communications among Commissioners are not privileged; and communications among an assistant(s) of one Commissioner with a different Commissioner are not privileged.

7. The Blanket Assertion of the Work Product Doctrine is Improper. The Commission's claim that the records requested are immune from disclosure based on the work-

product doctrine similarly is wrong. That doctrine generally serves to protect the mental impressions, conclusions and opinions of attorneys prepared in anticipation of litigation. *See Nat'l R.R. Passenger Corp. v. Fowler*, 788 A.2d 1053, 1065 (Pa. Cmwlth. 2001). As with the claim of attorney-client privilege, the Commission did not describe the documents that contain such information or the content of the records in order to substantiate that each and every record withheld from disclosure contains mental impressions, conclusions, and opinions of a licensed Pennsylvania attorney in anticipation of any litigation.

8. The Blanket Assertion of the Pre-Decisional Deliberation Exemption is Improper. The Commission partially denied Request Nos. 1 and 3, *inter alia*, on the basis that they seek records relating to internal pre-decisional deliberations. An agency must show three elements to meet its burden under this exception: (1) the deliberations reflected must be “internal” to the agency; (2) the deliberations reflected must be predecisional, *i.e.*, before a decision on an action; and (3) the contents must be deliberative in character, *i.e.*, pertaining to proposed action and/or policy-making. *See Kaplin v. Lower Merion Twp.*, 19 A.3d 1209, 1214 (Pa. Cmwlth. 2011). The Commission has offered no information on how the records requested meet this test. Moreover, as stated above, Hidden Valley will soon be subject to a penalty proceeding and a Section 529 proceeding. Since those proceedings did not even commence prior to the Requester’s filing of the Request, any deliberations pertaining to those proceedings would not fall within the pre-decisional deliberation exemption.

9. The Blanket Assertion of the Notes and Working Papers Exemption is Improper. Section 708(b)(12) of the RTKL exempts from disclosure “notes and working papers prepared by or for a public official or agency employee used solely for that official’s or employee’s own personal use.” The Commission asserts that this exemption applies to certain documents responsive to Request 3, which requests “any e-mails or other documents to or from any employee in the Bureau of Technical Utility Services mentioning Hidden Valley Utility Services, L.P., during the period 2013-present.” Without additional information, it is hard to fathom how a document “to or from” an employee is exempt from disclosure because it was prepared by that employee solely for that employee’s personal use.

10. The Assertion of both the Deliberative Process Privilege and the Pre-Decisional Deliberation Exemption is Improper. The Commission contends that certain documents are exempt from disclosure pursuant to the deliberative process privilege and/or the pre-decisional deliberation exemption. However, the Commonwealth Court has held that the pre-decisional deliberation exemption codifies the deliberative process privilege. *Scolforo, supra*, at 1101. If the pre-decisional deliberation exemption does not apply, neither does the deliberative process privilege.

11. Redactions/Partial Disclosure and Privilege Log. With respect to all claims of privilege, the Commission violated the RTKL by withholding the records in whole rather than disclosing them in part with appropriate redactions. 65 P.S. § 67.706; *cf. Mission Pa., LLC v. McKelvey*, 212 A.3d 119 (Pa. Cmwlth. Ct. 2019) (the failure to disclose many pages of a public record does not comport with the narrow construction of RTKL exemptions and the minimal redaction mandate). At a bare minimum, the Commission should have produced a log identifying each record or part of record that contains privileged information and the applicable privilege.

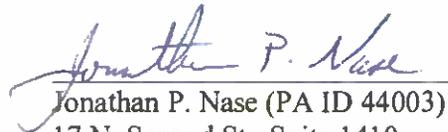
12. Reservation of Rights. Requester hereby reserves the right to amend and offer additional support and grounds for the appeal.

III. Conclusion

WHEREFORE, the Appeals Officer should grant this appeal and order the Commission to disclose all records requested (with appropriate redactions, if necessary). In addition, the Appeals Officer should provide the Requester with an opportunity to provide additional briefing and support for the appeal, and the Appeals Officer should conduct an *in camera* review of the documents alleged to be exempt from disclosure.

Respectfully submitted,

Cozen O'Connor



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Tel: (717) 773-4191

Fax: (215) 372-2340

Date: December 30, 2019

Attachment C



Standard Right-to-Know Law Request Form

Good communication is vital in the RTKL process. Complete this form thoroughly and retain a copy; it is required should an appeal be necessary. You have 15 business days to appeal after a request is denied or deemed denied.

SUBMITTED TO AGENCY NAME: Pennsylvania Public Utility Commission _____ (Attn: AORO)

Date of Request: October 30, 2019 _____ Submitted via: Email U.S. Mail Fax In Person

PERSON MAKING REQUEST:

Name: Jonathan Nase _____ Company (if applicable): Cozen O'Connor _____

Mailing Address: 17 North Second Street, Suite 1410 _____

City: Harrisburg _____ State: PA _____ Zip: 17101 _____ Email: jnase@cozen.com

Telephone: (717) 773-4191 _____ Fax: (215) 372-2340 _____

How do you prefer to be contacted if the agency has questions? Telephone Email U.S. Mail

RECORDS REQUESTED: *Be clear and concise. Provide as much specific detail as possible, ideally including subject matter, time frame, and type of record or party names. Use additional sheets if necessary. RTKL requests should seek records, not ask questions. Requesters are not required to explain why the records are sought or the intended use of the records unless otherwise required by law.*

1. Any e-mails or other documents to or from a Commissioner, or any member of a Commissioner's staff, mentioning Hidden Valley Utility Services, L.P. during the period 2013-present.
2. Any e-mails or other documents between any employee of the Bureau of Investigation and Enforcement and an employee of any other Commission bureau, department or office, mentioning Hidden Valley Utility Services, L.P., during the period 2013-present.
3. Any e-mails or other documents to or from any employee in the Bureau of Technical Utility Services mentioning Hidden Valley Utility Services, L.P. during the period 2013-present.
4. Any e-mails or other documents to or from any Commission employee and the Department of Environmental Protection mentioning Hidden Valley Utility Services, L.P., during the period 2013-present.
5. The power point presentation of Commissioner Norman J. Kennard at the National Association of Water Companies annual meeting held at the Keystone Building in 2019.

DO YOU WANT COPIES? Yes, electronic copies preferred if available
 Yes, printed copies preferred
 No, in-person inspection of records preferred (*may request copies later*)

Do you want certified copies? Yes (*may be subject to additional costs*) No

RTKL requests may require payment or prepayment of fees. See the Official RTKL Fee Schedule for more details.

Please notify me if fees associated with this request will be more than \$100 (or) \$_____.

ITEMS BELOW THIS LINE FOR AGENCY USE ONLY



pennsylvania

OFFICE OF OPEN RECORDS

Tracking: _____ Date Received: _____ Response Due (5 bus. days): _____

30-Day Ext.? Yes No (If Yes, Final Due Date: _____) Actual Response Date: _____

Request was: Granted Partially Granted & Denied Denied Cost to Requester: \$ _____

Appropriate third parties notified and given an opportunity to object to the release of requested records.

Attachment D

**PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17105-3265**

Public Meeting held May 3, 2018

Commissioners Present:

Gladys M. Brown, Chairman
Andrew G. Place, Vice Chairman
Norman J. Kennard
David W. Sweet
John F. Coleman, Jr.

Tanya J. McCloskey, Acting Consumer Advocate

C-2014-2447138

v.

Hidden Valley Utility Services, L.P. – Water

and

Tanya J. McCloskey, Acting Consumer Advocate

C-2014-2447169

v.

Hidden Valley Utility Services, L.P. – Wastewater

OPINION AND ORDER

BY THE COMMISSION:

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition is the Petition for Clarification, Reconsideration and Amendment (Petition) of Hidden Valley Utility Services, L.P. (HVUS, Company or

Petitioner) filed on February 2, 2018, seeking clarification and reconsideration of our Opinion and Order entered on January 18, 2018 (*January 2018 Order*), relative to the above-captioned proceeding. On February 12, 2018, the Office of Consumer Advocate (OCA) and Intervenors, Robert J. Kollar and Kellie A. Kuhleman (Intervenors) filed their respective Answers to the Petition. For the reasons stated below, we shall grant the Petition, in part, deny it, in part, and modify our *January 2018 Order* consistent with this Opinion and Order.

I. History of the Proceeding

On February 12, 2004, HVUS filed two applications for approval to begin to offer, render, furnish or supply water and wastewater services to the public in Hidden Valley at Docket Nos. A-00210117 and A-00230101 (Applications). Protests to the Applications were filed. Thereafter, the parties reached a settlement agreement (2005 Settlement) which addressed issues and protests raised in the Application Proceedings. By Final Order entered July 15, 2005 (*July 2005 Order*), the Commission approved the 2005 Settlement and granted the Applications.

The 2005 Settlement required HVUS to implement changes and improvements to provide adequate, safe and reasonable service and to address long-term problems including brown or rust-colored water, low water pressure, and high levels of unaccounted-for water. HVUS's rates were set at the time of the 2005 Settlement and have not been increased since that time.¹

¹ Pursuant to the 2005 Settlement, a residential customer using 5,000 gallons per month would pay \$116.55 per quarter for water service and \$261.00 per quarter for wastewater service.

On October 9, 2014, the OCA filed a Formal Complaint against HVUS, regarding water services, at Docket No. C-2014-2447138 (Water Complaint). On October 9, 2014, the OCA also filed a Formal Complaint against the Company, regarding wastewater services, at Docket No. C-2014-2447169 (Wastewater Complaint). In the Water Complaint, the OCA averred that the Company failed to provide adequate, safe and reasonable service, regarding water system issues, alleging, *inter alia*, continuing incidents of dirty, brown and rusty water; lack of proper equipment; the failure to properly maintain water tanks; low water pressure which is alleged to be inadequate for basic household uses, and lack of system maintenance. The OCA further alleged the existence of financial and managerial problems.

In the Wastewater Complaint, the OCA averred, in part, that the Company failed to provide adequate, safe and reasonable service, and that the system lacks certain equipment. The OCA further alleged the existence of financial and managerial problems similar to those pertaining to the water system.

On October 29, 2014, HVUS filed Answers to both of the OCA's Formal Complaints. In the Answers, the Company denied the claims related to service and financial issues.

On April 9, 2015, counsel filed a notice of entry of appearance on behalf of Hidden Valley Foundation, Inc. (Foundation). The Foundation has not filed a petition to intervene and is, therefore not a Party in this proceeding.

On June 19, 2015, a Prehearing Order was issued, setting forth various procedural matters and consolidating the Water and Wastewater Complaints. On June 25, 2015, public input hearings were held at 12:30 p.m. and 7 p.m. at the Hidden Valley Resort in Jefferson Township, Somerset County, Pennsylvania.

By letters dated July 9, 2015, the Intervenors requested permission to intervene in this proceeding, and thereafter, HVUS filed objections to the intervention. On September 3, 2015, the OCA filed a motion requesting that the public input hearing transcript, pages 62 through 138, and the Joint Petition for Settlement of Separate Water and Wastewater Application Proceedings filed at Docket Nos. A-210117 and A-230101, both from a prior proceeding (Settlement), be admitted into evidence. No objection to the motion was filed.

By Interim Order dated September 8, 2015, the ALJ granted the petition to intervene. The ALJ also issued an Interim Order dated November 9, 2015, granting the OCA's motion to admit the public input hearing transcript and the Settlement into evidence.

The evidentiary hearing convened as scheduled on November 17, 2015. Counsel appeared on behalf of the OCA and the Company. Intervenor Kollar appeared *pro se*, but Intervenor Kuhleman did not attend the evidentiary hearing.²

By Interim Order dated December 15, 2015, the ALJ admitted various evidence and late-filed exhibits into the record. The OCA and Intervenor Kollar filed their Main Briefs on January 20, 2016. On January 21, 2016, HVUS filed its Main Brief. The OCA and the Company filed reply briefs on February 10, 2016. Supplemental Briefs containing proposed findings of fact and conclusions of law were filed by HVUS and

² At the time of the evidentiary hearing, the Company had failed to comply with the following requirements of the 2005 Settlement: (1) the submission of a report to the Commission and all parties reassessing the need, size and cost of treatment plant to permanently solve the problems caused by iron and manganese; (2) the replacement of 1,500 feet of 3-inch line to the Heights neighborhood and of 1,000 feet of 2-inch line to the Valley View neighborhood in Hidden Valley, which was required to be completed by July 2015; and (3) the holding of semi-annual customer meetings.

Intervenor Kollar on April 15, 2016. On April 25, 2016, the OCA filed objections to the Company's Supplemental Brief, which the ALJ denied by Interim Order dated May 3, 2016. The record was closed on June 8, 2016.

In the Initial Decision issued on September 9, 2016, the ALJ sustained the Water and Wastewater Complaints filed by the OCA and imposed a corrective plan to implement improvements to the water and wastewater systems operated by HVUS.³ The OCA, HVUS, and the Intervenors filed Exceptions on September 29, 2016. On October 10, 2016, the Intervenors filed Replies to Exceptions, and on October 11, 2016, the OCA and the Company filed Replies to Exceptions.

In our *January 2018 Order*, we granted the Exceptions of the OCA, HVUS and the Intervenors, in part, and denied them in part, and adopted the Initial Decision, as modified. As noted above, the Company filed its Petition on February 2, 2018. By Order entered February 8, 2018, we granted the Petition, pending further review of, and consideration on, the merits. On February 12, 2018, the OCA and the Intervenors filed their respective Answers to the Petition.

On April 11, 2018, the Company filed its first sixty-day status report with the Commission which was required by Ordering Paragraph No. 17 of the *January 2018 Order*.⁴ Additionally, on April 18, 2018, HVUS filed the engineer's reports required by Ordering Paragraph Nos. 6 and 9 and the revised bill form for review required by Ordering Paragraph Nos. 12 and 13 of the *January 2018 Order*.

³ For a summary of the Initial Decision, see pages 9 to 19 of the *January 2018 Order*.

⁴ The Company asserts that it initially attempted to file a status report with the Commission, through a filing dated March 19, 2018, but that the wrong docket numbers were listed on the document.

II. Discussion

A. Legal Standards

Before addressing the Petition, we note that any issue not specifically discussed shall be deemed to have been duly considered and denied without further discussion. The Commission is not required to consider expressly or at length each contention or argument raised by the parties. *Consolidated Rail Corp. v. Pennsylvania Public Utility Commission*, 625 A.2d 741 (Pa. Cmwlth. 1993).

The Code establishes a party's right to seek relief following the issuance of our final decisions pursuant to Subsections 703(f) and (g), 66 Pa. C.S. § 703(f) and § 703(g), relating to rehearings, as well as the rescission and amendment of orders. Such requests for relief must be consistent with Section 5.572 of our Regulations, 52 Pa. Code § 5.572, relating to petitions for relief following the issuance of a final decision.

The standards for granting a Petition for Reconsideration were set forth in *Duick v. Pennsylvania Gas and Water Company*, 56 Pa. P.U.C. 553 (1982):

A Petition for Reconsideration, under the provisions of 66 Pa. C.S. § 703(g), may properly raise any matters designed to convince the Commission that it should exercise its discretion under this code section to rescind or amend a prior order in whole or in part. In this regard, we agree with the court in the *Pennsylvania Railroad Company* case, wherein it was stated that “[p]arties . . . cannot be permitted by a second motion to review and reconsider, to raise the same questions which were specifically decided against them” What we expect to see raised in such petitions are new and novel arguments, not previously heard, or considerations which appear to have been overlooked by the Commission.

Duick, 56 Pa. P.U.C. at 559 (quoting *Pennsylvania Railroad Co. v. Pennsylvania Public Service Commission*, 179 A. 850, 854 (Pa. Super. Ct. 1935)).

Under the standards of *Duick*, a petition for reconsideration may properly raise any matter designed to convince this Commission that we should exercise our discretion to amend or rescind a prior Order, in whole or in part. Such petitions are likely to succeed only when they raise “new and novel arguments” not previously heard or considerations which appear to have been overlooked or not addressed by the Commission. *Duick*, 56 Pa. P.U.C. at 559.

B. *January 2018 Order*

1. Rate Reduction and Usage Allowance

In our *January 2018 Order*, we first addressed the OCA’s Exception No. 1 and its request to impose a rate reduction of fifty percent for both water and wastewater service or alternatively a customer usage allowance. We agreed with the ALJ’s finding that the Company has failed to provide adequate and reasonable service to its water and wastewater customers. Thus, we determined that HVUS did not comply with Section 1501 of the Code. However, we declined to impose the OCA’s recommended remedy of a rate reduction. Additionally, we did not believe that the OCA’s alternate recommendation of a usage allowance was fully supported by the record. *January 2018 Order* 23-26.

2. Compliance Deadlines

Next, we addressed the OCA’s second Exception, which criticized the Initial Decision for not including all of the OCA’s recommendations for ensuring compliance with the deadlines for resolving the Company’s water and wastewater

problems. We also considered HVUS's second Exception, which contended that the ALJ established an arbitrary and unrealistic one-year deadline for the completion of projects to improve the Company's system. Upon review, we denied, in part, and granted, in part, the OCA Exception No. 2, and denied HVUS Exception No. 2.

Regarding the OCA's Exception No. 2, we noted our rejection of the OCA's requested rate relief discussed in the prior section. Thus, we denied the Exception to the extent that it requested a rate reduction as a deadline compliance measure for the reasons discussed in the disposition above. However, due to the extended time-period for compliance with the 2005 Settlement and the lack of resolution of the outstanding service problems, we believed there should be some mechanism for ensuring that further compliance deadlines are met. We explained that any failure to further comply with the deadlines set forth in the *January 2018 Order* could be indicative of the Company's lack of competency to operate and of the inability to provide reasonable and adequate service. Accordingly, we modified the Initial Decision to clarify that upon notice of the Company's failure to comply with any applicable deadlines the Commission shall initiate a separate proceeding pursuant to 66 Pa. C.S. § 529 (relating to directing a competent utility to operate or acquire a small sewer utility that has jeopardized public safety by failing to provide reasonable and adequate service). We further discussed our rationale for limiting the enforcement provisions to compliance with the deadlines specified in our Opinion and Order. *January 2018 Order* at 29-31.

As to HVUS's second Exception, we explained that the Company's customers have been suffering from poor water quality and unreasonable service for years. We emphasized that any subsequent delays in failing to remediate the problems due to the failure to meet compliance deadlines would be unacceptable. The one-year deadline for implementing the corrective measures established in the engineer's report sets an objective guideline for compliance. We explained that, if additional time were

deemed critical, the Company could petition the Commission for relief to modify the deadline pursuant to Section 5.572(d) of the Code. *January 2018 Order* at 31.

3. Ordering Paragraph Revisions

In their third Exception, the Intervenors objected to several ordering paragraphs in the Initial Decision as providing unreasonable extensions of time for complying with the 2005 Settlement and failing to provide clear penalties and consequences for future noncompliance by HVUS. The Intervenors requested several modifications to help establish sufficient enforcement measures. Likewise, the OCA in its third Exception requested modifications of several ordering paragraphs in the Initial Decision and the addition of other paragraphs to ensure that the water being provided to customers is treated as effectively as possible.⁵

We granted the Intervenors' Exception No. 3, in part, to the extent that it sought a clarification of Ordering Paragraph No. 12 in the Initial Decision which addressed the filing of corrected annual reports. We explained that the language in the ordering paragraph required the Company to "make all reasonable efforts to timely file correct information in its annual reports" which was potentially ambiguous and inconsistent with the 180-day timeline for compliance set forth in the ordering paragraph. Accordingly, we modified the Initial Decision to delete the "reasonable efforts" language so that it is clear that any corrective filings or amendments must be submitted to the Commission within 180 days of entry of this Opinion and Order. This modification was incorporated in Ordering Paragraph No. 14 of the *January 2018 Order*. We denied the remainder of Intervenors Exception No. 3 on the basis that sufficient corrective measures

⁵ For a summary of the recommended adjustments to the Initial Decision ordering paragraphs, see pages 31-39 of our *January 2018 Order*.

are contained in other portions of our disposition and ordering paragraphs. *January 2018 Order* 39-40.

Upon review of the OCA's arguments, we found that the requested clarification of several ordering paragraphs and the addition of the new ordering paragraphs to be reasonable and supported by the evidentiary record. Moreover, we noted the Company's lack of objections to these modifications. As such, we granted the OCA's Exception and modified the Initial Decision. Specifically, we incorporated the requested modifications in Ordering Paragraph Nos. 6, 9, 20, 22, 23, 24, 25 of the *January 2018 Order*.⁶

4. Additional Hearings

In its Exception No. 4, the OCA requested enhancements to Ordering Paragraph No. 18 of the Initial Decision which established a procedure for the OCA to investigate the completed rehabilitative measures conducted by the Company or alternatively permitted a referral to the Commission's Bureau of Technical Utility Services (TUS) for review. The OCA requested that the Commission clarify that, first, the Company must carry the burden of proving that the service and facilities are no longer inadequate; and, second, the hearing must address the requirements of Section 529 of the Code, 66 Pa. C.S. § 529. *January 2018 Order* at 40-42.

In our disposition, we emphasized our intention to reduce any further delays in the event a subsequent evidentiary hearing becomes necessary to evaluate the

⁶ Our *January 2018 Order* contains errors in the numbering of the Ordering Paragraphs beginning on page 67. Ordering Paragraph No. 22 on page 67 should be numbered Ordering Paragraph No. 23 and the remaining paragraph numbers should be corrected accordingly. We will restate the Ordering Paragraphs in this Opinion and Order to correct this error.

propriety of the Commission's rehabilitative measures. We found that the OCA's proposal in its Exception No. 4 would help in this regard. By requiring the Company to carry the burden of proving that its service and facilities are no longer inadequate and mandating that any subsequent hearing address the requirements of Section 529 of the Code, 66 Pa. C.S. § 529, we found that the timeframe for final resolution of the outstanding issues in this proceeding should be streamlined. Further, we noted that the Company did not object to the OCA's proposal. Thus, we granted OCA Exception No. 4 and modified the Initial Decision to incorporate the modifications. *January 2018 Order* at 42.

5. Customer Bills

Next, we considered the OCA's Exceptions pertaining to the Ordering Paragraphs of the Initial Decision, which required the Company to modify its billing practices to ensure compliance with all Commission requirements and to provide a copy of the revised bill form to the OCA within ninety days of the final Commission Order in this proceeding. The OCA argued that the Commission should modify the Ordering Paragraphs to provide a sufficient advance opportunity to review and provide input on the bill revisions. *January 2018 Order* at 43.

We granted the OCA's Exception No. 5, finding that it would be beneficial to the Company's customers for the OCA to provide input on the bill revisions. Moreover, we noted that the Company did not object to this proposal. To facilitate the OCA's input and review, we directed HVUS to seek input from the OCA about its draft customer bills within sixty days from the date of entry of *January 2018 Order*. *Id.*

6. Utility Bills

Ordering Paragraph No. 13 of the Initial Decision required HVUS to pay all electric and telephone bills in a timely manner to ensure adequate and reasonable service to its customers. In our *January 2018 Order*, we addressed the OCA's Exception No. 6, which argued that the ALJ failed to include important oversight mechanisms in Ordering Paragraph No. 13 to ensure compliance with the payment obligations. *January 2018 Order* at 44.

Regarding the payment of electric bills, the OCA recommended that the Company be required to execute appropriate authorization forms permitting its electric provider, Pennsylvania Electric Company (Penelec), to continue providing monthly billing and payment information for all HVUS accounts to the OCA until June 10, 2018. The OCA argued, in part, that having monthly payment information will allow the OCA to timely respond to late payments before they escalate to termination notices and put the utility's ability to provide continuous water and wastewater service in jeopardy. The OCA also asserted that its requested relief imposes a minor burden on HVUS, requiring the Company to simply execute written authorization for Penelec to release its account information to the OCA. Moreover, the OCA noted, the submission of account information for monitoring provides a reciprocal benefit to Penelec by encouraging timely payment by the Company. *January 2018 Order* at 44.

Regarding the payment of telephone bills, the OCA requested that its recommendation of an annual update on telephone service be adopted. Specifically, the OCA requested that copies of the Company's bills for telephone service be provided to ensure that HVUS will maintain phone service at the numbers listed on the bills, so customers are able to reliably contact the Company. *Id.*

In our disposition, we agreed that timely payment of the Company's electric and telephone bills is critical to ensuring adequate and reasonable service to its customers. We found that the OCA's proposed mechanism for monitoring payment of the electric and telephone bills involves a minimal burden on HVUS and appeared to be an appropriate modification to the Initial Decision. Noting the lack of objection by the Company to this modification we found it to be reasonable and supported by the evidentiary record. Thus, we granted OCA Exception No. 6.

7. Customer Meetings

Moving to the requirement of scheduling semi-annual customer meetings, we addressed the OCA's Exception No. 7, which requested clarification to add specific dates to ensure that the meetings are well-attended and useful to both the Company and its customers. Additionally, the OCA requested that the Company be required to confer with the Foundation, which is the Hidden Valley homeowner's association, regarding dates that may result in higher attendance and increased communications with the customers. *January 2018 Order* at 45-46.

We also addressed the Company's Exception No. 1 which requested modification of the customer meeting provision in Ordering Paragraph No. 3 to explicitly state that the semi-annual meetings should be held only until the line replacement work referenced in Ordering Paragraph No. 3 is completed.⁷ Alternatively, the Company asserted that the Commission should require semi-annual customer meetings until HVUS completes the projects necessary to comply with the Commission's final Order in this proceeding. *January 2018 Order* at 46.

⁷ Ordering Paragraph No. 3(a) of the Initial Decision provided that HVUS shall replace 1,500 feet of three-inch line to the Heights neighborhood and 1,000 feet of two-inch line to the Valley View neighborhood in Hidden Valley.

We granted the OCA's Exception No. 7 finding that the requested modifications would help ensure appropriate customer involvement. Additionally, we agreed with the Company that the mandatory customer meetings need not be held in perpetuity. Rather, we determined that the meetings could be concluded upon the filing of a status report by the Company and its engineer, and a report from the OCA and TUS evidencing completion of all the requirements and the closing of the proceeding. Although we encouraged the Company to continue to provide contact opportunities and public meetings by which customers could receive information and provide input to the Company about its services, we declined to mandate these meetings after final resolution of the issues in this proceeding. Accordingly, we granted HVUS Exception No. 1, in part.⁸ *January 2018 Order* at 48.

8. Wastewater Violations

Next, we addressed the Company's objection to the ALJ's finding that HVUS failed to provide adequate wastewater service in violation of Section 1501 of the Code. Upon review, we found that the ALJ's findings and conclusions regarding the wastewater violations were well reasoned and amply supported by the evidentiary record. Accordingly, we denied HVUS Exception No. 3. *January 2018 Order* at 49-50.

9. Civil Penalties

We also addressed the Intervenors' Exception No. 1, which argued that the Commission should have imposed civil penalties on the Company after concluding that HVUS failed to comply with the 2005 Settlement. In rejecting the Intervenors' arguments, we explained that the Commission was not required to impose a civil penalty

⁸ However, we denied HVUS Exception No. 1 to the extent that it attempted to limit the topics of the public meetings to the line replacement work to be completed.

for failure to comply with the 2005 Settlement. Rather, the imposition of a civil penalty for violating the Code or a Commission Regulation or Order is a discretionary exercise.⁹ *January 2018 Order* at 52.

Next, we indicated our agreement with the ALJ's decision not to impose civil penalties in this proceeding. However, we found that the ALJ should have considered the ten factors pursuant to our policy statement in considering whether a civil penalty should be applied in this case and conducted an evaluation of the factors set forth in 52 Pa. Code § 69.1201(c). Upon consideration of all the factors, we noted that some of the Company's actions merited or supported a civil penalty, but that we declined to issue or impose a civil penalty at this time. *January 2018 Order* at 52-56.

10. Receivership

Finally, we addressed the Intervenors' Exception No. 2 pertaining to the ALJ's failure to find that the Company was insolvent and lacked managerial and financial fitness. The Intervenors also argued that the evidence already supported an immediate Commission Order directing acquisition of HVUS by a viable utility pursuant to 66 Pa. C.S. § 529(a). *January 2018 Order* at 56-59.

We agreed with the ALJ that the record evidence did not support a finding that the Company should be placed in receivership. Although such a remedy could be considered in the context of a Section 529 proceeding should one be deemed necessary in the future, we explained that such a finding would be inappropriate under the present

⁹ We also held that the Commission's discretion is informed by our enabling legislation under 66 Pa. Code § 3301, our policy statement under 52 Pa. Code § 69.1201, and long-standing case law that not only reflects our regulatory policy but also affirms our statutory discretion. *Pa. PUC v. HIKO Energy, LLC*, Docket Nos. P-2015-2519419 and C-2014-2431410 (Order entered January 28, 2016) at 22.

procedural posture of this case. Instituting a Section 529 proceeding would, in part, require notice to the appropriate parties and the holding of an evidentiary hearing to consider statutory factors before the Commission can order a capable public utility to acquire HVUS. 66 Pa. C.S. §§ 529(c) and (h). Accordingly, we denied the Intervenors' Exception No. 2.

C. Petition and Answers

In its Petition, HVUS raises three objections to separate ordering paragraphs contained in our *January 2018 Order*. First, the Company believes that Ordering Paragraph No. 8, pertaining to the deadline for compliance with the engineer's report, is confusing and should be clarified. Second, HVUS argues that the requirement to submit an authorization to Penelec to release monthly bills and payment information, as set forth in Ordering Paragraph No. 15, should be eliminated. Third, the Petitioner asserts that the Commission should reconsider the investigation requirement in Ordering Paragraph No. 20 by tasking TUS with any subsequent investigation rather than the OSA.

Regarding its first argument, the Company proffers that the deadline for compliance in Ordering Paragraph No. 8, as follows, is subject to two interpretations:

8. That Hidden Valley Utility Services, L.P., shall comply with all recommendations from the engineer in order to correct any identified deficiencies including a remedy to eliminate the rust or brown-colored water provided to customers in order to ensure that customers shall receive adequate service from the improved water facilities, and to reassess the need, size and cost of treatment plant to permanently solve the problems caused by iron and manganese, within one (1) year from the date of the engineer's report.

According to HVUS, one interpretation is that the Company will implement the recommendations contained in the engineer's report within one year of the date of the report. Additionally, under this first interpretation, the Company will reassess the need, size and cost of a treatment plant within one year from the date of the engineer's report. A second interpretation, the Petitioner asserts, limits the application of the one-year deadline to only the treatment plant reassessment. Petition at 3.

Although the Company reads Ordering Paragraph No. 8 consistent with the first interpretation – that HVUS is required to implement both the recommendations *and* reassess the need, size and cost of the treatment plant within one year – the Company believes the directive should be clarified. Moreover, HVUS asserts that it has already taken many of the steps that would be outlined in any engineering report and that the one-year deadline would be moot. Petition at 3.

In its Answer, the OCA submits that it has no objection to the Company's request to clarify the deadline for compliance with the engineer's recommendation to address inadequate water service. The OCA interprets the one-year deadline for compliance in Ordering Paragraph No. 8 as applying to both the corrective recommendations for the water service and the reassessment of the treatment plant. Additionally, the OCA argues that the Company's alternate interpretation is inconsistent with our disposition in the *January 2018 Order* in which we rejected HVUS's exception to the one-year deadline for the completion of the projects to improve the Company's system. OCA Answer at 4-5 (citing *January 2018 Order* at 31).

The OCA suggests that, if the Commission intends to amend this ordering paragraph, the clarification should be limited to and consistent with the disposition of the *January 2018 Order*. As such, the OCA recommends the following clarification:

8. That, within one (1) year from the date of the engineer's report, Hidden Valley Utility Services, L.P., shall comply with all recommendations from the engineer in order (1) to correct any identified deficiencies including a remedy to eliminate the rust or brown-colored water provided to customers in order to ensure that customers shall receive adequate service from the improved water facilities, and (2) to reassess the need, size and cost of treatment plant to permanently solve the problems caused by iron and manganese, ~~within one (1) year from the date of the engineer's report.~~

OCA Answer at 5.

The Intervenors argue that the wording of Ordering Paragraph No. 8 is clear and not subject to an alternative interpretation. Accordingly, the Intervenors submit that no clarification is necessary. Intervenors Answer at 2.

In its second argument, HVUS contends that it should not be required to provide an authorization to Penelec to release monthly bills and payment information for monitoring. The Company argues that this issue was resolved in another proceeding and is now moot. HVUS submits that the OCA had filed an emergency petition on June 4, 2014, at Docket No. P-2014-2424858 (Emergency Petition), averring that late paid bills for electric service jeopardized the Company's ability to provide adequate service. According to the Company, the Parties settled the matter by agreement filed on September 26, 2014, with provisions mirroring Ordering Paragraph No. 15, which required continued monitoring by the OCA and an authorization to Penelec to provide billing information. HVUS states that in August of 2016, the Company proved authorization to Penelec to provide another year of billing information to the OCA. The Petitioner asserts that, based on the prior settlement agreement and the extended monitoring, the OCA opted to cease the Emergency Petition proceeding by filing a

Petition for Leave to Withdraw, which ALJ Katrina Dunderdale granted on March 1, 2017. Petition at 4-5.

The Company reiterates that the issue of payments of electric bills was litigated and settled, pointing to the OCA's withdraw of its case after two years of monitoring. Additionally, HVUS argues that it would be unfair and violative of the Company's due process rights to reimpose a penalty for alleged violations that were resolved in a separate matter. Thus, the Company requests the deletion of Ordering Paragraph No. 15. *Id.* at 5.

In its Answer, the OCA first argues that the Company has misrepresented the resolution reached in the Emergency Petition proceeding. The OCA asserts that it agreed to withdraw its Emergency Petition pursuant to various conditions in the emergency proceeding, including the ALJ's direction to HVUS to extend the release of billing and payment information until the Commission entered an Order in this proceeding. The purpose of the extension, the OCA contends, was to prevent a gap in reporting so that HVUS's timely compliance with its bill paying obligations could be monitored continuously. According to the OCA, both the OCA and HVUS had asked the ALJ to keep the record open in the Emergency Petition proceeding until an Order was entered in this proceeding but that the ALJ declined the request. The OCA submits that the resolution of the Emergency Petition proceeding did not resolve the underlying concerns forming both the basis of the emergency proceeding and one of the grounds for this Complaint proceeding. Indeed, the OCA avers, the concerns – about the Company's failure to timely pay its electric bills for accounts used in providing its water and wastewater service and the possible interruption of that service due to termination of electric service for nonpayment – continue in this proceeding. Thus, the OCA asserts that the remedy of requiring HVUS to authorize Penelec to release its billing and payment information was not resolved in the Emergency Petition proceeding. OCA Answer at 6-7.

Additionally, the OCA rejects the Company's argument that the remedy of releasing the billing and payment information would be unfair and unreasonable. The OCA explains that it requested this remedy in its Exceptions to the Initial Decision when the ALJ directed HVUS to timely pay its electric and telephone bills but did not address the recommendation of the release authorization for Penelec. According to the OCA, the Company did not file a Reply to the Exception and the Commission granted the Exception. Thus, the Company has now waived its objection. There being no new or novel argument not previously considered, the OCA continues, the Company's request to rescind the directive to authorize a release for Penelec to continue providing billing and payment information should be denied. *Id.* at 8.

In their Answer, the Intervenors argue that the provisions in Ordering Paragraph No. 15 are appropriate considering the financial management concerns of HVUS raised in this proceeding. The Intervenors believe that the requirements are not unreasonable or burdensome and that the Company's request to eliminate the ordering paragraph should be denied. Intervenors Answer at 3.

In its third argument, the Company proffers that Ordering Paragraph No. 20 inappropriately authorizes the OCA to investigate the quality of service following HVUS's final status report. According to HVUS, it is highly irregular and inappropriate for a party in a litigated proceeding with an alleged bias against the utility to be given authority to investigate that utility. The Company submits that if the Commission deems it necessary to order an investigation after the March 2019 deadline that TUS be tasked with the investigation, which the Company believes would be independent and fair. Petition at 5-6.

The OCA responds that Ordering Paragraph No. 20, which was approved by the Commission, was substantially similar to an ordering paragraph contained in the

Initial Decision. OCA Answer at 9 (citing I.D. at 42, ¶ 18). The OCA notes that the Company failed to file an Exception regarding this ordering paragraph and to have the Commission consider this issue. Thus, the OCA asserts, the Company's request to eliminate this provision in the context of this Petition is untimely and improper. OCA Answer at 9.

Additionally, the OCA objects to the Company's attacks on the OCA's motives in this proceeding and cites to the evidentiary record establishing the failure of HVUS to remediate quality and service issues dating to 2005. OCA Answer at 10 (citing *January 2018 Order* at 4-6; I.D. at 6-12). Also, the OCA does not interpret Ordering Paragraph No. 20 as requiring the OCA to conduct an enforcement investigation. Rather, the provision permits the OCA to investigate the service issue through discovery and site inspections. However, the OCA indicates that it has no objection to the Commission clarifying the OCA's role and requiring TUS to investigate the quality of the services following the issuance of HVUS's final report. If the Commission chooses to modify the provision, the OCA requests that the Commission make clear that the OCA retains its right to undertake discovery and obtain an evidentiary hearing if the quality and service problems persist. OCA Answer at 10.

The OCA submits a revised Ordering Paragraph No. 20 to address the proposed clarification as follows:

20. That on or before March 31, 2019, or within sixty (60) days after receipt of a written report of all completed rehabilitative measures from Hidden Valley Utility Services, L.P. and its engineer, the **Bureau of Technical Utility Services** ~~Office of Consumer Advocate~~ shall investigate the quality of the water **and as well as of** the water and wastewater services being received by Hidden Valley Utility Services, L.P.'s customers ~~or request that this matter be referred to the Bureau of Technical Utility Services.~~ **Notwithstanding the investigation by the Bureau of**

Technical Utility Services, the Office of Consumer Advocate may conduct discovery and site visits. If the recommended repairs, modifications, rehabilitative and maintenance procedures have not been accomplished within the time frame structured herein, or if the water quality or **water and wastewater service** as reported by the Office of Consumer Advocate or the Bureau of Technical Utility Services is not adequate and reasonable, an evidentiary hearing shall forthwith be scheduled by the Office of Administrative Law Judge for purposes of addressing one or more of the following issues: the adequacy of the water system, the adequacy of the wastewater system, the quality of the water, the appropriateness of penalties to be imposed against Hidden Valley Utility Services, L.P., the appropriateness of ratepayer refunds, and any other issue relative to these ordering paragraphs. The burden of proof in the evidentiary hearing as to these issues shall be upon Hidden Valley Utility Services, L.P. The Commission shall retain jurisdiction for that purpose.

OCA Answer at 11.

In their Answer, the Intervenors argue that the requirements of Ordering Paragraph No. 20 are necessary and that either the OCA or TUS should have the authority to verify compliance. The Intervenors also object to the Company's apparent disparaging comments about the OCA and emphasize that the OCA has acted in good faith in representing the interest of the HVUS customers. Intervenors Answer at 4.

D. Disposition

Upon review of the Company's first argument pertaining to the deadline for compliance with the engineer's recommendations, we disagree with the Company's alternate interpretation, which limits application of the one-year deadline to only the treatment plant reassessment. Rather, we agree with the OCA that such an alternate interpretation is inconsistent with our discussion in the *January 2018 Order*. In our prior

determination, we held that “[a]ny subsequent delays in failing to remediate the problems due to the failure to meet compliance deadlines would be unacceptable. The one-year deadline for implementing the corrective measures established in the engineer’s report sets an objective guideline for compliance.” *January 2018 Order* at 31. Thus, we do not believe that the Petition has offered a new or novel argument or identified considerations which appear to have been overlooked by the Commission. Nonetheless, in the interest of avoiding any possible confusion, and because we are modifying other portions of the prior Order as discussed below, we shall revise the provision to incorporate the adjustments suggested by the OCA.

Regarding the Company’s second argument objecting to the continued monitoring of electric service bills and payments, we shall deny the Petitioner’s request to eliminate the monitoring provision. We note the Commission’s prior holdings that, in the interest of judicial economy, the Commission will not grant exceptions or reconsideration when the party failed to raise an argument earlier in the proceeding. *See, e.g., Hess v. Pa. PUC*, 107 A.3d 246, 265-266 (Pa. Cmwlth. 2014); *Pa. PUC v. York Cab, Inc.*, Docket No. C-2010-2212946 (Order entered April 18, 2013), at 5; *Generic Investigation Regarding Transportation Assessments*, Docket No. I-2008-2022003 (Order entered August 26, 2008), at 8.

During the Exception stage, the Company did not object to the language proposed by the OCA, which ultimately was incorporated into Ordering Paragraph No. 15. Accordingly, we shall, on the basis of judicial economy, decline to consider the Company’s arguments to eliminate the monitoring provisions set forth in Ordering Paragraph No. 15.

Even if we were to consider the Company’s arguments on the basis that it is a new argument pursuant to *Duick*, the position of HVUS as to this issue appears to be without merit. The OCA’s withdraw of the Emergency Petition proceeding did not

eliminate the concerns of electric service termination and the potential health and safety danger of water and wastewater service disruption to the customers of HVUS. Indeed, the record evidence supported the monitoring provisions established in Ordering Paragraph No. 15. For example, Ashley E. Everette, in her surrebuttal testimony on behalf of the OCA, testified that: “HVUS’s authorization for Penelec to provide payment information ends on June 10, 2016. Given the risk to health and safety that termination of electric service presents, HVUS should execute appropriate authorization forms which permit [Penelec] to continue providing monthly billing and payment information for all HVUS accounts” OCA Statement 1S at 10-11. Accordingly, we shall deny the Petition as to this issue.

Regarding the third argument pertaining to an investigation following HVUS’s final status report, we shall grant the Petition as to this issue. Although the Company failed to raise an objection about this provision during the Exception stage, it appears that the Commission overlooked the potential issue of giving a party litigant, such as the OCA, an investigatory role after the submission of the final status report. On review, we believe that upon filing of the final status report the examination of the repairs, modifications, and rehabilitative and maintenance procedures, as well as the water quality status, should rest with TUS. Moreover, we find that if TUS determines and reports that the remedial measures are inadequate or unreasonable, the matter should be referred to the Office of Administrative Law Judge for further evidentiary hearings. As such we shall revise the ordering to paragraph to delete the references to the OCA in Ordering Paragraph No. 20 pertaining to investigation and reporting.

Although the OCA does not object to TUS’s investigatory role over the completed rehabilitative measures, the OCA requests clarification that it retains the right to conduct discovery and site visits. It is unclear what types of discovery the OCA is contemplating at this late stage of the proceeding. Given the extensive reporting obligations set forth in the *January 2018 Order*, we decline to add the clarifications

requested by the OCA. However, we note that there is nothing preventing the OCA from requesting site visits or informally seeking further documentation from the Company relative to the completed rehabilitative matters. The OCA retains its right to petition for further relief pursuant to our Regulations should it deem the responses of the Company to be unsatisfactory. Moreover, the OCA retains the right to fully participate in any subsequently scheduled evidentiary hearing as to the adequacy of the rehabilitative measures.¹⁰

III. Conclusion

Based on the foregoing discussion, we shall grant the Petition, in part, deny it, in part, and modify the *January 2018 Order*, consistent with this Opinion and Order; **THEREFORE,**

IT IS ORDERED:

1. That the Petition for Clarification, Reconsideration and Amendment of Hidden Valley Utility Services, L.P. filed on February 2, 2018, is granted, in part, and denied in part, consistent with this Opinion and Order.

2. That, beginning with Ordering Paragraph No. 5 set forth in the Opinion and Order entered on January 18, 2018, the Ordering Paragraphs of the Opinion and Order entered on January 18, 2018, are restated and/or modified below, consistent with this Opinion and Order:

¹⁰ However, we shall add the clause “or water and wastewater service” to Ordering Paragraph No. 20 as requested by the OCA because this language is consistent with our disposition in the *January 2018 Order*.

5. That Hidden Valley Utility Services, L.P. shall comply with the unresolved issues of the 2005 Settlement Agreement which was approved by the Commission Order entered on July 15, 2005 at Docket Nos. A-00210117 and A-00230101, as follows:

a. Hidden Valley Utility Services, L.P., shall replace 1,500 feet of 3-inch line to the “Heights” neighborhood, as well as 1,000 feet of 2-inch line to the “Valley View” neighborhood in Hidden Valley, which was required to be completed by July 2015, on or before June 30, 2018.

b. Hidden Valley Utility Services, L.P., shall, in coordination with the Hidden Valley Foundation, Inc., schedule and conduct semi-annual customer meetings, to be held at least every six months, with the first meeting to be held on or before June 30, 2018. The customer meetings shall continue until the completion of the requirements under Ordering Paragraph No. 28.

6. That Hidden Valley Utility Services, L.P., shall obtain and file with the Commission a written report from an independent or third-party Pennsylvania licensed water and wastewater engineer concerning the adequacy of its water distribution system and water source; and said report shall contain recommendations and a cost analysis to correct any found deficiencies including a remedy to eliminate the rust or brown-colored water provided to customers in order to ensure that customers shall receive adequate service from the improved water facilities, and with said report, to include an evaluation and proposed remedy to reassess the need, size and cost of the treatment plant to permanently solve the problems caused by iron and manganese, as well as alternative sources of water supply such as

the Quemahoning River, within ninety (90) days from the date of entry of this Opinion and Order in this proceeding. In addition to estimating costs, the study will include an implementation schedule for completion of the design, repairs or improvements, obtaining permits, obtaining bids, awarding contracts, and completion of construction/start of operation. Additionally, the engineering report will include a schedule to replace and/or test customer meters in accordance with Section 65.8(b) that results in compliance by April 30, 2019. Hidden Valley Utility Services, L.P., will implement the replacement and testing schedule.

7. That Hidden Valley Utility Services, L.P., shall provide a copy of the engineer's report and any amendments or supplements thereto, to the Office of Consumer Advocate and to the Commission's Bureau of Technical Utility Services, in writing, not later than fourteen (14) days from the date of the expert report and each amendment or supplement thereto.

8. That, within one (1) year from the date of the engineer's report, Hidden Valley Utility Services, L.P., shall comply with all recommendations from the engineer in order (1) to correct any identified deficiencies including a remedy to eliminate the rust or brown-colored water provided to customers in order to ensure that customers shall receive adequate service from the improved water facilities, and (2) to reassess the need, size and cost of treatment plant to permanently solve the problems caused by iron and manganese.

9. That Hidden Valley Utility Services, L.P., shall obtain and file with the Commission a written report from an independent or third-party Pennsylvania licensed water and wastewater engineer concerning the

adequacy of its wastewater system; and the report shall contain recommendations and a cost analysis to identify whether or not the pumping stations are equipped and operating properly, whether an adequate and appropriate type and number of pumps and alarms are being utilized and maintained in operating conditions, and identify any deficiencies, repairs, maintenance, replacements or improvements and recommendations to ensure that reasonable and adequate wastewater services are being provided to its customers. The engineer shall inspect all wastewater facilities, tanks and equipment and prepare a report of its findings. The report shall confirm that the wastewater treatment plant and equipment is installed, properly maintained and operable. If this is not the case, then the engineer shall include a schedule for making all repairs, replacements and/or maintenance and to correct any found deficiencies recommend any maintenance or improvements in the report. The report shall include a survey of the lagoon at Treatment Plant No. 2 to estimate the current capacity and provide a timeframe for removal of sediment. The report shall also confirm the draining, inspection, repair, and repainting of Tank 1 (side 1). The report shall also include an evaluation and proposed remedy to ensure that Hidden Valley Utility Services, L.P., is providing adequate and reasonable wastewater services to its customers. Hidden Valley Utility Services, L.P., shall obtain said report within ninety (90) days from the date of entry of this Opinion and Order.

10. That Hidden Valley Utility Services, L.P., shall provide a copy of the engineer's report regarding wastewater services and any amendments or supplements thereto, to the Office of Consumer Advocate and to the Commission's Bureau of Technical Utility Services, in writing, not later than fourteen (14) days from the date of the expert report and each amendment or supplement thereto.

11. That Hidden Valley Utility Services, L.P., shall comply with all recommendations from the engineer with regard to wastewater services in order to ensure that customers shall receive adequate and reasonable wastewater service, on or before January 31, 2019.

12. That Hidden Valley Utility Services, L.P., shall modify its billing practices to ensure that all customer bills are fully compliant with all Commission rules, regulations and orders, within ninety (90) days of the date of entry of this Opinion and Order. Hidden Valley Utility Services, L.P., shall seek input from the Office of Consumer Advocate pertaining to the modification of its billing practices within sixty (60) days of the date of entry of this Opinion and Order.

13. That a copy of the revised bill form shall be submitted to the Commission within ninety (90) days of the date of entry of this Opinion and Order for review by the Commission's Bureaus of Consumer Services and Technical Utility Services for compliance.

14. That Hidden Valley Utility Services, L.P., shall file correct information in its annual reports to the Commission and shall amend any prior reports that contain inaccurate or incorrect information within 180 days of the date of the final Commission Order entered in this proceeding. Any requests for extensions to file any such reports or amendments or modifications of said reports shall be filed with the Commission in writing, with a copy to be provided to the Office of Consumer Advocate at the time of filing.

15. That Hidden Valley Utility Services, L.P., shall pay all electric and telephone bills in a timely manner to ensure adequate and reasonable service to its customers. Additionally, Hidden Valley Utility Services, L.P., shall execute appropriate authorization forms permitting its electric provider, Pennsylvania Electric Company, to continue providing monthly billing and payment information for all Hidden Valley Utility Services, L.P., accounts to the Office of Consumer Advocate until the requirements under Ordering Paragraph No. 28 are satisfied. Hidden Valley Utility Services, L.P., shall also provide an annual update of telephone service numbers which includes copies of bills for telephone service so that customers are able to reliably contact Hidden Valley Utility Services, L.P.

16. That consistent with the terms of this Opinion and Order, Hidden Valley Utility Services, L.P., shall comply in all other respects with its tariff filed with the Commission, as well as all laws, rules, regulations and orders of the Commission, as they relate to providing adequate and reasonable water and wastewater services to its customers. Any modifications in the practices of Hidden Valley Utility Services, L.P., in order to comply with this provision shall be implemented within ninety days of entry of this Opinion and Order.

17. That Hidden Valley Utility Services, L.P., shall file detailed status reports with the Commission every sixty days and provide copies to the Office of Consumer Advocate and to the Commission's Bureau of Technical Utility Services, in writing, at the time of filing, with regard to the compliance and progress as set forth in this decision and order and identifying any matters not fully completed and the reasons therefore,

with the first progress report to be filed not later than sixty (60) days from the date of entry of this Opinion and Order.

18. That Hidden Valley Utility Services, L.P., shall cease and desist from further violations of the Public Utility Code or any of the Orders, Rules or Regulations of this Commission.

19. That on or before January 31, 2019, or as soon as all repairs, modifications and improvements have been made, as ordered herein, Hidden Valley Utility Services, L.P., shall file a final detailed status report with the Secretary of the Commission, along with a verification from its engineer outlining the details of what has and has not been completed, and provide copies to the Office of Consumer Advocate and to the Commission's Bureau of Technical Utility Services, in writing, at the time of filing, identifying in detail the extent of compliance and any incomplete matters as ordered herein. If any matters ordered herein have not been completed, Hidden Valley Utility Services, L.P., and its engineer shall state in said report, in detail, the reasons for the same.

20. That on or before March 31, 2019, or within sixty (60) days after receipt of a written report of all completed rehabilitative measures from Hidden Valley Utility Services, L.P. and its engineer, the Bureau of Technical Utility Services shall investigate the quality of the water as well as of the water and wastewater services being received by Hidden Valley Utility Services, L.P.'s customers. If the recommended repairs, modifications, rehabilitative and maintenance procedures have not been accomplished within the time frame structured herein, or if the water quality or water and wastewater service as reported by the Bureau of Technical Utility Services is not adequate and reasonable, an evidentiary

hearing shall forthwith be scheduled by the Office of Administrative Law Judge for purposes of addressing one or more of the following issues: the adequacy of the water system, the adequacy of the wastewater system, the quality of the water, the appropriateness of penalties to be imposed against Hidden Valley Utility Services, L.P., the appropriateness of ratepayer refunds, and any other issue relative to these ordering paragraphs. The burden of proof in the evidentiary hearing as to these issues shall be upon Hidden Valley Utility Services, L.P. The Commission shall retain jurisdiction for that purpose.

21. That in the event an evidentiary hearing is required under Ordering Paragraph No. 20, the Commission shall initiate a separate proceeding pursuant to 66 Pa. C.S. § 529 (relating to directing a competent utility to operate or acquire a small sewer utility that has jeopardized public safety by failing to provide reasonable and adequate service). To the extent possible, the separate proceeding pursuant to 66 Pa. C.S. § 529 shall be a bifurcated proceeding with the hearing required under Ordering Paragraph No. 20.

22. That Hidden Valley Utility Services, L.P., shall take and record a pressure survey in compliance with 52 Pa. Code § 65.6(d) before the end of 2018 and at least once per year going forward. If the pressure surveys show that customers are receiving inadequate water pressure, Hidden Valley Utility Services, L.P., shall install booster pumping stations to provide water at adequate water pressures to the affected customers.

23. That until a permanent solution to the iron and manganese problem is in place, Hidden Valley Utility Services, L.P., shall

have a spare pump and motor available for Well No. 1 within seventy-two (72) hours of the primary pump and motor becoming inoperable.

24. That after the engineering report is submitted, pursuant to Ordering Paragraph No. 6, if the chosen means to address iron and manganese is treatment of water from Well No. 1 and Well No. 2, Hidden Valley Utility Services, L.P., shall install instrumentation to control the on/off cycle of Well No. 2.

25. That Hidden Valley Utility Services, L.P., shall maintain an operable, installed second high lift pump.

26. That in the event Hidden Valley Utility Services, L.P., fails to comply with any of the time deadlines directed in these Ordering Paragraphs, the Office of Consumer Advocate shall notify the Secretary of the Commission and the Director of the Commission's Bureau of Investigation and Enforcement within thirty days of the missed deadline.

27. That in the event a Notice as set forth in Ordering Paragraph No. 26 is received by the Commission, a separate proceeding shall be initiated pursuant to 66 Pa. C.S. § 529 (relating to directing a competent utility to operate or acquire a small sewer utility that has jeopardized public safety by failing to provide reasonable and adequate service).

28. That upon completion of the terms set forth in this decision and order, and the filing of a status report by Hidden Valley Utility Services, L.P., and its engineer, and a report from Office of Consumer Advocate or the Commission's Bureau of Technical Utility Services,

evidencing that all the requirements set forth herein have been completed, the proceeding docketed at C-2014-2447138 and C-2014-2447169 shall be marked closed.

3. That in all other respects, the Opinion and Order entered on January 18, 2018, in the above-captioned proceeding shall remain in full force and effect.

BY THE COMMISSION,

A handwritten signature in black ink, appearing to read "Rosemary Chiavetta". The signature is written in a cursive, flowing style.

Rosemary Chiavetta
Secretary

(SEAL)

ORDER ADOPTED: May 3, 2018

ORDER ENTERED: May 3, 2018

Attachment E



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

IN REPLY PLEASE
REFER TO OUR FILE
PUC RTK 2019-0069

November 5, 2019

Jonathan Nase, Esquire
Cozen O'Connor
17 North Second Street Suite 1410
Harrisburg, PA 17101

Interim response sent via Email only:
jnase@cozen.com

Dear Attorney Nase:

We are in receipt of your Right to Know request, filed pursuant to the provisions of the Right to Know Law, 65 P.S. Section 67.101 et seq., *as amended*. In your request received via email on Wednesday, October 30, 2019, you requested:

1. Any e-mails or other documents to or from a Commissioner, or any member of a Commissioner's staff, mentioning Hidden Valley Utility Services, L.P. during the period 2013-present.
2. Any e-mails or other documents between any employee of the Bureau of Investigation and Enforcement and an employee of any other Commission bureau, department or office, mentioning Hidden Valley Utility Services, L.P., during the period 2013-present.
3. Any e-mails or other documents to or from any employee in the Bureau of Technical Utility Services mentioning Hidden Valley Utility Services, L.P., during the period 2013-present.
4. Any e-mails or other documents to or from any Commission employee and the Department of Environmental Protection mentioning Hidden Valley Utility Services, L.P., during the period 2013-present.
5. The power point presentation of Commissioner Norman J. Kennard at the National Association of Water Companies annual meeting held at the Keystone Building in 2019.

Pursuant to Section 902(a)(4) of the Act, you are hereby advised that a legal review is necessary to determine whether the record is a record subject to access under this act. In addition, pursuant to Section 902(a)(7) of the Act, you are hereby advised that due to the nature and extent of the request, a response within the five (5) day statutorily required period is precluded.

A response is expected to be provided to you on or before Friday, December 6, 2019.

Sincerely,


Rosemary Chiavetta, Secretary
Right to Know Officer
Pa Public Utility Commission

cc: Hayley Dunn, PUC Assistant Counsel
Scott Thomas, PUC Assistant Counsel
PUC RTK Official File 2019-0069

Attachment F



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

IN REPLY PLEASE
REFER TO OUR FILE

PUC RTK 2019-0069

December 6, 2019

Jonathan Nase, Esquire
Cozen O'Connor
17 North Second Street Suite 1410
Harrisburg, PA 17101

Final response sent via Email only:

jnase@cozen.com

Dear Attorney Nase:

By this letter, the Pennsylvania Public Utility Commission (Commission) responds to your Right to Know request filed pursuant to the provisions of Pennsylvania's Right to Know Law (RTKL), 65 P.S. § 67.101, *et seq.*, *as amended*. In your request received via email on Wednesday, October 30, 2019, you requested:

- “1. Any e-mails or other documents to or from a Commissioner, or any member of a Commissioner's staff, mentioning Hidden Valley Utility Services, L.P. during the period 2013-present.
2. Any e-mails or other documents between any employee of the Bureau of Investigation and Enforcement and an employee of any other Commission bureau, department or office, mentioning Hidden Valley Utility Services, L.P., during the period 2013-present.
3. Any e-mails or other documents to or from any employee in the Bureau of Technical Utility Services mentioning Hidden Valley Utility Services, L.P, during the period 2013-present.
4. Any e-mails or other documents to or from any Commission employee and the Department of Environmental Protection mentioning Hidden Valley Utility Services, L.P., during the period 2013-present.
5. The power point presentation of Commissioner Norman J. Kennard at the National Association of Water Companies annual meeting held at the Keystone Building in 2019.”

In response to Paragraph 1 of your request, the Commission is providing emails meeting the criteria in your request that do not fall under an exemption in the RTKL. All other emails within the criteria of your request fall under exemptions and privileges prescribed in the RTKL, including the attorney-client privilege, attorney work product doctrine, deliberative process privilege, 65 P.S. §§ 67.102, 67.305(a)(2), and pre-decisional deliberation exemption, 65 P.S. § 67.708(b)(10). Therefore, your request is granted in part and denied in part.

In response to Paragraph 2 of your request, the only exchanges meeting the criteria in your request are those between employees of the Bureau of Investigation and Enforcement (BIE) and the presiding Administrative Law Judges when BIE acted as a party of record in proceedings before the Commission.¹ The Commission is providing these emails. Therefore, your request is granted.

In response to Paragraph 3 of your request, the Commission is providing emails meeting the criteria in your request that do not fall under an exemption in the RTKL. Personal identification information has been redacted from these records in accordance with the RTKL, 65 P.S. §§ 67.706, 67.708(b)(6). All other emails within the criteria of your request fall under exemptions and privileges prescribed in the RTKL, including the attorney-client privilege, deliberative process privilege, 65 P.S. §§ 67.102, 67.305(a)(2), pre-decisional deliberation exemption, and notes and working papers exemption. 65 P.S. §§ 67.708(b)(10), 67.708(b)(12). Therefore, your request is granted in part and denied in part.

In response to Paragraph 4 of your request, the Commission limited its search to the Commissioners, members of Commissioners' staff, BIE and the Bureau of Technical Utility Services (TUS) and the only group that possessed emails meeting the criteria in your request is TUS. The Commission is providing these emails. Therefore, your request is granted.

In response to Paragraph 5 of your request, the Commission is providing the power point presentation presented by former Commissioner Norman J. Kennard at the National Association of Water Companies Pennsylvania Chapter annual meeting held on May 7, 2019. Therefore, your request is granted.

All records being released by the Commission, other than those available on the Commission's website, are being provided to you in digital format on a USB thumb drive as per our normal format in the course of business. The thumb drive is being provided to you at no expense. Instructions on how to access the information on the thumb drive are included.

Additionally, pursuant to the RTKL, an agency may make its records available through any publicly accessible electronic means and respond to a request by notifying the requestor that the records are available through publicly accessible electronic means. 65 P.S. §§ 67.704(a), 67.704(b)(1). You may access documents associated with the docketed proceedings involving Hidden Valley at Docket Nos. P-2014-2424858, R-2018-3001307, C-2014-2447169, and C-2014-2447138 on the Commission's website using the "Public Document Search" at http://www.puc.pa.gov/about_puc/search_results.aspx. To search by docket number, enter a docket number as shown above in the "Docket Number" field and select "Search for Documents." Additional tips on searching for public documents on the Commission's website can be found at: http://www.puc.pa.gov/general/pdf/Searching_Public_Documents.pdf.

Finally, the proceedings at Docket Nos. C-2014-2447169 and C-2014-2447138 have been remanded to the Commission from the Commonwealth Court of Pennsylvania and these matters are pending before the Commission. *Hidden Valley v. Pa. Public Utility Commission*, No. 187 C.D. 2019 (Pa. Cwmlth. May 15, 2019). Since all RTKL requests and responses along

¹ Due to the proceedings at Docket Nos. P-2014-2424858, R-2018-3001307, C-2014-2447169, and C-2014-2447138, any exchanges between BIE and advisory personnel within the Commission are prohibited by Section 334(c) of the Public Utility Code, 66 Pa. C.S. § 334(c), and the bifurcation of advisory and prosecutorial roles required by *Lyness v. State Board of Medicine*, 605 A.2d 1204 (Pa. Cwmlth. 1992) and, therefore, do not exist.

with the records released with the agency's response are public, and to the extent your request could be deemed an *ex parte* communication, a copy of your RTKL request, the Commission's response, and the records accompanying the response will be provided to the Office of Consumer Advocate in these pending dockets. Likewise, a copy of your request and the Commission's response are being provided to the Parties, and to the Office of Administrative Law Judge, regarding these pending dockets.

This is the final response of the Commission in accordance with the Pennsylvania RTKL.

NOTICE OF RIGHT TO APPEAL

If you believe the Commission has wrongfully denied any part of your request, you may appeal within 15 business days from the date of this letter to:

Office of Open Records
16th Floor
333 Market Street
Harrisburg, PA 17126-0333

If you choose to file an appeal you must do so within 15 business days of the mailing date of the agency's response. 65 P.S. § 67.1101. Please note that a copy of your original Right-to-Know request and this denial letter must be included when filing an appeal. The law also requires that you state the reasons why the record is a public record and address the reasons the Agency denied your request. Visit the Office of Open Records website at <http://openrecords.pa.gov> for further information on filing an appeal.

Please be advised that this correspondence will serve to close this record with our office as permitted by law.

Sincerely,



Rosemary Chiavetta, Secretary
Right to Know Officer
Pa Public Utility Commission

cc: Scott Thomas, PUC Assistant Counsel
Hayley Dunn, PUC Assistant Counsel
PUC RTK Official File 2019-0069

Copies of request, response, and records to:

Tanya McCloskey, Office of Consumer Advocate

Copies of request and response to:

Chief ALJ Charles Rainey, Office of Administrative Law Judge

Allison Kaster, Bureau of Investigation and Enforcement

All Parties of Record to Docket Nos. C-2014-2447169 and C-2014-2447138

EXHIBIT 3



December 31, 2019

Via Email Only:

Johathan Nase
Cozen O'Connor
17 North Second Street
Suite 1410
Harrisburg, PA 17101
jnase@cozen.com

Via Email Only:

Rosemary Chiavetta
Agency Open Records Officer
Pennsylvania Public Utility Commission
400 North Street, 2nd Floor
P.O. Box 3265
Harrisburg, PA 17105-3265
RA-PUCRightToKnow@pa.gov

RE: OFFICIAL NOTICE OF APPEAL – DOCKET #AP 2019-2652

Dear Parties:

Review this information and all enclosures carefully as they affect your legal rights.

The Office of Open Records (“OOR”) received this appeal under the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101, *et seq.* on December 30, 2019. The appeal process is described briefly in this letter and more fully in the enclosed documents. A binding Final Determination will be issued pursuant to the timeline required by the RTKL, generally within 30 calendar days. The OOR’s Final Determination is currently due on February 28, 2020.

Notes for both parties (more information in the enclosed documents):

- Evidence, legal argument and general information to support your position must be submitted within seven (7) business days from the date of this letter, January 10, 2020.
- If the proceedings have been stayed for the parties to submit a completed mediation agreement form, the record will remain open for seven (7) additional business days beyond the mediation agreement submission deadline.
- The docket number above must be included on all submissions related to this appeal.
- Any information provided to the OOR must be provided to all parties involved in this appeal. Information shared with the OOR that is not also shared with all parties will not be considered.
- All submissions to the OOR, other than in camera records, will be public records. Do not include any sensitive information such as Social Security numbers.

If you have any questions about the appeal process, please contact the assigned Appeals Officer (contact information is enclosed) – and be sure to provide a copy of any correspondence to all other parties involved in this appeal.

Sincerely,

A handwritten signature in black ink, appearing to read "Erik Arneson", with a long horizontal flourish extending to the right.

Erik Arneson
Executive Director

Enc.: Description of RTKL appeal process
Assigned Appeals Officer contact information
Entire appeal as filed with OOR

EXHIBIT 4



January 10, 2020

VIA HAND DELIVERY

Jonathan P. Nase

Direct Phone 717-773-4191

Direct Fax 215-372-2340

jnase@cozen.com

Appeals Officer Erin Burlew, Esq.
Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101-2234

RECEIVED

JAN 10 2020

Re: Appeal of Jonathan Nase, Docket #AP 2019-2652

Evidence and Legal Argument of Jonathan Nase

OFFICE OF OPEN RECORDS

Dear Appeals Officer Burlew:

In accordance with the Official Notice of Appeal in this matter, enclosed please find the Evidence and Legal Argument of Jonathan Nase ("Requester"), together with the Attestation of Jonathan Nase. A copy of this filing has been served on the Public Utility Commission as indicated on the enclosed certificate of service.

Should you have any questions, please contact me. Thank you.

Sincerely,

COZEN O'CONNOR



By: Jonathan P. Nase

JPN
Attachments

cc: Per Certificate of Service
James Kettler, President, Hidden Valley Utility Services, L.P.

COMMONWEALTH OF PENNSYLVANIA
OFFICE OF OPEN RECORDS

RECEIVED

JAN 10 2020

OFFICE OF OPEN RECORDS

Jonathan Nase,
Petitioner

v.

Pennsylvania Public Utility Commission,
Respondent

:
:
:
:
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:

Docket No. AP 2019-2652

**Requester's Evidence and Legal Argument in
Support of His Position**

Introduction

This appeal concerns a request for public records in the possession of the Pennsylvania Public Utility Commission ("PUC") relating to a small, troubled water and sewer company: Hidden Valley Utility Services, L.P. ("HVUS"). Jonathan Nase (the "Requester") has served as counsel to HVUS in several recent proceedings before the PUC.

In a recent complaint proceeding, *Tanya J. McCloskey, Acting Consumer Advocate v. Hidden Valley Utility Services, L.P. – Water and Wastewater*, Docket Nos. C-2014-2447138 and C-02014-2447169 ("*McCloskey*") (appended to the appeal as Attachment D), the PUC found that HVUS was not providing reasonable and adequate water and sewer service. HVUS was ordered to undertake corrective action, including but not limited to designing, contracting for, obtaining permits for, and building either (i) a new water treatment plant or (ii) a pipeline connecting the HVUS' system to another water source, all within one year from the date of the PUC's Order. Not surprisingly, HVUS failed to meet that deadline.

I expect the PUC will soon initiate a penalty proceeding against HVUS for failing to comply with the PUC's Order in *McCloskey*. In addition, the PUC will shortly commence an investigation into whether the PUC should force HVUS to sell its water and sewer systems to another utility pursuant to 66 Pa. C.S. § 529 (power of commission to order acquisition of small water and sewer utilities).

The Requester filed a Right to Know Law ("RTKL") request with the PUC to obtain documents necessary for HVUS to defend itself in these upcoming proceedings – documents that generally would not be available to HVUS through discovery in PUC proceedings. The PUC granted the RTKL request, in part, and denied it, in part.

For purposes of brevity, the Requester incorporates by reference the reasons for his appeal, appended to his appeal at Attachment B. For the convenience of the Appeals Officer, this document is attached hereto as **Exhibit 1**. In summary, although the PUC turned over a large number of documents, the PUC withheld an unknown number of documents. The Requester respectfully submits that the PUC failed to carry its burden of proving that any of these documents are exempt from disclosure. The PUC did not provide an exemption log, an affidavit, or any other evidence to establish the necessary elements of its claim that certain exemptions apply to those documents. Additionally, the PUC withheld all of those documents in their entirety, rather than redacting portions and disclosing the remainder of the pertinent documents. In short, the PUC's response failed to meet the requirements of the RTKL. *Mission Pa. LLC v. McKelvey*, 212 A.3d 119 (Pa. Cmwlth. Ct. 2019) (the failure to disclose many pages of a public record does not comport with the narrow construction of RTKL exemptions and the minimal redaction mandate).

Burden of Proof

The RTKL provides that a record in the possession of a Commonwealth agency (such as the PUC) is presumed to be a public record, but this presumption does not apply if the record is exempt from disclosure pursuant to Section 708 of the RTKL. 65 P.S. § 67.305(a)(1). The PUC has not claimed that any requested document is not a “record” within the meaning of the RTKL. 65 P.S. § 102. Instead, the PUC claims that some of the requested records are exempt from disclosure pursuant to Section 708.

The PUC bears the burden of proving that any given record is exempt from public disclosure. 65 P.S. § 67.708(a)(1). As explained in **Exhibit 1**, the PUC has failed to carry its burden. The PUC has not identified the documents that are allegedly exempt from disclosure, nor has it provided any factual support whatsoever for its claim that those documents are exempt from disclosure. Moreover, the PUC has failed to provide any factual support for its claim that every allegedly exempt document may be withheld in its entirety, rather than being disclosed with appropriate redactions. Consequently, the Appeals Officer should order the disclosure of those documents. In the alternative, the Appeals Officer should order the PUC to provide a privilege log, together with copies of the withheld documents, so the Appeals Officer can conduct an *in camera* review of the withheld documents to determine whether any exemption applies to those documents, in part or in whole.

Facts

The Requester’s Appeal included a copy of the RTKL request and the PUC’s response thereto. Since the PUC has yet to provide any factual support for its partial denial of the RTKL request, the Requester is unable to provide evidence to rebut that claim. Nevertheless, it is

significant to note that the RTKL request sought, *inter alia*, “All e-mails or other documents to or from a Commissioner, or any member of a Commissioner’s staff, mentioning Hidden Valley Utility Services, L.P. during the period 2013-present.” See Attachment C to the Appeal.

Although the PUC disclosed many documents in response to the request, few if any documents are to/from a Commissioner or a member of a Commissioner’s staff. While the Requester has no doubt that some of the requested documents, or portions of those documents, are exempt from disclosure, it is difficult to believe that every word of every such record is exempt from disclosure. This is particularly true with regard to comments regarding the upcoming proceedings – since those proceedings have yet to be commenced, any discussion of those proceedings surely would not fall within the pre-decisional deliberation exemption.

Legal Argument

The purpose of the RTKL is to promote government accountability. *Bowling v. Office of Open Records*, 990 A.2d 813, 824 (Pa. Cmwlth. Ct. 2010), *aff’d* 75 A.3d 453 (Pa. 2013). The PUC’s response to the instant RTKL request promoted government accountability by addressing concerns that the PUC may have violated HVUS’s due process rights by commingling the functions of prosecutor and adjudicator in violation of the Commonwealth Court of Pennsylvania’s decision in *Lyness v. State Board of Medicine*, 605 A.2d 1204 (1992). See PUC’s RTKL response p. 2 n.1.

The PUC’s response, however, did not promote government accountability in that the PUC failed to turn over virtually any document to/from a Commissioner or Commissioner’s Assistant. These documents, for example, would demonstrate whether one or more Commissioners, or Commissioner’s Assistants, has prejudged the upcoming proceedings. If any Commissioner, or

Commissioner's Assistant, has prejudged those proceedings, their participation in the upcoming adjudications would violate HVUS' due process rights. The instant request for public records is the only avenue of discovery available to HVUS and its counsel to obtain evidence regarding this important point. The Appeals Officer should ensure that the PUC is held accountable by carefully scrutinizing each and every claim that a document is exempt from disclosure, in part or in whole.

Conclusion

For all of the reasons set forth above and in **Exhibit 1**, the Requester respectfully requests that the Appeals Officer find that the PUC has failed to carry its burden of proof, and therefore should order the PUC to disclose all public records responsive to the Requester's RTKL request. In the alternative, the Requester respectfully requests that the Appeals Officer order the PUC to provide a privilege log, together with copies of the withheld documents, so the Appeals Officer can conduct an *in camera* review of the withheld documents to determine whether any exemption applies to those documents, in part or in whole.

Respectfully submitted,


Jonathan P. Nase

Exhibit 1

Attachment B – Reasons for Appeal

I. Introduction

1. The requester in this case requested specific records (“Requests”) from the Pennsylvania Public Utility Commission (“Commission”) relating to Hidden Valley Utility Services, L.P. (“Hidden Valley”), a public utility subject to Commission jurisdiction. A copy of the Request is included as **Attachment C**.

2. Hidden Valley was a party to several matters before the Commission during the period 2014-2019, and will shortly be subject to additional Commission proceedings. Those proceedings included:

(a) *Tanya J. McCloskey, Acting Consumer Advocate v. Hidden Valley Utility Services, L.P. – Water and Wastewater*, Docket Nos. C-2014-2447138 and C-2014-2447169 (Initial Decision issued September 9, 2016; Opinion and Order entered January 18, 2018; Opinion and Order on Petition for Clarification, Reconsideration and Amendment entered May 3, 2018; Opinion and Order on Petition for Amendment entered January 17, 2019). **Attachment D** is a copy of the Commission’s Order entered May 3, 2018 in this proceeding. That Order provides, *inter alia*, that the Commission will begin certain proceedings in the future (e.g., a penalty proceeding and a proceeding to order the sale of the company pursuant to Section 529 of the Pennsylvania Public Utility Code, 66 Pa. C.S. § 529) if Hidden Valley does not comply with the Commission’s Order by the deadlines set forth in that Order. *See* ¶¶ 20 and 21. The penalty proceeding and the Section 529 proceeding are expected to begin in the near future.

(b) *Pennsylvania Public Utility Commission v. Hidden Valley Utility Services, L.P. – Water and Wastewater*, Docket Nos. R-2018-3001306 *et al.* (Recommended Decision issued January 25, 2019; Opinion and Order entered March 14, 2019; Opinion and Order on Motion to Extend the Time Period for Completing an Independent Financial Audit entered August 29, 2019).

(c) *Hidden Valley Utility Services, L.P. v. Pennsylvania Public Utility Commission*, 187 C.D. 2019 (appeal quashed by Order entered May 15, 2019).

3. In response to the Requests, the Commission’s Right to Know Law Officer (“RTKL Officer”), after an extension (a copy of which is included as **Attachment E**), granted three of the five Requests in full, and denied two of the five Requests in part. A copy of the Commission’s responses to the Requests is included as **Attachment F** (the Commission turned over a large number of documents, which are included on an attached CD).

4. This appeal concerns the partial denial of Requests 1 and 3. The RTKL Officer, *inter alia*, refused to provide certain documents, claiming that they fall under certain exemptions and privileges contained in the RTKL, including the attorney-client privilege, the attorney work product doctrine, the deliberative process privilege, the pre-decisional deliberation exemption and the notes and working papers exemption. The RTKL Officer did not provide a privilege log for the documents that allegedly fall within the RTKL’s exemptions and privileges.

II. Reasons for Appeal

5. Conclusory Denials are Insufficient. The Commission did not meet its burden of proving by a preponderance of the evidence that the records requested are exempt from disclosure under the RTKL. 65 P.S. § 67.708(a). The Commission merely concluded summarily that certain requested records are not subject to disclosure, without providing any other analysis. Mere conclusory statements like the ones the Commission provided in response to the requests are insufficient to meet the Commission's burden of proof. *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Cmwlth. 2013) (“[A] generic determination or conclusory statements are not sufficient to justify the exemption of public records.”).

6. The Blanket Assertion of the Attorney-Client Privilege is Improper. The Commission denied requests on the basis that the requested documents are protected by the attorney-client privilege. The attorney-client privilege requires “(1) that the asserted holder of the privilege is or sought to become a client; (2) that the person to whom the communication was made is a member of the bar of a court, or his or her subordinate; (3) that the communication relates to a fact of which the attorney was informed by the client, without the presence of strangers, for the purpose of securing an opinion of law, legal services, or assistance in a legal matter; and (4) that the claimed privilege has not been waived by the client.” See *Chambersburg Area School District v. Dorsey*, 97 A.3d 1281, 1289 (Pa. Cmwlth. 2014). The Commission did not meet its burden of proving that this exemption applies to any of the requested public records.

a. As the OOR concluded in *Davis v. Payne Commission*, Docket No. AP 2011-0754 (OOR Final Determination Issued June 27, 2011), the Commission here did not describe the documents that contain such communications or the content of the communications in order to substantiate that each and every record withheld from disclosure was made for the purpose of securing or providing legal advice.

b. Similarly, the Commission employs staff members who serve in various capacities, even if they are lawyers, and do not necessarily provide legal advice, opinions, services, or assistance; therefore, the attorney-client privilege does not attach to their communications.

c. Moreover, the Commission did not address whether the privilege has been waived for any responsive records through disclosure to a third party, including (without limitation) whether any communications by and among the Commissioners and all their respective assistants, along with any documentation resulting therefrom, results in a waiver of any privilege and therefore are not subject to protection. See *Chambersburg*. In other words, communications among the assistants of each of the Commissioners are not privileged; communications among Commissioners are not privileged; and communications among an assistant(s) of one Commissioner with a different Commissioner are not privileged.

7. The Blanket Assertion of the Work Product Doctrine is Improper. The Commission's claim that the records requested are immune from disclosure based on the work-

product doctrine similarly is wrong. That doctrine generally serves to protect the mental impressions, conclusions and opinions of attorneys prepared in anticipation of litigation. *See Nat'l R.R. Passenger Corp. v. Fowler*, 788 A.2d 1053, 1065 (Pa. Cmwlth. 2001). As with the claim of attorney-client privilege, the Commission did not describe the documents that contain such information or the content of the records in order to substantiate that each and every record withheld from disclosure contains mental impressions, conclusions, and opinions of a licensed Pennsylvania attorney in anticipation of any litigation.

8. The Blanket Assertion of the Pre-Decisional Deliberation Exemption is Improper. The Commission partially denied Request Nos. 1 and 3, *inter alia*, on the basis that they seek records relating to internal pre-decisional deliberations. An agency must show three elements to meet its burden under this exception: (1) the deliberations reflected must be “internal” to the agency; (2) the deliberations reflected must be predecisional, *i.e.*, before a decision on an action; and (3) the contents must be deliberative in character, *i.e.*, pertaining to proposed action and/or policy-making. *See Kaplan v. Lower Merion Twp.*, 19 A.3d 1209, 1214 (Pa. Cmwlth. 2011). The Commission has offered no information on how the records requested meet this test. Moreover, as stated above, Hidden Valley will soon be subject to a penalty proceeding and a Section 529 proceeding. Since those proceedings did not even commence prior to the Requester’s filing of the Request, any deliberations pertaining to those proceedings would not fall within the pre-decisional deliberation exemption.

9. The Blanket Assertion of the Notes and Working Papers Exemption is Improper. Section 708(b)(12) of the RTKL exempts from disclosure “notes and working papers prepared by or for a public official or agency employee used solely for that official’s or employee’s own personal use.” The Commission asserts that this exemption applies to certain documents responsive to Request 3, which requests “any e-mails or other documents to or from any employee in the Bureau of Technical Utility Services mentioning Hidden Valley Utility Services, L.P., during the period 2013-present.” Without additional information, it is hard to fathom how a document “to or from” an employee is exempt from disclosure because it was prepared by that employee solely for that employee’s personal use.

10. The Assertion of both the Deliberative Process Privilege and the Pre-Decisional Deliberation Exemption is Improper. The Commission contends that certain documents are exempt from disclosure pursuant to the deliberative process privilege and/or the pre-decisional deliberation exemption. However, the Commonwealth Court has held that the pre-decisional deliberation exemption codifies the deliberative process privilege. *Scolforo, supra*, at 1101. If the pre-decisional deliberation exemption does not apply, neither does the deliberative process privilege.

11. Redactions/Partial Disclosure and Privilege Log. With respect to all claims of privilege, the Commission violated the RTKL by withholding the records in whole rather than disclosing them in part with appropriate redactions. 65 P.S. § 67.706; *cf. Mission Pa., LLC v. McKelvey*, 212 A.3d 119 (Pa. Cmwlth. Ct. 2019) (the failure to disclose many pages of a public record does not comport with the narrow construction of RTKL exemptions and the minimal redaction mandate). At a bare minimum, the Commission should have produced a log identifying each record or part of record that contains privileged information and the applicable privilege.

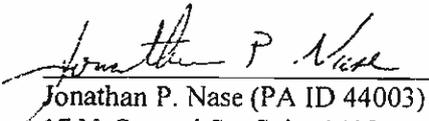
12. Reservation of Rights. Requester hereby reserves the right to amend and offer additional support and grounds for the appeal.

III. Conclusion

WHEREFORE, the Appeals Officer should grant this appeal and order the Commission to disclose all records requested (with appropriate redactions, if necessary). In addition, the Appeals Officer should provide the Requester with an opportunity to provide additional briefing and support for the appeal, and the Appeals Officer should conduct an *in camera* review of the documents alleged to be exempt from disclosure.

Respectfully submitted,

Cozen O'Connor


Jonathan P. Nase (PA ID 44003)
17 N. Second St., Suite 1410
Harrisburg, PA 17101
jnase@cozen.com
Tel: (717) 773-4191
Fax: (215) 372-2340

Date: December 30, 2019

**COMMONWEALTH OF PENNSYLVANIA
OFFICE OF OPEN RECORDS**

Jonathan Nase,	:	
Petitioner	:	
	:	
v.	:	Docket No. AP 2019-2652
	:	
Pennsylvania Public Utility Commission,	:	
Respondent	:	

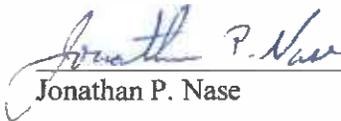
Attestation of Jonathan P. Nase

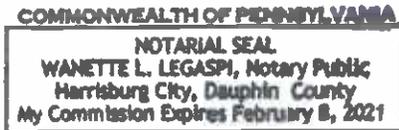
I, JONATHAN P. NASE, hereby declare, pursuant to 18 Pa. C.S. § 4904, that the following statements are true and correct:

1. I am an attorney with the law firm of Cozen O'Connor. I have represented Hidden Valley Utility Services, L.P., in several recent proceedings before the Pennsylvania Public Utility Commission.
2. I am the Requester in the above-referenced proceeding.
3. Attached hereto is a true and correct copy of correspondence filed by the Office of Consumer Advocate, a party in *Tanya J. McCloskey, Acting Consumer Advocate v. Hidden Valley Utility Services, L.P. – Water and Wastewater*, Docket Nos. C-2014-2447138 and C-02014-2447169.
4. Based on the attached letter, I expect that the PUC will soon initiate a penalty proceeding against Hidden Valley Utility Services, L.P. (“HVUS”), as well as an investigation into

whether the PUC should force HVUS to sell its water and sewer systems to another utility pursuant to 66 Pa. C.S. § 529 (power of commission to order acquisition of small water and sewer utilities).

Respectfully,


Jonathan P. Nase




1/10/2020

COMMONWEALTH OF PENNSYLVANIA



OFFICE OF CONSUMER ADVOCATE

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FAX (717) 783-7152
consumer@paoca.org

November 20, 2019

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

RE: Tanya J. McCloskey, Acting Consumer Advocate
v.
Hidden Valley Utility Services, L.P. - Wastewater
Docket No. C-2014-2447169

Tanya J. McCloskey, Acting Consumer Advocate
v.
Hidden Valley Utility Services, L.P. - Water
Docket No. C-2014-2447138

Dear Secretary Chiavetta:

Pursuant to Ordering Paragraph 26 of the Commission's Opinion and Order entered May 3, 2018 (May 2018 Order) in the above-referenced dockets, the Office of Consumer Advocate (OCA) submits this letter notifying the Commission that Hidden Valley Utility Services, L.P. (HVUS) has failed to comply with certain deadlines specified in the May 2018 Order.

The May 2018 Order includes detailed timeframes for HVUS to bring its water and wastewater service into compliance with Commission regulations. Ordering Paragraph 26 provides that "in the event that [HVUS] fails to comply with any of the time deadlines directed in these Ordering Paragraphs, the Office of Consumer Advocate shall notify the Secretary of the Commission and the Director of the Commission's Bureau of Investigation and Enforcement within thirty days of the missed deadline." Per Ordering Paragraph 27, such a notice will trigger a separate proceeding pursuant 66 Pa. C.S. § 529.

HVUS submitted an engineer's report dated April 16, 2018 as required by Ordering Paragraphs 6, 7, 9, and 10 of the May 2018 Order. However, HVUS has now missed the deadlines in the May 2018 Order requiring that it comply with the recommendations of the engineer's report regarding

water service within one year of the date of the report. Ordering Paragraph 8. Further, the May 2018 Order also required HVUS to comply with the engineer's recommendations regarding wastewater service by January 31, 2019. Ordering Paragraph 11. By this letter, the OCA is notifying the Commission that HVUS has failed to comply with these deadlines.

Although it has been more than thirty days since HVUS missed these deadlines, the OCA did not previously submit a letter due to HVUS's pending appeal before Commonwealth Court at 187 C.D. 2019 challenging the compliance deadlines at issue here. The Commission initially issued an Opinion and Order in this proceeding on January 18, 2018. HVUS filed a Petition for Clarification on February 2, 2018, and the OCA filed an Answer to the Petition for Reconsideration on February 12, 2018. The Commission entered an Opinion and Order on the HVUS Petition for Clarification on May 3, 2018 (the May 2018 Order discussed herein). On October 18, 2018, HVUS submitted a Petition for an Amendment of the Opinion and Order issued on May 3, 2018. The OCA filed an Answer to the Petition for Amendment on October 29, 2018, and the Commission issued an Opinion and Order regarding the Petition on January 17, 2019. Subsequently, HVUS filed its Petition for Review with Commonwealth Court on February 19, 2019. On May 15, 2019, the Petition for Review was quashed and the record remanded to the Commission with direction that "a hearing will be held forthwith before the Commission regarding the sufficiency of both the engineer's report and the previously ordered one-year compliance deadline." Memorandum Opinion at 10-11. The OCA awaited further hearings as directed by Commonwealth Court, but now submits this letter out of an abundance of caution.

The OCA respectfully requests that further hearings be scheduled as required by the Orders discussed above, and a separate proceeding be initiated pursuant to 66 Pa. C.S. § 529 as required by the May 2018 Order.

Respectfully Submitted,


Christine Maloni Hoover
Senior Assistant Consumer Advocate
PA Attorney I.D. # 50026
E-mail: CHoover@paoca.org

Erin L. Gannon
Senior Assistant Consumer Advocate
PA Attorney I.D. # 83487
E-mail: EGannon@paoca.org

Enclosures:

cc: Richard Kanaskie, Director, Bureau of Investigation and Enforcement
Certificate of Service

*280774

CERTIFICATE OF SERVICE

Tanya J. McCloskey, Acting Consumer Advocate :
 :
 v. : Docket Nos. C-2014-2447138
 : C-2014-2447169
 Hidden Valley Utility Services, L.P. – :
 Water and Wastewater :

I hereby certify that I have this day served a true copy of the following document, the Office of Consumer Advocate's Letter Requesting Scheduling of Further Hearings, upon parties of record in this proceeding in accordance with the requirements of 52 Pa. Code §1.54 (relating to service by a participant), in the manner and upon the persons listed below:

Dated this 20th day of November 2019.

SERVICE BY E-MAIL AND FIRST CLASS MAIL, POSTAGE PREPAID

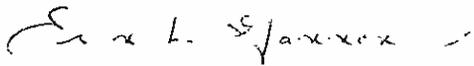
Paige Macdonald-Matthes
Obermayer Rebmann
Maxwell & Hippel, LLP
200 Locust Street
Suite 400
Harrisburg, PA 17101

Jonathan P. Nase, Esquire
David P. Zambito, Esquire
Cozen O'Connor
17 North Second Street
Suite 1410
Harrisburg, PA 17101

SERVICE BY FIRST CLASS MAIL, POSTAGE PREPAID

James Kettler, President
Hidden Valley Utility Services, L.P.
811 Russell Avenue, Suite F
Gaithersburg, MD 20879

Robert J. Kollar
Kellie A. Kuhleman
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Dated: November 20, 2019
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COMMONWEALTH OF PENNSYLVANIA
OFFICE OF OPEN RECORDS

Jonathan Nase,
Petitioner

v.

Pennsylvania Public Utility Commission,
Respondent

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Docket No. AP 2019-2652

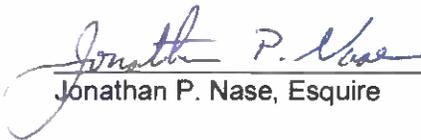
CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing **Evidence and Legal Argument of Jonathan Nase**, upon the parties, listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

Via E-mail and First Class Mail

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Jonathan P. Nase, Esquire

Date: January 10, 2020

EXHIBIT 5



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. BOX 3265, HARRISBURG, PA 17105-3265

January 13, 2020

OOR Docket # AP 2019-2652

Erin Burlew, Esquire
Appeals Officer
Commonwealth of Pennsylvania
Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101-2234

Via E-Mail (eburlew@pa.gov)

Re: Pa. PUC Response – OOR Appeal Docket No. # AP 2019-2652

Dear Appeals Officer Burlew:

The Pennsylvania Public Utility Commission files this Response in this matter.

I. Background

On October 30, 2019, Jonathan P. Nase, Esq., submitted via email the following request to the Pennsylvania Public Utility Commission (Commission) pursuant to Pennsylvania's Right-to-Know Law (RTKL), 65 P.S. §§ 67.101 *et seq.*:

- “1. Any e-mails or other documents to or from a Commissioner, or any member of a Commissioner's staff, mentioning Hidden Valley Utility Services, L.P. during the period 2013-present.
2. Any e-mails or other documents between any employee of the Bureau of Investigation and Enforcement and an employee of any other Commission bureau, department or office, mentioning Hidden Valley Utility Services, L.P., during the period 2013-present.
3. Any e-mails or other documents to or from any employee in the Bureau of Technical Utility Services mentioning Hidden Valley Utility Services, L.P, during the period 2013-present.

4. Any e-mails or other documents to or from any Commission employee and the Department of Environmental Protection mentioning Hidden Valley Utility Services, L.P., during the period 2013-present.

5. The power point presentation of Commissioner Norman J. Kennard at the National Association of Water Companies annual meeting held at the Keystone Building in 2019.”

Chiavetta Affidavit ¶ 2.

On November 5, 2019, the Commission provided an Interim Response to Nase extending the deadline for a Final Response to his request (PUC RTKL 2019-0069) to December 6, 2019. The Commission issued its Final Response on December 6, 2019. Chiavetta Affidavit ¶¶ 3, 5. Regarding Item Nos. 2, 4, and 5, the Commission granted Nase’s request in full and provided all responsive records. Chiavetta Affidavit ¶¶ 3, 5. The Commission granted in part Item No. 1 of Nase’s request and provided responsive emails. Chiavetta Affidavit ¶¶ 3, 5, 7. However, the Commission denied Nase’s request to the extent that responsive emails were exempt from disclosure under the attorney-client privilege, the attorney work product doctrine, the deliberative process privilege, 65 P.S. §§ 67.102, 67.305(a)(2), and the RTKL’s pre-decisional deliberation exemption, 65 P.S. § 67.708(b)(10). Chiavetta Affidavit ¶¶ 5-7. The Commission granted in part Item No. 3 of Nase’s request and provided responsive emails. Chiavetta Affidavit ¶¶ 3, 5, 9. However, the Commission denied Nase’s request to the extent that responsive emails were exempt from disclosure under the attorney-client privilege, the deliberative process privilege, 65 P.S. §§ 67.102, 67.305(a)(2), the predecisional

deliberation exemption, 65 P.S. § 67.708(b)(10), and the RTKL's notes and working papers exemption, 65 P.S. § 67.708(b)(12). Chiavetta Affidavit ¶¶ 5, 8-9.

Responsive records were provided to Nase on a USB drive. In addition, the Commission identified four docketed proceedings involving Hidden Valley Utility Services, L.P. (Hidden Valley), including two active complaint dockets, and instructed Nase on how to access associated documents on the Commission's website. Regarding the two complaint proceedings against Hidden Valley pending before the Commission's Office of Administrative Law Judge (OALJ), to the extent Nase's request may be deemed an *ex parte* communication, copies of Nase's request, the Commission's response, and the records accompanying the response were provided to the Office of Consumer Advocate, a party to the proceedings. Copies of the request and the response were also provided to the Commission's Bureau of Investigation and Enforcement (BIE), all parties of record, and the OALJ. Chiavetta Affidavit ¶¶ 4-5.

Nase filed this Appeal of the Commission's partial denial of Item Nos. 1 and 3 of his request to the Office of Open Records (OOR) on December 30, 2019. The Commission received official notification of the Appeal on December 31, 2019. At that time, the Commission was given until Friday, January 10, 2020 to file a response. On January 10, due to the unavailability of the Commission's affiant, the OOR granted the Commission an extension to the close of business on Monday, January 13, 2020.

II. Argument

The Commission conducted a thorough search for all responsive records. Chiavetta Affidavit ¶ 3. The responsive records consist of (1) emails and attached

documents to and from Commission employees mentioning Hidden Valley and (2) Commissioner Kennard's PowerPoint presentation from the 2019 annual meeting of the National Association of Water Companies. Some emails and documents were protected by privilege(s) and/or RTKL exemptions. Chiavetta Affidavit ¶¶ 3, 5, 7, 9. The Commission respectfully requests that the OOR deny Nase's Appeal because the Commission properly applied the asserted privileges and exemptions.

A. Nase Improperly Conflates The Requirements Of An RTKL Request Response With The Standard On Appeal

Under the RTKL, an agency's response denying a RTKL request is required to include a "description of the record requested" and the "specific reasons for denial, including a citation of supporting legal authority." 65 P.S. § 67.903. It is not until an appeal is filed with the OOR that the agency is required to meet its burden of proving that a record is exempt from public access by a preponderance of the evidence. 65 P.S. § 708(a)(1); *see Pa. State Police v. Kim*, 150 A.3d 155, 157 (Pa. Cmwlth. 2016) ("[t]he agency bears the burden of substantiating its denial on appeal to OOR.").

Here, however, Nase erroneously claims that the Commission did not meet its burden of proof because it did not include with its RTKL request response evidence (specifically, a "privilege log") or an analysis demonstrating that the records are exempt from disclosure under the RTKL. Nase improperly conflates the requirements of an agency's RTKL request response with the standard on appeal before the OOR. Therefore, Nase's arguments that the Commission has not met its burden of proof are premature and should be rejected by the OOR.

Further, as demonstrated herein, the Commission has met its burden of proof before the OOR. The Commonwealth Court stated that “[a] preponderance of the evidence standard, the lowest evidentiary standard, is tantamount to a ‘more likely than not inquiry.’” *Carey v. Pa. Dep’t of Corrections*, 61 A.3d 367, 374 (Pa. Cmwlth. 2013). Before the OOR, an affidavit may serve as sufficient evidentiary support for a claimed privilege or exemption. *Sherry v. Radnor Twp. School District*, 20 A.3d 515, 520 (Pa. Cmwlth. 2011). The use of affidavits is reasonable “given the strict time limitations imposed on agencies and OOR to make a determination.” *Id.* Here, the Commission’s affidavit sufficiently demonstrates how the claimed privileges and exemptions apply to the records at issue. Absent competent evidence showing bad faith, the veracity of the Commission’s submissions explaining reasons for nondisclosure should not be questioned and the averments in the affidavits should be accepted as true. *See McGowan v. Pa. Dep’t of Environmental Protection*, 103 A.3d 374, 381-82 (Pa. Cmwlth. 2014).

B. A Privilege/Exemption Log And *In Camera* Review Are Unnecessary

With regard to privilege/exemption logs, the Commonwealth Court has recognized that “a satisfactory index could undermine the exemption, and in those cases, agencies may proffer generic determinations for nondisclosure.” *Bowling v. Office of Open Records*, 990 A.2d 813, 825 n. 13 (Pa. Cmwlth. 2010). In addition, agencies may “justify their exemptions on a . . . category-of-document basis.” *Id.* Where an agency sufficiently explains the basis for nondisclosure through an affidavit, a log or *in camera* review is not necessary. *UnitedHealthcare of Pa., Inc. v. Pa. Dep’t of Human Services*, 187 A.3d 1046, 1060 (Pa. Cmwlth. 2018) (*UnitedHealthcare*).

Nase claims that the Commission should have included a “privilege log” with its RTKL request response.¹ Nase fails to recognize that, as explained above, an agency is *not* required to provide a privilege/exemption log with its RTKL request response. 65 P.S. § 67.903 (a denial need only include a description of the records requested and the reasons for denial). Moreover, a log is not required before OOR when the agency justifies nondisclosure via affidavit. *Bowling* at 825 n. 13; *UnitedHealthcare* at 1060. The Commission’s affidavit sufficiently describes the records and demonstrates how the privileges and exemptions apply. No log is necessary here.²

Nase also seeks *in camera* review. As with privilege/exemption logs, *in camera* review is not required where the government agency otherwise provides a sufficient basis for meaningful review and independent assessment. *Commonwealth v. Center Twp.*, 95 A.3d 354, 367 (Pa. Cmwlth. 2014) (quoting *Schenck v. Twp. of Center*, 975 A.2d 591, 599 (Pa. 2009)). Because the Commission’s affidavit adequately identifies the records and justifies the privileges and exemptions, *in camera* review is unnecessary here. See *UnitedHealthcare* at 1060. Further, *in camera* review in this matter is not in the interest of administrative economy or preserving administrative resources. Therefore, the OOR should deny the request for *in camera* review.

¹ A “privilege log” applies when a privilege is asserted, whereas an “exemption log” applies when an exemption is asserted.” *UnitedHealthcare* at 1059 n. 13. In its Appeal, the Requester seeks a “privilege log,” rather than an “exemption log.”

² Given the limited timeframe for filing a response, the affidavit is sufficient to support its partial denial of Items No. 1 and 3 of the RTKL request. See *Sherry* at 520. If the OOR deems necessary, however, the Commission is amendable to providing a privilege/exemption log or proceeding with hearings.

C. The Commission Properly Asserted Privileges And Exemptions In Determining To Partially Deny Nase’s RTKL Request

Pursuant to the RTKL, a public record is an agency record that is not exempt under Section 708 of the RTKL, 65 P.S. § 67.708, or not protected by a privilege. 65 P.S. § 67.102. The presumption that agency records are public does *not* apply to exempt records and privileged records. 65 P.S. § 67.305. Under the RTKL, a privilege refers to “[t]he attorney-work product doctrine, the attorney-client privilege . . . or other privilege recognized by a court interpreting the laws of this Commonwealth.” 65 P.S. § 67.102. In partially denying the RTKL request, the Commission properly asserted the (1) attorney-client privilege, (2) attorney work product doctrine, (3) pre-decisional deliberation exemption, 65 P.S. § 65.708(b)(10), and the deliberative process privilege, and (4) the notes and working papers exemption, 65 P.S. § 65.708(b)(12). For the reasons set forth below, Nase’s arguments to the contrary are without merit.

1. Records Are Protected By The Attorney-Client Privilege

The attorney-client privilege protects communications between an attorney and a client that are confidential and made in connection with the provision of legal service or advice. *Cal. University of Pa. v. Schackner*, 168 A.3d 413, 421 (Pa. Cmwlth. 2017). In asserting the a attorney-client privilege, the agency must show that (1) the holder of the privilege is a client, (2) the person to whom the communication was made is an attorney, or his or her subordinate, (3) the communication relates to a fact of which the attorney was informed by the client, without the presence of strangers, to secure an opinion of law, and (4) the privilege has not been waived. *Id.* The privilege applies to client-to-attorney

communications to obtain legal advice and attorney-to-client communications to provide legal advice. *Id.* at 422. The attorney-client privilege may be waived by disclosing attorney-client communications to a third party. *Pa. Dep't of Education v. Bagwell*, 114 A.3d 1113, 1124 (Pa. Cmwlth. 2015). A requester challenging the attorney-client privilege based on waiver bears the burden of proving waiver. *Id.*

Regarding Item No. 1 of Nase's request—emails and documents to or from Commissioners and Commissioners' staff—some responsive records are protected by the attorney-client privilege. These records include (i) emails with attached documents between attorneys in the Commission's Law Bureau and Commissioners' staff providing legal advice regarding legislation; and (ii) emails with attached documents between Commissioners' staff attorneys and Commissioners containing legal advice, analysis, and recommendations regarding proposed Commission action with respect to water and wastewater complaint proceedings and other proceedings before the Commission.

Chiavetta Affidavit ¶¶ 6-7(a)-(b).

Likewise, regarding Item No. 3 of Nase's request—emails and documents to and from employees of the Commission's Bureau of Technical Utility Services (TUS)—some responsive records are exempt from disclosure pursuant to the attorney-client privilege. These records include (i) emails with attached documents between attorneys in the Commission's Law Bureau and TUS staff providing legal advice on legislation and (ii) emails between attorneys in the Law Bureau and TUS staff providing legal advice regarding procedures in a complaint proceeding. Chiavetta Affidavit ¶¶ 8-9(a), (d).

The emails and documents at issue were between Commission attorneys and Commissioners or TUS staff for the purpose of providing legal advice on the matters identified above. Further, the records were not shared with any third parties. Chiavetta Affidavit ¶ 10. As such, the Commission properly asserted the attorney-client privilege and determined that the emails and attached documents are exempt from disclosure.

2. Records Are Protected By The Attorney Work Product Doctrine

The attorney work product doctrine protects the mental impressions of an attorney and his or her conclusions, opinions, memoranda, notes or summaries, legal research or theories. *Bagwell v. Pa. Dep't of Education*, 103 A.3d 409, 415 (Pa. Cmwlth. 2014). The attorney work product doctrine also protects materials prepared by agents for an attorney, such as investigators. *Id.* at 416. While the attorney work product doctrine protects any materials prepared in “anticipation of litigation,” it also protects materials created by an attorney “in the course of his or her professional duties” generally. The Commonwealth Court has held that “[t]he anticipation of litigation part of the work-product doctrine is *not* an absolute requirement.” *Id.* (emphasis added).

Moreover, government counsel are entitled to exercise the privilege. *Id.* For example, the Commonwealth Court has stated that “memorandum containing legal analysis of a court decision prepared for other agency lawyers, without reference to specific litigation, is protected by the work-product doctrine.” *Id.* Additionally, the Pennsylvania Supreme Court has held that “to the extent material constitutes an agency’s work product, it is not subject to compulsory public disclosure pursuant to the RTKL.” *In re Thirty-Third Statewide Investigating Grand Jury*, 86 A.3d 204, 225 (Pa. 2014).

Finally, with regard to waiver, the Pennsylvania Supreme Court has held that doctrine “is not waived by disclosure unless the alleged work product is disclosed to an adversary.”

Bousamra v. Excelsa Health, 210 A.3d 967, 969 (Pa. 2019).³

Regarding Item No. 1 of Nase’s request, some responsive records are exempt from disclosure under the attorney work product doctrine. These records include emails with attached documents between Commissioners’ staff attorneys and Commissioners containing legal advice, analysis, and recommendations—prepared by Commissioners’ staff attorneys—on proposed Commission action in water and wastewater complaint proceedings and other proceedings before the Commission. Chiavetta Affidavit ¶ 7(b).

The emails and documents at issue contain the attorneys’ mental impressions, summaries of underlying events, and legal opinions and conclusions regarding matters before the Commission. These records were prepared by the attorneys in the course of their professional duties to the Commission. These records have not been disclosed to an adversary of the Commission. Chiavetta Affidavit ¶ 10. As such, the Commission properly asserted the attorney work product doctrine and determined that the records are exempt from disclosure.

3. Records Fall Under The Predecisional Deliberation Exemption And Are Protected By The Deliberative Process Privilege

The predecisional deliberation exemption of the RTKL applies to records that, *inter alia*, reflect the “internal, predecisional deliberations of an agency, its members,

³ A requester challenging the attorney work product privilege based on waiver bears the burden of proving waiver. *Bagwell*, 114 A.3d at 1124.

employees or officials . . . relating to a budget recommendation, legislative proposals, legislative amendment, contemplated or proposed course of action or any research, memos, or other documents used in predecisional deliberations.” 65 P.S. § 67.708(10)(i). The Commonwealth Court has held that the predecisional deliberation exemption codifies the deliberative process privilege. *McGowan* 103 A.3d at 383 (Pa. Cmwlth. 2014).

The Commonwealth Court has also held that “the predecisional deliberation privilege protects information where an agency demonstrates that the information merely *reflects*, or, in other words, ‘mirrors’ or ‘shows,’ that the agency engaged in the deliberative process; it does not require that an agency establish that the information itself *reveals* or ‘discloses’ deliberative communication.” *Id.* (emphasis in original). In addition, “there is nothing in . . . the RTKL that requires a predecisional deliberation by an agency to be one that results in an official adjudication or decision.” *Id.* at 385. Rather, the predecisional deliberation exemption “is much broader.” *Id.* For example, the exemption “covers recommendations, draft documents, proposals, suggestions, and other subjective documents” as well as “documents that would inaccurately reflect or prematurely disclose the views of the agency.” *Id.* at 384-85 (quoting *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).

Regarding Item No. 1 of Nase’s request, some records are exempt from disclosure under the deliberative process privilege and the RTKL’s predecisional deliberations exemption. These records include (i) emails with attached documents between the Commission’s Law Bureau and Commissioners’ staff regarding new legislation; (ii) emails with attached documents between Commissioners staff attorneys and

Commissioners regarding proposed courses of action in water and wastewater complaint proceedings and other proceedings; and (iii) emails with attached documents to or from Commissioners and/or Commissioners' staff containing status updates on pending proceedings, addressing proposed courses of Commission action, and including preliminary drafts of official Commission documents. Chiavetta Affidavit ¶ 7(a)-(c).

In addition, regarding Item No. 3 of Nase's request, emails and documents to or from TUS staff are deliberative in nature and therefore exempt from disclosure. These emails and documents include (i) communications with the Law Bureau regarding legislation; (ii) communications containing activity summaries and calendar deadlines for Commission proceedings and internal compilations of water and wastewater data; and (iii) communications involving technical assistance provided by TUS, addressing proposed courses of Commission action, and including preliminary drafts of official Commission documents. Chiavetta Affidavit ¶ 9(a)-(b), (d).

The emails and documents at issue reveal deliberations and discussions among Commission staff and/or information to be used in deliberations regarding contemplated courses of action by the Commission and Commission staff. As such, the Commission properly asserted the deliberative process privilege and RTKL's predecisional deliberation exemption and determined that the records are exempt from disclosure.

Further, predecisional deliberations are part of the Commission's adjudicatory function. Pursuant to *Lyness v. State Board of Medicine*, 605 A.2d 1204 (Pa. 1992), all prosecutory and adjudicatory functions of the Commission must remain separate. In *Lyness*, the Pennsylvania Supreme Court held that there must be "walls of division"

between prosecutory and adjudicatory functions to eliminate the threat or appearance of bias. *Id.* at 1210. The comingling of functions is prohibited to preserve due process.

Hidden Valley, as represented by Nase, is currently the subject of ongoing, contested proceedings before the Commission at Docket Nos. C-2014-2447138 and C-2014-2447169 pursuant to the Commonwealth Court's May 15, 2019 Order and subsequent remand to the Commission. Chiavetta Affidavit ¶ 4; *Hidden Valley Utility Services, L.P. v. Pa. Public Utility Commission*, Docket No. 187 C.D. 2019 (Pa. Cmwlth. 2019). These proceedings involve Hidden Valley's compliance with unresolved water and wastewater quality of service issues dating back to 2005. Pursuant to the Commission's May 3, 2018 Order, BIE, the Commission's prosecutory arm, would be notified of Hidden Valley's failure to meet certain compliance deadlines. Failure to meet the compliance deadlines would result in an evidentiary hearing addressing, *inter alia*, the penalties to be imposed against Hidden Valley as well as a separate proceeding pursuant to Section 529 of the Public Utility Code, 66 Pa. C.S. § 529 (relating to directing a competent utility to operate or acquire a small sewer utility that has jeopardized public safety by failing to provide reasonable and adequate service). Chiavetta Affidavit ¶ 4.

Making predecisional, or adjudicatory, communications public also means making those communications available to BIE, the Commission's prosecutory arm. In effect, dispersing those communications to BIE is akin to adjudicatory personnel consulting with prosecutory personnel. This is exactly the type of interaction that *Lyness* seeks to prohibit. The Commission must maintain "walls of separation" to ensure that there is no bias in proceedings, like the penalty proceeding involving Hidden Valley and BIE.

Disclosing predecisional communications violates *Lyness* and jeopardizes the due process afforded to Hidden Valley in the proceedings before the Commission.⁴

4. Records Fall Under The Notes and Working Papers Exemption

The notes and working papers exemption of the RTKL applies to documents prepared for or by a public official or agency employee and used for that official's or employee's personal use. 65 P.S. § 67.708(b)(12). This exemption covers "those documents necessary for that official that are 'personal' to that official in carrying out his public responsibilities." *City of Philadelphia v. Philadelphia Inquirer*, 52 A.3d 456, 461 (Pa. Cmwlth. 2012). A record need not involve personal affairs. *Smith v. Pa. Dep't Environmental Protection*, 161 A.3d 1049, 1066 (Pa. Cmwlth. 2017). Rather, a record is exempt when it "relates to an official's public responsibilities but is personal." *Id.* at 1067. Further, documents prepared for officials' or employees' personal use that are not dispersed outside of the office fall under the notes and working papers exemption. *Glunk v. Pa. Dep't State*, 102 A.3d 605 (Pa. Cmwlth. 2014).

Regarding Item No. 3 of Nase's request, emails and documents containing information prepared and used by TUS staff are exempt from disclosure under the RTKL's notes and working papers exemption. These emails and documents include notes, memos, summaries, and internal compilations of water and wastewater data prepared by TUS staff to document meetings, calendar deadlines associated with

⁴ The Commission notes that the Commonwealth Court has held that RTKL requests concerning ongoing litigation may be problematic. *See City of Pittsburgh v. Silver*, 50 A.3d 296 (Pa. Cmwlth. 2012).

Commission proceedings, and other activity associated with pending water and wastewater matters. Chiavetta Affidavit ¶ 9(b).

The records at issue represent internal work papers prepared and used by employees of TUS to carry out their assigned duties. These documents were personally prepared by the employees to note and summarize information. As such, the Commission properly asserted the RTKL's notes and working papers exemption and determined that the records are exempt from disclosure.

D. Any *Ex Parte* Issues Must Be Cured

The Commission notes that making the remaining requested records available to Hidden Valley may violate the rule against *ex parte* communications. Dispersing records in which Commissioners, presiding officers, and employees of the Commission discuss the merits of issues internally to a party is, in effect, akin to consulting directly with the party. The rules against *ex parte* communications prohibit Commissioners, presiding officers, and employees from consulting with a party on the merits, unless there is notice and an opportunity for all parties to participate. 52 Pa. Code § 5.484; 66 Pa. C.S. § 334. Therefore, if the OOR orders the disclosure of records involving the merits of issues that may arise in the ongoing, contested proceedings before the Commission, those records should be made available to all parties in an effort to cure any *ex parte* issues.

III. Conclusion

The Commission properly granted Nase's RTKL request in part and denied the request in part. As to the partial denial, the records sought are protected by the privileges and exemptions asserted herein and, therefore, are not subject to disclosure under the RTKL. For the reasons set forth above, Nase's arguments are without merit. Further, Nase's misunderstanding of the requirements of the RTKL is not grounds for disclosure. The Commission respectfully requests that the OOR dismiss this Appeal.

Respectfully submitted,

/s/ Scott J. Thomas
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Deputy Chief Counsel

Renardo L. Hicks
Chief Counsel

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Enclosures

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**COMMONWEALTH OF PENNSYLVANIA
OFFICE OF OPEN RECORDS**

Jonathan P. Nase

v.

OOB AP Docket # 2019-2652

Pennsylvania Public Utility Commission

**AFFIDAVIT OF
ROSEMARY CHIAVETTA, SECRETARY
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Before me, the undersigned notary public, this day, January 13, 2020, personally appeared Rosemary Chiavetta, Secretary of the Pennsylvania Public Utility Commission, to me known, who being duly sworn according to law, deposes the following:

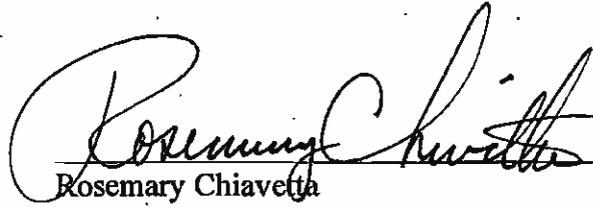
I, **Rosemary Chiavetta**, being duly sworn according to law, say that I am authorized to make this affidavit on behalf of the Pennsylvania Public Utility Commission (Commission), being an employee of the Commission as Secretary, and having the duty as records custodian for the Commission to maintain all records of the Commission, and having knowledge of the facts relevant to the present matter, the facts set forth are true and correct to the best of my knowledge, information, and belief, and I expect to be able to prove the same at any hearing hereof, attest as follows:

- 1) As Secretary for the Commission, my duties include being custodian of all Commission records. As part of my duties, my staff maintains the files of the Commission, including all records retained in public access files and internal access only files. I am custodian of all records, including internal and external communications, whether in hard copy or electronic format.
- 2) In my capacity as Open Records Officer of the Commission, on October 30, 2019, I received via email Jonathan P. Nase's Right-to-Know Law (RTKL) Request. Nase's Request was docketed as PUC RTK 2019-0069. A true and correct copy of the Request is attached hereto as "Appendix A."
- 3) Following a thorough search for responsive records, I received from Commission staff all responsive emails and documents. I personally reviewed all responsive records. On December 6, 2019, I sent the Commission's response to Nase's RTKL Request. A true and correct copy of the Commission's response letter granting Nase's Request in part and denying it in part is attached hereto as "Appendix B."

- 4) The Commission's only docketed proceedings involving Hidden Valley Utility Services, L.P. (Hidden Valley) are at Docket Nos. P-2014-2424858, R-2018-3001307, C-2014-2447169, and C-2014-2447138. The "C" Dockets are contested proceedings against Hidden Valley currently before the Commission in which Hidden Valley is represented by Nase, an attorney with Cozen O'Connor. These proceedings involve questions of Hidden Valley's compliance with deadlines for resolving water and wastewater quality of service problems. These matters were remanded to the Commission from the Commonwealth Court for further hearings regarding penalties for Hidden Valley and a proceeding under Section 529 of the Public Utility Code, 66 Pa. C.S. § 529.
- 5) The Commission provided numerous emails and documents to Nase in response to his RTKL Request. Other responsive emails and documents were not turned over because they are exempt from disclosure under privilege(s) and/or RTKL exemptions. Nase's appeal is limited to the partial denial of Item Nos. 1 and 3 of his Request.
- 6) Item No. 1 of Nase's RTKL Request is for "e-mails or other documents to or from a Commissioner, or any member of a Commissioner's staff, mentioning Hidden Valley Utility Services, L.P. from 2013-present."
- 7) Except for those records already provided to Nase in response to Item No. 1 of his RTKL Request, all responsive records in the Commission's possession are exempt from disclosure pursuant to the attorney-client privilege, the attorney work product doctrine, the deliberative process privilege, and/or the RTKL's predecisional deliberations exemption, 65 P.S. § 67.708(b)(10). Specifically, the records described below are exempt from disclosure for the following reasons:
 - (a) Emails with attached documents between attorneys in the Commission's Law Bureau and Commissioners' staff contain legal advice regarding legislation. These emails with attached documents are exempt from disclosure pursuant to the attorney-client privilege, the deliberative process privilege, and the RTKL's predecisional deliberations exemption, 65 P.S. § 67.708(b)(10).
 - (b) Emails with attached documents between Commissioners' staff attorneys and Commissioners contain legal advice, analysis, and recommendations regarding proposed Commission action in water and wastewater complaint proceedings and other proceedings. These emails with attached documents are exempt from disclosure pursuant to the attorney-client privilege, the attorney work product doctrine, the deliberative process privilege, and the RTKL's predecisional deliberations exemption, 65 P.S. § 67.708(b)(10).

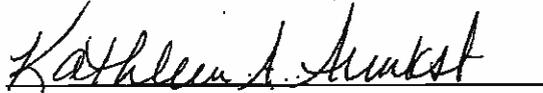
- (c) Emails with attached documents to or from Commissioners and/or Commissioners' staff contain status updates on pending proceedings, address proposed courses of Commission action, and include preliminary drafts of official Commission documents. These emails with attached documents are exempt from disclosure pursuant to the deliberative process privilege and the RTKL's predecisional deliberations exemption, 65 P.S. § 67.708(b)(10).
- 8) Item No. 3 of Nase's RTKL Request is for "emails or other documents to or from any employee in the Bureau of Technical Utility Services (TUS) mentioning Hidden Valley Utility Services, L.P. during the period 2013-present."
- 9) Except for those records already provided to Nase in response to Item No. 3 of his RTKL Request, all responsive records in the Commission's possession are exempt from disclosure pursuant to the attorney-client privilege, deliberative process privilege, the RTKL's predecisional deliberations exemption, 65 P.S. 67.708(b)(10), and/or the RTKL's notes and working papers exemption, 65 P.S. § 67.708(b)(12). Specifically, the records described below are exempt from disclosure for the following reasons:
- (a) Emails with attached documents between attorneys in the Commission's Law Bureau and TUS staff contain legal advice regarding legislation. These emails with attached documents are exempt from disclosure pursuant to the attorney-client privilege, the deliberative process privilege, and the RTKL's predecisional deliberations exemption, 65 P.S. § 67.708(b)(10).
 - (b) Emails and documents to or from TUS staff contain notes, memos, activity summaries, calendar deadlines for Commission proceedings, and internal compilations of water and wastewater data prepared by TUS staff to document meetings and other activities associated with pending water and wastewater matters. These emails and documents are exempt from disclosure pursuant to the deliberative process privilege, the RTKL's predecisional deliberations exemption, 65 P.S. § 67.708(b)(10), and the RTKL's notes and working papers exemption, 65 P.S. § 67.708(b)(12).
 - (c) Emails between attorneys in the Commission's Law Bureau and TUS staff contain legal advice regarding procedures in a complaint proceeding. These emails are exempt from disclosure pursuant to the attorney-client privilege.
 - (d) Emails with attached documents to or from TUS staff involve technical assistance offered by TUS, address proposed courses of Commission action, and include preliminary drafts of official Commission documents. These emails with attached documents are exempt from disclosure pursuant to the deliberative process privilege and the RTKL's predecisional deliberations exemption, 65 P.S. § 67.708(b)(10).

- 10) None of the records that are exempt from disclosure pursuant to the attorney-client privilege have been disclosed to a third party.



Rosemary Chiavetta
Secretary
Pennsylvania Public Utility Commission

Subscribed and sworn to before me this
13th day of January, 2020.


Kathleen A. Aunkst
Notary Public

Commonwealth of Pennsylvania
Notary Seal
Kathleen A. Aunkst, Notary Public
Dauphin County
My Commission Expires: March 27, 2022
Commission Number: 1282472

Appendix A

**Jonathan P. Nase
Right-to-Know Request
October 30, 2019**



Standard Right-to-Know Law Request Form

Good communication is vital in the RTKL process. Complete this form thoroughly and retain a copy; it is required should an appeal be necessary. You have 15 business days to appeal after a request is denied or deemed denied.

SUBMITTED TO AGENCY NAME: Pennsylvania Public Utility Commission _____ (Attn: AORO)

Date of Request: October 30, 2019 _____ Submitted via: Email U.S. Mail Fax In Person

PERSON MAKING REQUEST:

Name: Jonathan Nase _____ Company (if applicable): Cozen O'Connor _____

Mailing Address: 17 North Second Street, Suite 1410 _____

City: Harrisburg, _____ State: PA _____ Zip: 17101 _____ Email: jnase@cozen.com

Telephone: (717) 773-4191 _____ Fax: (215) 372-2340 _____

How do you prefer to be contacted if the agency has questions? Telephone Email U.S. Mail

RECORDS REQUESTED: *Be clear and concise. Provide as much specific detail as possible, ideally including subject matter, time frame, and type of record or party names. Use additional sheets if necessary. RTKL requests should seek records, not ask questions. Requesters are not required to explain why the records are sought or the intended use of the records unless otherwise required by law.*

1. Any e-mails or other documents to or from a Commissioner, or any member of a Commissioner's staff, mentioning Hidden Valley Utility Services, L.P. during the period 2013-present.
2. Any e-mails or other documents between any employee of the Bureau of Investigation and Enforcement and an employee of any other Commission bureau, department or office, mentioning Hidden Valley Utility Services, L.P., during the period 2013-present.
3. Any e-mails or other documents to or from any employee in the Bureau of Technical Utility Services mentioning Hidden Valley Utility Services, L.P., during the period 2013-present.
4. Any e-mails or other documents to or from any Commission employee and the Department of Environmental Protection mentioning Hidden Valley Utility Services, L.P., during the period 2013-present.
5. The power point presentation of Commissioner Norman J. Kennard at the National Association of Water Companies annual meeting held at the Keystone Building in 2019.

DO YOU WANT COPIES? Yes, electronic copies preferred if available
 Yes, printed copies preferred
 No, in-person inspection of records preferred (*may request copies later*)

Do you want certified copies? Yes (*may be subject to additional costs*) No
RTKL requests may require payment or prepayment of fees. See the Official RTKL Fee Schedule for more details.

Please notify me if fees associated with this request will be more than \$100 (or) \$ _____.

ITEMS BELOW THIS LINE FOR AGENCY USE ONLY



pennsylvania

OFFICE OF OPEN RECORDS

Tracking: _____ Date Received: _____ Response Due (5 bus. days): _____

30-Day Ext.? Yes No (If Yes, Final Due Date: _____) Actual Response Date: _____

Request was: Granted Partially Granted & Denied Denied Cost to Requester: \$ _____

Appropriate third parties notified and given an opportunity to object to the release of requested records.

Appendix B

**Commission's Final Response
Jonathan P. Nase Right-to-Know Request
December 6, 2019**



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

IN REPLY PLEASE
REFER TO OUR FILE

PUC RTK 2019-0069

December 6, 2019

Jonathan Nase, Esquire
Cozen O'Connor
17 North Second Street Suite 1410
Harrisburg, PA 17101

Final response sent via Email only:
jnase@cozen.com

Dear Attorney Nase:

By this letter, the Pennsylvania Public Utility Commission (Commission) responds to your Right to Know request filed pursuant to the provisions of Pennsylvania's Right to Know Law (RTKL), 65 P.S. § 67.101, *et seq.*, as amended. In your request received via email on Wednesday, October 30, 2019, you requested:

- “1. Any e-mails or other documents to or from a Commissioner, or any member of a Commissioner's staff, mentioning Hidden Valley Utility Services, L.P. during the period 2013-present.
2. Any e-mails or other documents between any employee of the Bureau of Investigation and Enforcement and an employee of any other Commission bureau, department or office, mentioning Hidden Valley Utility Services, L.P., during the period 2013-present.
3. Any e-mails or other documents to or from any employee in the Bureau of Technical Utility Services mentioning Hidden Valley Utility Services, L.P., during the period 2013-present.
4. Any e-mails or other documents to or from any Commission employee and the Department of Environmental Protection mentioning Hidden Valley Utility Services, L.P., during the period 2013-present.
5. The power point presentation of Commissioner Norman J. Kennard at the National Association of Water Companies annual meeting held at the Keystone Building in 2019.”

In response to Paragraph 1 of your request, the Commission is providing emails meeting the criteria in your request that do not fall under an exemption in the RTKL. All other emails within the criteria of your request fall under exemptions and privileges prescribed in the RTKL, including the attorney-client privilege, attorney work product doctrine, deliberative process privilege, 65 P.S. §§ 67.102, 67.305(a)(2), and pre-decisional deliberation exemption, 65 P.S. § 67.708(b)(10). Therefore, your request is granted in part and denied in part.

In response to Paragraph 2 of your request, the only exchanges meeting the criteria in your request are those between employees of the Bureau of Investigation and Enforcement (BIE) and the presiding Administrative Law Judges when BIE acted as a party of record in proceedings before the Commission.¹ The Commission is providing these emails. Therefore, your request is granted.

In response to Paragraph 3 of your request, the Commission is providing emails meeting the criteria in your request that do not fall under an exemption in the RTKL. Personal identification information has been redacted from these records in accordance with the RTKL, 65 P.S. §§ 67.706, 67.708(b)(6). All other emails within the criteria of your request fall under exemptions and privileges prescribed in the RTKL, including the attorney-client privilege, deliberative process privilege, 65 P.S. §§ 67.102, 67.305(a)(2), pre-decisional deliberation exemption, and notes and working papers exemption. 65 P.S. §§ 67.708(b)(10), 67.708(b)(12). Therefore, your request is granted in part and denied in part.

In response to Paragraph 4 of your request, the Commission limited its search to the Commissioners, members of Commissioners' staff, BIE and the Bureau of Technical Utility Services (TUS) and the only group that possessed emails meeting the criteria in your request is TUS. The Commission is providing these emails. Therefore, your request is granted.

In response to Paragraph 5 of your request, the Commission is providing the power point presentation presented by former Commissioner Norman J. Kennard at the National Association of Water Companies Pennsylvania Chapter annual meeting held on May 7, 2019. Therefore, your request is granted.

All records being released by the Commission, other than those available on the Commission's website, are being provided to you in digital format on a USB thumb drive as per our normal format in the course of business. The thumb drive is being provided to you at no expense. Instructions on how to access the information on the thumb drive are included.

Additionally, pursuant to the RTKL, an agency may make its records available through any publicly accessible electronic means and respond to a request by notifying the requestor that the records are available through publicly accessible electronic means. 65 P.S. §§ 67.704(a), 67.704(b)(1). You may access documents associated with the docketed proceedings involving Hidden Valley at Docket Nos. P-2014-2424858, R-2018-3001307, C-2014-2447169, and C-2014-2447138 on the Commission's website using the "Public Document Search" at http://www.puc.pa.gov/about_puc/search_results.aspx. To search by docket number, enter a docket number as shown above in the "Docket Number" field and select "Search for Documents." Additional tips on searching for public documents on the Commission's website can be found at: http://www.puc.pa.gov/general/pdf/Searching_Public_Documents.pdf.

Finally, the proceedings at Docket Nos. C-2014-2447169 and C-2014-2447138 have been remanded to the Commission from the Commonwealth Court of Pennsylvania and these matters are pending before the Commission. *Hidden Valley v. Pa. Public Utility Commission*, No. 187 C.D. 2019 (Pa. Cwmlth. May 15, 2019). Since all RTKL requests and responses along

¹ Due to the proceedings at Docket Nos. P-2014-2424858, R-2018-3001307, C-2014-2447169, and C-2014-2447138, any exchanges between BIE and advisory personnel within the Commission are prohibited by Section 334(c) of the Public Utility Code, 66 Pa. C.S. § 334(c), and the bifurcation of advisory and prosecutorial roles required by *Lyness v. State Board of Medicine*, 605 A.2d 1204 (Pa. Cwmlth. 1992) and, therefore, do not exist.

with the records released with the agency's response are public, and to the extent your request could be deemed an *ex parte* communication, a copy of your RTKL request, the Commission's response, and the records accompanying the response will be provided to the Office of Consumer Advocate in these pending dockets. Likewise, a copy of your request and the Commission's response are being provided to the Parties, and to the Office of Administrative Law Judge, regarding these pending dockets.

This is the final response of the Commission in accordance with the Pennsylvania RTKL.

NOTICE OF RIGHT TO APPEAL

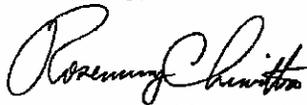
If you believe the Commission has wrongfully denied any part of your request, you may appeal within 15 business days from the date of this letter to:

Office of Open Records
16th Floor
333 Market Street
Harrisburg, PA 17126-0333

If you choose to file an appeal you must do so within 15 business days of the mailing date of the agency's response. 65 P.S. § 67.1101. Please note that a copy of your original Right-to-Know request and this denial letter must be included when filing an appeal. The law also requires that you state the reasons why the record is a public record and address the reasons the Agency denied your request. Visit the Office of Open Records website at <http://openrecords.pa.gov> for further information on filing an appeal.

Please be advised that this correspondence will serve to close this record with our office as permitted by law.

Sincerely,



Rosemary Chiavetta, Secretary
Right to Know Officer
Pa Public Utility Commission

cc: Scott Thomas, PUC Assistant Counsel
Hayley Dunn, PUC Assistant Counsel
PUC RTK Official File 2019-0069

Copies of request, response, and records to:

Tanya McCloskey, Office of Consumer Advocate

Copies of request and response to:

Chief ALJ Charles Rainey, Office of Administrative Law Judge

Allison Kaster, Bureau of Investigation and Enforcement

All Parties of Record to Docket Nos. C-2014-2447169 and C-2014-2447138

EXHIBIT 6

Nase, Jonathan

From: Burlew, Erin <eburlew@pa.gov>
Sent: Friday, February 21, 2020 9:14 AM
To: Nase, Jonathan; Thomas, Scott
Cc: Chiavetta, Rosemary; Dunn, Hayley; Herzog, John; Hicks, Renardo
Subject: RE: [External] RE: Nase v. PUC, AP 2019-2652; request for extension of time to gather additional evidence

****EXTERNAL SENDER****

Thank you, Attorney Nase. I appreciate it.

The log is due March 20, 2020 and the final determination issuance date is now April 17, 2020.

Best,



Erin Burlew
Attorney
Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101-2234
(717) 346-9903 | eburlew@pa.gov
<https://openrecords.pa.gov> | [@OpenRecordsPA](https://twitter.com/OpenRecordsPA)

From: Nase, Jonathan <JNase@cozen.com>
Sent: Friday, February 21, 2020 9:08 AM
To: Burlew, Erin <eburlew@pa.gov>; Thomas, Scott <sjthomas@pa.gov>
Cc: Chiavetta, Rosemary <rchiavetta@pa.gov>; Dunn, Hayley <haydunn@pa.gov>; Herzog, John <JHERZOG@pa.gov>; Hicks, Renardo <rehicks@pa.gov>
Subject: RE: [External] RE: Nase v. PUC, AP 2019-2652; request for extension of time to gather additional evidence

Appeals Officer Burlew:

I have no objection to an extension until April 17 for the issuance of the Final Determination.

Thank you.

Jonathan Nase



Jonathan Nase
Member | Cozen O'Connor
Utility, Environmental & Energy (UE2) Group
17 North Second Street Suite 1410 | Harrisburg, PA 17101
P: 717-773-4191 F: 215-372-2340
Pronouns: he, him, his
Email | Map | cozen.com

From: Burlew, Erin <eburlew@pa.gov>
Sent: Friday, February 21, 2020 9:05 AM
To: Nase, Jonathan <JNase@cozen.com>; Thomas, Scott <sithomas@pa.gov>
Cc: Chiavetta, Rosemary <rchiavetta@pa.gov>; Dunn, Hayley <haydunn@pa.gov>; Herzog, John <JHERZOG@pa.gov>; Hicks, Renardo <rehicks@pa.gov>
Subject: RE: [External] RE: Nase v. PUC, AP 2019-2652; request for extension of time to gather additional evidence

****EXTERNAL SENDER****

Attorney Nase-

I appreciate your consideration in this matter, but if I grant the Commission's request to change the submission date to March 20, 2020, I will have to extend the final determination issuance date to April 17, 2020 so that I may be able to review that log. Please let me know as soon as practicable if you consent to this.

Additionally, in order to provide me with sufficient evidence, the Commission's log should include the record type, date of the record, the sender and recipient(s) including their position (i.e. attorney), a general description of the subject matter, a citation to the legal basis on which each record is withheld and number of pages. The log must be attested to by a person with actual knowledge of the contents of the records. Please see the OOR's website for a sample log should it be necessary.

Best regards,



Erin Burlew
Attorney
Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101-2234
(717) 346-9903 | eburlew@pa.gov
<https://openrecords.pa.gov> | [@OpenRecordsPA](https://twitter.com/OpenRecordsPA)

From: Nase, Jonathan <JNase@cozen.com>
Sent: Thursday, February 20, 2020 5:33 PM
To: Thomas, Scott <sithomas@pa.gov>; Burlew, Erin <eburlew@pa.gov>
Cc: Chiavetta, Rosemary <rchiavetta@pa.gov>; Dunn, Hayley <haydunn@pa.gov>; Herzog, John <JHERZOG@pa.gov>; Hicks, Renardo <rehicks@pa.gov>
Subject: RE: [External] RE: Nase v. PUC, AP 2019-2652; request for extension of time to gather additional evidence

Appeals Officer Burlew:

I have no objection to the requested extension, but I would respectfully request that you provide direction as to what information must be included in the privilege log. At a minimum, the log should identify the author of each document, the recipient(s) of the document, the date of the document, the number of pages in the document (including attachments), and the exemption that allegedly applies to the document.

Thank you.

Jonathan Nase



Jonathan Nase
Member | Cozen O'Connor
Utility, Environmental & Energy (UE2) Group
17 North Second Street Suite 1410 | Harrisburg, PA 17101
P: 717-773-4191 F: 215-372-2340
Pronouns: he, him, his
Email | Map | cozen.com

From: Thomas, Scott <sjthomas@pa.gov>
Sent: Thursday, February 20, 2020 3:19 PM
To: Burlew, Erin <eburlew@pa.gov>
Cc: Nase, Jonathan <JNase@cozen.com>; Chiavetta, Rosemary <rchiavetta@pa.gov>; Dunn, Hayley <haydunn@pa.gov>; Herzog, John <JHERZOG@pa.gov>; Hicks, Renardo <rehicks@pa.gov>
Subject: RE: [External] RE: Nase v. PUC, AP 2019-2652; request for extension of time to gather additional evidence

****EXTERNAL SENDER****

A.O. Burlew:

Given other assignments we're facing and the fact that there are a large number of records to review, the Commission is requesting that the deadline for us to produce a privilege log be extended to March 20. We have to look through a large number of emails, many of which include attachments in the form of multiple additional emails and other records. Further, many of those emails are chains of emails among numerous senders and recipients. That being the case, it will take some effort to produce a complete privilege log.

From: Nase, Jonathan <JNase@cozen.com>
Sent: Thursday, February 20, 2020 12:04 PM
To: Burlew, Erin <eburlew@pa.gov>; Chiavetta, Rosemary <rchiavetta@pa.gov>; Thomas, Scott <sjthomas@pa.gov>; Dunn, Hayley <haydunn@pa.gov>; Herzog, John <JHERZOG@pa.gov>; Hicks, Renardo <rehicks@pa.gov>
Subject: [External] RE: Nase v. PUC, AP 2019-2652; request for extension of time to gather additional evidence

ATTENTION: This email message is from an external sender. Do not open links or attachments from unknown sources. To report suspicious email, forward the message as an attachment to CWOPA_SPAM@pa.gov.

Appeals Officer Burlew:

I have no objection to requiring the privilege log and extending the deadline for a Final Determinatiop.

Thank you.

Jonathan



Jonathan Nase
Member | Cozen O'Connor
Utility, Environmental & Energy (UE2) Group
17 North Second Street Suite 1410 | Harrisburg, PA 17101
P: 717-773-4191 F: 215-372-2340
Pronouns: he, him, his
Email | Map | cozen.com

From: Burlew, Erin <eburlew@pa.gov>

Sent: Thursday, February 20, 2020 11:58 AM

To: Nase, Jonathan <JNase@cozen.com>; Chiavetta, Rosemary <rchiavetta@pa.gov>; Thomas, Scott <sithomas@pa.gov>; Dunn, Hayley <haydunn@pa.gov>; Herzog, John <JHERZOG@pa.gov>; Hicks, Renardo <rehicks@pa.gov>

Subject: Nase v. PUC, AP 2019-2652; request for extension of time to gather additional evidence

****EXTERNAL SENDER****

Dear Parties-

Upon review of the file and the parties' submissions, and in order to properly develop the record in this appeal, the OOR has determined a privilege/exemption log is necessary in order to determine whether the requested records are public records. Given that it is unclear how many records are at issue and therefore the length of the log, in order to properly review and consider the existing record along with the additional materials, it will be necessary for the Requester to agree to an extension of time in which to render a Final Determination. The OOR proposes the following schedule:

Privilege /exemption log due March 6

Final Determination issuance date March 25

Attorney Nase, please inform us if you have any objection to requiring a log and extending the deadline. Attorney Thomas, please inform us if there is any reason the Commission would need additional time to create the log.

Please reply to this request as soon as practicable, or, at the latest, February 21, 2020, confirming your agreement to the extension of time to issue the final determination.

Thank you for your cooperation in this matter.

Sincerely,



Erin Burlew

Attorney

Office of Open Records

333 Market Street, 16th Floor

Harrisburg, PA 17101-2234

(717) 346-9903 | eburlew@pa.gov

<https://openrecords.pa.gov> | [@OpenRecordsPA](https://twitter.com/OpenRecordsPA)

Notice: This communication, including attachments, may contain information that is confidential and protected by the attorney/client or other privileges. It constitutes non-public information intended to be conveyed only to the designated recipient(s). If the reader or recipient of this communication is not the intended recipient, an employee or agent of the intended recipient who is responsible for delivering it to the intended recipient, or you believe that you have received this communication in error, please notify the sender immediately by return e-mail and promptly delete this e-mail, including attachments without reading or saving them in any manner. The unauthorized use, dissemination, distribution, or reproduction of this e-mail, including attachments, is prohibited and may be unlawful. Receipt by anyone other than the intended recipient(s) is not a waiver of any attorney/client or other privilege.

Notice: This communication, including attachments, may contain information that is confidential and

protected by the attorney/client or other privileges. It constitutes non-public information intended to be conveyed only to the designated recipient(s). If the reader or recipient of this communication is not the intended recipient, an employee or agent of the intended recipient who is responsible for delivering it to the intended recipient, or you believe that you have received this communication in error, please notify the sender immediately by return e-mail and promptly delete this e-mail, including attachments without reading or saving them in any manner. The unauthorized use, dissemination, distribution, or reproduction of this e-mail, including attachments, is prohibited and may be unlawful. Receipt by anyone other than the intended recipient(s) is not a waiver of any attorney/client or other privilege.

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EXHIBIT 7



NAWC Pennsylvania Chapter Annual Meeting

Commissioner Norman J. Kennard
May 7, 2019



Replacement of Customer-Owned Lead Service Lines

- Act 120 of 2018 (66 Pa. C.S. § 1311)
 - Accelerated replacement of customer-owned lead water service lines and damaged sewer laterals
 - Utility recovery of and on prudently incurred costs
 - Future PUC stakeholder workshops to develop a uniform approach



2

The PA American lead service line matter is currently pending before the OALJ.



PWSA Update



Pittsburgh
Water & Sewer
Authority

- **Rate Case Settlement Approved by the PUC on 2/7/19**
 - **\$21 million** rate increase approved to fund critical infrastructure investment
 - 13% increase in rates to customers
- **Consolidated Compliance Plan Proceeding and LTIIP Pending before PUC (Hearings 5/21/19 - 5/24/19)**
 - Main components:
 - Infrastructure repair and replacement
 - Lead line replacement
 - Metering plan
 - Future implementation of a stormwater tariff
 - Customer service management compliance

3

Shout out to DEP Secretary for helping PUC to identify the priority of critical infrastructure repair needed in the Compliance Plan proceeding (see next slide)



DEP Identification of Critical Infrastructure Issues



Pittsburgh
Water & Sewer
Authority

- **DEP Consent Order and Agreement (2017)**
 - Required PWSA to replace at least 7% of its lead service lines (1,341 lines) by June 30, 2018
 - \$2.4 Million Civil Penalty
 - \$1.8 million set aside to low-income customer to replace private lead service lines
 - **Update:** On 2/1/19, the PA Attorney General also filed 161 criminal charges against PWSA regarding lead line replacement notice violations
- **DEP Administrative Order (2017)**
 - Required improvements include: new cover for Lanpher Reservoir, upgrades to the Bruecken Pump Station, treatment upgrades for the Highland No. 1 Reservoir and Microfiltration Plant
- **DEP Comprehensive Performance Evaluation (2017)**
 - Performance-limiting factors: key management position vacancies, Pittsburgh residency requirement, compartmentalization of organization duties, and process control issues



66 Pa. C.S. §529



- Winola Water Company (Wyoming County, PA)
 - PUC Ex Parte Emergency Order (11/9/18)
 - Section 529 investigation instituted based on DEP Field Order issued 10/5/18
 - DEP: “High risk of contamination of water provided to customers”
 - PA American Water Company appointed as receiver



66 Pa. C.S. §529



- Hidden Valley Utility Services (Somerset County, PA)
 - PUC § 529 Orders (beginning January 2018)
 - OCA initiated Complaint for numerous issues
 - Failure by the Company to improve its service by March 31, 2019 could result in the commencement of a § 529 proceeding
 - PUC Rate Case Order (entered 3/29/19)
 - Provide the Company with the additional revenue needed to cover operating expenses and make the Commission-mandated repairs to their water and wastewater systems.
 - Denies the rate increases, in part, to prevent the Company from earning a return on equity until all mandated improvements are made and the Commission has verified the improvements

6

OCA Complaint (Section 529): Company failed to provide adequate, safe and reasonable service, regarding water system issues, alleging, inter alia, continuing incidents of dirty, brown and rusty water; lack of proper equipment; the failure to properly maintain water tanks; low water pressure which is alleged to be inadequate for basic household uses, and lack of system maintenance.

PUC 529 Order: That on or before March 31, 2019, or within sixty (60) days after receipt of a written report of all completed rehabilitative measures from Hidden Valley Utility Services, L.P. and its engineer, the Bureau of Technical Utility Services shall investigate the quality of the water as well as of the water and wastewater services being received by Hidden Valley Utility Services, L.P.'s customers. If the recommended repairs, modifications, rehabilitative and maintenance procedures have not been accomplished within the time frame structured herein, or if the water quality or water and wastewater service as reported by the Bureau of Technical Utility Services is not adequate and reasonable, an evidentiary hearing shall forthwith be scheduled by the Office of Administrative Law Judge.



66 Pa. C.S. §529



- Delaware Sewer Company (Pike County, PA)
 - PUC Order (4/25/19)
 - Approve Settlement for PA American Water Company to purchase the assets of Delaware Sewer Company
 - “Voluntary” Section 529 initiation Petition by Delaware Sewer Company
 - » Septic tank system in poor condition



Section 1329 Update



- PUC Final Supplemental Implementation Order (2/28/19)
 - One notice to all customers based on the results of the most recently adjudicated rate case
 - Non-binding estimate of the likely incremental rate effect of the proposed valuation rate base addition (use single-tariff models)



PA American - Exeter Township Notice Example



Water:

Rate Class	Average Usage	Estimated Monthly Increase
Residential	3,630 gal/month	\$0.24
Commercial	22,000 gal/month	\$1.17
Industrial	476,000 gal/month	\$18.11

Wastewater:

Rate Class	Average Usage	Estimated Monthly Increase
Residential	3,630 gal/month	\$2.79
Commercial	22,000 gal/month	\$12.05
Industrial	476,000 gal/month	\$238.52



PA American - Steelton Borough Notice Example



Water:

Rate Class	Average Usage	Estimated Monthly Increase
Residential	3,630 gal/month	\$0.12
Commercial	22,000 gal/month	\$0.58
Industrial	476,000 gal/month	\$9.05

Wastewater:

Rate Class	Average Usage	Estimated Monthly Increase
Residential	3,630 gal/month	\$0.00
Commercial	22,000 gal/month	\$0.00
Industrial	476,000 gal/month	\$0.00



Section 1329 Acquisitions Approved by the PUC



Seller	Purchaser	Sale Amount
Limerick Twp. Montgomery County	Aqua	\$75.1 Million
East Bradford Twp. Chester County	Aqua	\$5 Million
Mahoning Twp. Carbon County	Suez	\$9.5 Million
Sadsbury Twp. Chester County	PA American	\$8.6 Million
City of McKeesport Allegheny County	PA American	\$158 Million



Section 1329 Acquisitions Pending before the PUC



Seller	Purchaser	Sale Amount
New Garden Twp. Chester County	Aqua	\$29.5 Million (Remand)
Cheltenham Twp. Montgomery County	Aqua	\$50.25 Million
East Norriton Twp. Montgomery County	Aqua	\$21 Million
Steelton Borough Dauphin County	PA American	\$22.5 Million
Exeter Twp. Berks County	PA American	\$96 Million



Tax Cuts and Jobs Act (TCJA)

Past Practice:

- Water CIAC *not* taxable income
- Neither the Utility nor the Developer were taxed regarding new build-out cost

TCJA Requirement:

- Water CIAC *is* taxable income to Utility
- HB 751: New tax paid by the Utility (unanimously voted out of the House on 3/19/19)



Thank You

Questions?