

COMMONWEALTH OF PENNSYLVANIA



OFFICE OF CONSUMER ADVOCATE

555 Walnut Street, 5th Floor, Forum Place
Harrisburg, Pennsylvania 17101-1923
(717) 783-5048
800-684-6560

 @pa_oca
 /pennoca

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

May 8, 2020

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.
Water and Wastewater
Docket Nos. C-2014-2447138 (Water)
C-2014-2447169 (Wastewater)

Dear Secretary Chiavetta:

Attached for electronic filing please find the Answer of the Office of Consumer Advocate to Hidden Valley Utility Services, L.P.'s Motion for Stay, in the above-referenced proceedings. The OCA has attached the verification of Noah D. Eastman, Regulatory Analyst, pursuant to the requirements of 52 Pa. Code § 1.36.

The OCA notes that the period for filing Answers to the Motion was extended by the Presiding Officer to May 8, 2020.

Copies have been served on the parties as indicated on the enclosed Certificate of Service.

Respectfully submitted,

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

Enclosures:

cc: The Honorable Katrina L. Dunderdale (**email only**)
Certificate of Service

*288101

CERTIFICATE OF SERVICE

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

I hereby certify that I have this day served a true copy of the following document, the Answer of the Office of Consumer Advocate to Hidden Valley Utility Services, L.P.'s Motion for Stay, 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 8th day of May 2020.

SERVICE BY E-MAIL ONLY

Allison C. Kaster, Esquire
Bureau of Investigation & Enforcement
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17120

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

Robert J. Kollar
Kellie A. Kuhleman
1374 Langport Drive
Pittsburgh, PA 1524

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

Sharon Howard-Frieri
1174 Grist Mill Court
P.O. Box 4126
Hidden Valley, PA 15502

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

Counsel for:
Office of Consumer Advocate
555 Walnut Street
5th Floor, Forum Place
Harrisburg, PA 17101-1923
Phone: (717) 783-5048
Fax: (717) 783-7152
Dated: May 8, 2020
*288102

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

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

OFFICE OF CONSUMER ADVOCATE’S ANSWER
TO HIDDEN VALLEY UTILITY SERVICES, L.P.’S MOTION FOR STAY

AND NOW COMES the Office of Consumer Advocate (OCA), by and through its attorneys, pursuant to 52 Pa. Code § 5.61, to file this Answer to Hidden Valley Utility Services, LP’s (HVUS or Company) Motion for Stay (Motion), filed on April 14, 2020, in the above-referenced matter before the Public Utility Commission (Commission or PUC). The OCA respectfully requests that the Honorable Administrative Law Judge Katrina L. Dunderdale (ALJ) should deny the Motion for Stay. In support whereof, the OCA avers as follows:

I. INTRODUCTION

The Motion filed by HVUS requests that this proceeding be stayed for an indeterminate period of time, until there is a decision in a separate proceeding before the Pennsylvania Office of Open Records (OOR) regarding a Right to Know Law (RTKL) request by its counsel, Jonathan Nase. The OCA opposes the stay because it will substantially harm Hidden Valley customers and will adversely affect the public interest.

II. ANSWER

In granting a stay, the Commission follows the Pennsylvania Supreme Court decision of Pennsylvania Public Utility Commission v. Process Gas Consumers Group, 467 A.2d 805 (Pa. 1983) (Process Gas). Accordingly, a stay will be granted only if all four of the following four criteria are satisfied:

- (1) there is a strong likelihood of success on the merits,
- (2) the petitioner will suffer irreparable harm absent the stay,
- (3) the stay will not substantially harm other parties, and
- (4) the stay will not adversely affect the public interest.¹

The Courts have held that the Applicant for a stay bears a heavy burden of proof.²

As addressed below, the Company has not met this burden. It is not likely HVUS will succeed on the merits and it will not suffer irreparable harm. At the same time, the stay will substantially harm and adversely affect its customers. As such, HVUS's Motion for Stay should be denied.

A. **HVUS Has Not Shown That Mr. Nase Has a Strong Likelihood of Success on the Merits of His Appeal.**

HVUS contends that Mr. Nase made a substantial case on the merits in the OOR proceeding because the Appeals Officer subsequently ordered the Commission to produce a log of the documents for which it was claiming privilege/exemption and produce the disputed documents for *in camera* review. Motion at 7-8. Rather, the OCA submits that the granting of *in camera* review may be reasonably interpreted only to show that the Appeals Officer exercised its fact-finding

¹ Process Gas, 502 Pa. at 551-52, 467 A.2d at 808-09; Pa. Coalition Against Domestic Violence v. Pa. P.U.C., 130 Pa. Cmwlth. 418, 422-25, 568 A.2d 726, 728-30 (1989).

² Tri-State Asphalt Corp. v. Com. Dept. of Transp., 135 Pa. Cmwlth. 410, 582 A.2d 55 (1990), *appeal denied*, 527 Pa. 659, 593 A.2d 429; Commonwealth Bd. of Fin. and Revenue v. Rosetta Oil, Inc., 535 Pa. 343, 635 A.2d 139 (1993).

authority to develop a complete record.³ As such, the OCA submits that HVUS has not demonstrated that Mr. Nase is likely to prevail on the merits.

B. HVUS Has Not Shown That It Will Suffer Irreparable Harm in the Absence of a Stay.

The Company has failed to show that, without the requested relief, it will suffer **irreparable** injury. Irreparable injury is irreversible harm for which there is no possibility of compensatory or other remedial relief.⁴ HVUS claims that the documents that could be turned over by the Commission could be relevant evidence in this proceeding and that the record might close before the OOR proceedings are complete. Motion at 8. First, as discussed below, the Company has not established relevance. Second, if the record closes before the OOR proceedings are complete, HVUS has recourse to file a petition to reopen this proceeding for the purpose of taking additional evidence. 52 Pa. Code § 5.571 (reopening prior to a final decision). Also, petitions for reconsideration can be submitted within 15 days after the Commission Order involved is entered or otherwise becomes final. Even if the Commission denies the Company's requested relief in the instant proceeding, *i.e.* grants no extensions and determines that HVUS failed to meet the compliance deadlines, the result is that there will be two more evidentiary hearings – pursuant to Ordering Paragraphs 20 and 21 of the May 2018 Order.⁵ At those hearings, the Company will have the opportunity to utilize any relevant information obtained from the disputed documents, if

³ The OOR has authority to conduct *in camera* review of documents to ascertain whether they constitute privileged material. Commonwealth v. Center Twp., 95 A.3d 354, 371 (Pa. Commw. Ct. 2014) (Center Twp.); *see, e.g., Pa. Dep't of Educ. v. Bagwell*, 114 A.3d 1113, 1121 (Pa. Commw. Ct. 2015) (quoting Center Twp. at 370) (“In Center Township, we reasoned that appeals officers had the authority to conduct *in camera* review to better enable appeals officers “to render an informed and reasoned decision— one that is based upon a sufficient factual predicate— especially with regard to matters concerning privileged or sensitive material.”)

⁴ *See Temple Ass'n of Univ. Prof'ls, Am. Fed'n of Teachers Local 4531 AFL-CIO v. Temple Univ. of Commw. Sys. of Higher Educ.*, 582 A.2d 63, 67 (Pa. Commw. Ct. 1990).

⁵ Motion, Exhibit 5 at 13 (Commission Position Statement, dated January 13, 2020).

it prevails in the OOR proceeding. Thus, HVUS has an adequate remedy at law, and there is no risk of irreparable injury here.

Mr. Nase's own statements rebut the Company's claim that the documents at issue in the OOR proceeding are relevant to this proceeding. In submissions to the OOR Appeals Officer dated January 10, 2020, Mr. Nase specifies that the basis for his appeal is that the requested emails are relevant to **future** proceedings, and makes no mention of the pending proceeding, which was already underway in January 2020.

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.

Motion, Exhibit 4 at 2.

Further, the Company's counsel has received answers to most of his RTKL requests. Mr. Nase was granted three of his five requests in full and the other two requests in part.⁶ Of the documents received, the only link to the instant case claimed by the Company is that a **former** PUC Commissioner, who will not participate in the disposition of this case, stated that a Section 529 proceeding had already commenced by May 2019. Motion at 6. HVUS suggests this to mean the Commissioner prejudged the outcome of this case. A more reasonable interpretation is that the statement was made in error or simply reflected that missing the one-year deadline **was** supposed to trigger a Section 529 proceeding. HVUS concedes that "At this time, it is unclear

⁶ Motion, Exhibit 2, Attachment F.

whether the OOR will order any of the disputed documents to be made public, and, if so, what will be in those documents.” Motion at 6. The Company’s claim that the disputed documents are relevant to the instant case is too attenuated to demonstrate harm to the utility.

For these reasons, the Joint Petitioners have failed to meet their burden of showing irreparable harm.

C. A Stay Will Substantially Harm Other Interested Parties in the Proceeding.

HVUS argues that there is no harm in delaying the proceeding because the Commission’s offices are closed due to the COVID-19 emergency and, for the same reason, the OCA and the Bureau of Investigation & Enforcement (I&E) have indicated that some delay might be necessary. Motion at 8-9. However, as demonstrated by the prehearing conferences, evidentiary hearings and Public Meetings that continue to be held, telephonically, since the Commission offices closed and the filing of this Answer to the Company’s Motion, the Commission and the OCA continue their work, remotely.

The Company also contends the stay will not impact the OCA and I&E’s ability to present their cases fully when the stay is lifted. Motion at 8-9. This ignores the substantial harm the delay will do to customers, those whose interests are represented by the OCA and those who are parties to this case.⁷

Importantly, HVUS seeks to delay the instant case for an indeterminate amount of time. It is not known how long it will take for the Appeals Officer to conduct *in camera* review, or how long it will take to “dispose” of the OOR proceeding after that review is conducted.

⁷ The Petition to Intervene by customers Robert J. Kollar and Kellie A. Kuhleman was granted by Interim Order entered on September 8, 2015. The Formal Complaint of Sharon Howard-Frieri against HVUS at Docket No. C-2019-3008093 was consolidated with this matter on February 25, 2020. Tr. at 418 (Prehearing Conference).

According to the most recent 60-day status report filed by HVUS, the Company “has purchased a water treatment plant to address the iron and manganese in the water” and has been granted a Department of Environmental Protection (DEP) permit authorizing the construction of the water treatment plant.⁸ According to the Company, the next steps are to apply for zoning and subdivision and land development approvals and request proposals from contractors.⁹ Although HVUS states that it can proceed with the construction of its water treatment plant while this case is stayed, an evidentiary record has not been developed regarding the Company’s plan for financing project costs and timetable for completion. It would be inimical to the customers’ interests to delay development of that record for an indeterminate amount of time.

Further, delaying disposition of the current matter would also delay the protection the Commission put in place in the event HVUS will not or cannot expeditiously make necessary improvements – the initiation of a Section 529 investigation.¹⁰ That investigation is not triggered unless it is determined that compliance deadlines have not been met, which cannot be determined until the Commission rules on HVUS’s proposed amendments to those deadlines.

In each Order entered in this proceeding, the Commission has recognized that the Company’s customers have been suffering from poor water quality and unreasonable service for years and emphasized the need to avoid subsequent delays in remediating the problems.¹¹ As such, in each Order, the Commission has denied requests by the Company for extensions of the deadlines

⁸ HVUS Status Report on Compliance with January 2018 and May 2018 Orders at 3 (Mar. 16, 2020).

⁹ Id.

¹⁰ Order at 25, 30 (Jan. 18, 2018) (January 2018 Order) (“However, due to the extended time-period for compliance with the 2005 Settlement and the lack of resolution of the outstanding service problems, we believe there should be some mechanism for ensuring that further compliance deadlines are met. Any failure to further comply with the deadlines set forth in this Opinion and Order could be indicative of the Company’s lack of competency to operate and of the inability to provide reasonable and adequate service”); Order at 8 (May 3, 2018) (May 2018 Order); Order at 8 (Jan. 17, 2019) (January 2019 Order).

¹¹ January 2018 Order at 30-31; May 2018 Order at 8; January 17, 2019 Order at 8-9.

for implementing the corrective measures established in the engineer's report. For the same reason, the Commission should deny the Company's request for an indeterminate stay of this proceeding, particularly where the link between this case and Mr. Nase's OOR proceeding is so attenuated.

D. A Stay Will Adversely Affect the Public Interest.

The evidence shows that, if a stay is granted it will adversely affect the public interest. As discussed above, whether or not the OOR proceeding concludes before the evidentiary record is closed in this proceeding, HVUS will not be denied due process. The Company recognizes that it has the recourse of filing a motion to reopen the record or for a rehearing if it obtains relevant evidence in the OOR proceeding. Motion at 9. In the alternative, the information could be made part of the record in the proceedings triggered by HVUS's failure to meet the one-year deadline. Likewise, a capable provider wishing to purchase the Company can make an offer while this case continues, or can be addressed as part of the Section 529 investigation, if one begins.

Administrative resources would be better utilized by moving forward with developing the record regarding the plan for financing project costs and timetable for completion than by waiting an unknown amount of time for the attenuated possibility that something might be obtained at the conclusion of the OOR proceeding that would be relevant to this proceeding.

In any case, the public interest in efficient administrative proceedings is not outweighed by the HVUS customers' interest in moving this proceeding forward. As noted by the ALJ, the current proceeding began in 2014:

I think this case needs to be decided quickly. We have a very finite, defined question. We have a limited amount of evidence. That evidence pretty much was available about a year ago. There really shouldn't be any time necessary for

discovery. We just need to get evidence in the record. We need to have a hearing. We need a decision.¹²

The HVUS customers will be adversely affected by further delay in resolving this proceeding and getting a Section 529 investigation underway so that timely alternatives can be pursued if the Company will not or cannot make the needed improvements to water service.

The pleadings and existing record evidence demonstrate that HVUS has failed to satisfy all four prongs of the Process Gas test. The Company argues that there is precedent for the ALJ to exercise flexibility and grant a stay notwithstanding this failure.¹³ Motion at 10. The Commission made clear in Pennsylvania Electric that equitable authority should be utilized sparingly and **only** where the public interest is advanced by granting a stay.¹⁴ A stay will materially and adversely impact the customers who need timely relief. As such, the OCA respectfully requests the ALJ to protect the rights of those customers.

¹² Tr. at 425.

¹³ Pa. P.U.C. v. Pennsylvania Elec. Co., Docket Nos. M-2008-2036188 *et al.*, Order (Mar. 25, 2010).

¹⁴ Id. at 11-12 (“the impact of our decision upon the public interest is controlling”).

III. CONCLUSION

For the foregoing reasons, the Commission should deny Hidden Valley Utility Services, L.P.'s Motion for Stay and permit this proceeding to move forward.

Respectfully Submitted,

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

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

Counsel for:
Tanya J. McCloskey
Acting Consumer Advocate

Office of Consumer Advocate
555 Walnut Street 5th Floor, Forum Place
Harrisburg, PA 17101-1923
Phone: (717) 783-5048
Fax: (717) 783-7152

Dated: May 8, 2020
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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

VERIFICATION

I, Noah D. Eastman, hereby state that the facts set forth in the Office of Consumer Advocate's Answer to Hidden Valley Utility Services, L.P.'s Motion for Stay, 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).

Dated: May 8, 2020
*288104

Signature: /s/ Noah D. Eastman
Noah D. Eastman
Office of Consumer Advocate
555 Walnut Street
5th Floor, Forum Place
Harrisburg, PA 17109-1923