



June 30, 2020

VIA E-FILE

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Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
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Re: 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

MAIN BRIEF OF HIDDEN VALLEY UTILITY SERVICES, L.P.

Dear Secretary Chiavetta:

Enclosed for filing with the Commission is the Main Brief of Hidden Valley Utility Services, L.P., in the above-referenced proceeding. Copies of the brief are being served on the Presiding Officer Administrative Law Judge Katrina L. Dunderdale, and on all parties, as indicated on the enclosed Certificate of Service.

Thank you for your attention to this filing. Should you have any questions or concerns, please contact me.

Sincerely,

COZEN O'CONNOR

By: Jonathan P. Nase

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

JPN:kmg
Enclosure

cc: Honorable Katrina L. Dunderdale (*including MS Word version*)
Per Certificate of Service
James M. Kettler

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Tanya J. McCloskey, Acting Consumer Advocate

Docket No. C-2014-2447138

v.

Hidden Valley Utility Services, L.P. – Water

and

Tanya J. McCloskey, Acting Consumer Advocate

Docket No. C-2014-2447169

v.

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 **Main Brief of Hidden Valley Utility Services, L.P.**, upon the parties, listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

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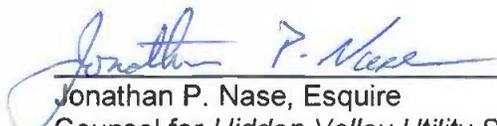
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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**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	:	

**MAIN BRIEF OF
HIDDEN VALLEY UTILITY SERVICES, L.P.**

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Dated: June 30, 2020

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I. INTRODUCTION

This proceeding concerns the “Petition of Hidden Valley Utility Services, L.P. for an Amendment of the Opinion and Order Entered May 3, 2018” (“Petition to Amend”) filed by Hidden Valley Utility Services, L.P. (“HVUS” or the “Company”) on October 18, 2018. That Petition to Amend primarily sought an extension of the one-year compliance deadline established in Ordering Paragraph 8¹ of the Opinion and Order entered in this matter on May 3, 2018 (the “May 2018 Order”).² The procedural posture of this proceeding is critical: This proceeding is being held pursuant to 66 Pa. C.S. § 703(g) to give the Parties an opportunity to be heard regarding the Petition to Amend so the Commission may render an appealable final order on that petition.

For the reasons set forth herein, HVUS respectfully submits that it has satisfied the standards in 66 Pa. C.S. § 703(g) and *Duick v. Pennsylvania Gas and Water Company*, 56 Pa. P.U.C. 553 (1982) (“*Duick*”), for amending a Commission Order. The Company has raised new and novel issues (including the applicability of 66 Pa. C.S. § 703(e) and 52 Pa. Code § 1.15(a)(1)). The Company has also raised issues that were overlooked or not addressed by the Commission when it entered the May 2018 Order (i.e., the implementation schedules in the engineer’s report filed in April 2018 (the “April 2018 Engineer’s Report”) demonstrated the insufficiency of the one-year compliance deadline for eliminating the rust or brown-colored water provided to customers). The Company has also introduced extensive evidence that was not available to it during the proceedings in this matter during 2015-2016 (including evidence from 2018-2020 demonstrating the insufficiency of the one-year compliance deadline for eliminating the rust or brown-colored water provided to customers).

¹ Ordering Paragraph 8 established two deadlines: a one-year deadline for eliminating the rust or brown-colored water provided to customers, Ordering Paragraph 8(1), and a one-year deadline for reassessing the need, size and cost of treatment plant to permanently solve the problems caused by iron and manganese, Ordering Paragraph 8(2). This case primarily concerns the one-year compliance deadline established in Ordering Paragraph 8(1).

² The Pennsylvania Public Utility Commission (“Commission”) entered an Opinion and Order in this matter on January 18, 2018 (the “January 2018 Order”). HVUS subsequently filed a Petition for Clarification, Reconsideration and Amendment (the “Petition for Reconsideration”). The May 2018 Order granted the Petition for Reconsideration in part and denied it in part. The January 2018 Order and the May 2018 Order will be referred to jointly herein as the “2018 Orders.”

HVUS respectfully requests that the Honorable Katrina L. Dunderdale (the “ALJ”) recommend, and the Commission adopt, an amendment to the May 2018 Order that replaces the existing one-year deadline for eliminating the rust or brown-colored water provided to customers with a series of deadlines for HVUS’s on-going project to construct a water treatment plant and complete related tasks to remove iron and manganese from its water. In the alternative, HVUS respectfully requests that the ALJ recommend, and the Commission adopt, an amendment that replaces the existing one-year deadline with an April 18, 2022 deadline for eliminating the rust or brown-colored water provided to customers.

II. STATEMENT OF THE CASE

A. HVUS and its Water System

HVUS owns and operates a water treatment and distribution system and a wastewater collection and treatment system in Somerset County, Pennsylvania. HVUS St. 3 p. 3. Its water system currently serves 1,160 residential customers, 16 non-residential customers, and 54 private fire protection service customers, as well as availability customers. HVUS St. 3-R pp. 8-9. Hidden Valley is a seasonal community, HVUS St. 2-R p. 5, and many of its customers are part-time residents. OCA St. 1 p. 11 n. 5.

The HVUS water system consists of two groundwater wells with Well No. 1 being the primary well and Well No. 2 serving as an alternate source. In July 2008, the Company received a permit from DEP to treat its water using sequestration. OCA St. 1 p. 11. The wells pump to treatment facilities located at the same site occupied by HVUS Sewage Treatment Plant No. 1. At this site, the groundwater is treated with a sequestering chemical for iron and manganese in the well water, followed by the addition of sodium hypochlorite for disinfection. The treated water passes through underground chlorine contact tanks, and then flows to the clearwell building where high service pumps deliver it into the distribution system, with finished water stored in a 250,000 gallon water storage tank. HVUS St. 2 pp. 2-3; HVUS St. 1 p. 2.

B. Events Since The Record Closed on June 8, 2016

The Initial Decision issued by Administrative Law Judge Jeffrey A. Watson on September 9, 2016 summarized the evidence introduced in this proceeding during 2015-2016. The Initial Decision noted that HVUS had not raised rates after it obtained its certificate of public convenience in 2005. I.D. Finding of Fact 12. HVUS filed a request for a rate increase in 2018, which was granted, in part, in 2019. *Pa. Pub. Util. Comm'n v. Hidden Valley Utility Services, L.P. – Water and Wastewater*, Docket Nos. R-2018-3001306 and R-2018-3001307, *et al.* (the “HVUS Rate Case”). In addition, since the 2016 hearing in this case, HVUS increased its staff from two to three employees. HVUS St. 3 p. 3.

On April 18, 2018, HVUS filed the April 2018 Engineer’s Report, as required by Ordering Paragraph 6 of the January 2018 Order. HVUS Exhibit JFL-2. Part of that report was completed by CME Engineering LP (“CME”) and part was completed by The EADS Group (“EADS”). HVUS St. 1 p. 5 and HVUS St. 2 p. 6. That report recommended that the Company implement any one of four projects to address the iron and manganese in its water. The recommended projects are summarized below:

	Recommended Project	Estimated Cost	Estimated Implementation Schedule
1	Conventional Iron Filter	\$1,081,000	1,475 days
2	WesTech Aeralater Iron Filter	\$1,157,000	1,475 days
3	Connection to Jefferson Township Water and Sewer Authority (“JTWSA”) (a/k/a Bakersville Water System)	\$ 852,000	1,535 days
4	Connection to Seven Springs Municipal Authority (“SSMA”)	\$2,389,000	Due to the cost of this option, no implementation schedule was developed.

HVUS Exhibit JFL-2; HVUS St. 3 p. 11. HVUS management subsequently spoke to representatives of JTWSA about the possibility of connecting to that system, but the cost of the raw water was so high that HVUS management eliminated that project from consideration. HVUS St. 3 p. 25.

In late 2018, HVUS and its engineers identified an existing treatment plant in proximity to Hidden Valley that was no longer in use. HVUS and its engineers analyzed the equipment and concluded that it would work for HVUS. They met with staff from the Pennsylvania Department of Environmental Protection (“DEP”) on November 7, 2018 to review the system and to ensure that DEP agreed with the

treatment process. In that meeting, it was decided that the treatment plant was sufficient for the treatment of iron and manganese at Hidden Valley. HVUS St. 3 p. 25; HVUS St. 2 p. 27. HVUS management made an offer to purchase the plant in early 2019 and the contract to purchase the equipment was signed in late May, 2019. HVUS St. 3 p. 25. The plant has been moved to Hidden Valley for installation. HVUS St. 3 p. 26.

HVUS and its engineers held a second meeting with DEP, which served as the Public Water Supply Permit pre-application meeting with DEP. This meeting was held in Pittsburgh on May 17, 2019. On June 20, 2019, HVUS signed an engineering agreement with EADS for design and permitting work for the construction of a water treatment facility at Hidden Valley to include the equipment previously utilized by Rolling Rock Farms. HVUS St. 2 p. 27.

The Public Water Supply Permit Application was submitted to DEP on November 27, 2019, and DEP issued the Public Water Supply Permit for construction of the project on March 9, 2020. HVUS St. 2 p. 27; HVUS Exhibit BRS-4. The proposed water treatment plant is expected to remove iron and manganese from the water being delivered from the treatment plant. HVUS St. 2 p. 28.

The Public Water Supply Permit Application included a schedule for the construction of the water treatment plant. This schedule was updated in February 2020. OCA Exhibit TLF-4. The updated schedule estimated that construction of the water treatment plant could be completed during November, 2020, but HVUS did not intend this schedule to be binding and enforceable. Transcript of May 20, 2020 Hearing ("Tr.") 495. DEP does not treat a schedule in a permit application as binding, nor does DEP impose penalties if a permittee does not comply with the schedule in its permit application. Tr. 495. Maintaining this schedule depends on many factors, including some outside the control of HVUS (such as the duration and impact of the COVID-19 Pandemic Emergency). HVUS St. 2 pp. 28-29. HVUS plans to continue its efforts to construct the water treatment plant while this case is pending. HVUS St. 2 p. 22.

HVUS obtained loans to finance part of the cost of constructing the water treatment plant. In January 2019, the Company borrowed \$206,529 for engineering, legal and other expenses relating to the project. OCA Late-Filed Exhibit 1. As of the hearing on May 20, 2020, HVUS had already paid most of

the engineering costs of the project. Tr. 510. HVUS management estimated that the cost of constructing the water treatment plant (the “sticks and bricks” portion of the project) will be approximately \$600,000, of which \$75,000-\$95,000 has already been invested. Tr. 510 and 533. In December 2019, HVUS borrowed \$400,000 to pay part of these costs. Tr. 519. HVUS management estimates that tariffed rates will provide the cash flow necessary to cover the remaining costs of constructing the water treatment plant. Tr. 519-520.

In March 2020, HVUS requested bids for the construction of the water treatment plant. HVUS St. 3 p. 26. It received two bids, which it was reviewing as of the date of the hearing. HVUS St. 3-R p. 3; Tr. 505. On April 17, 2020, HVUS obtained a waiver of Act 537 planning from DEP for the discharge of the Hidden Valley water treatment plant filter backwash water to HVUS Sewage Treatment Plant No. 1. HVUS St. 3-R p. 2; HVUS Exhibit BRS-6. On May 19, 2020, HVUS applied for a county minor land development approval, which must be received before applying for a building permit. Tr. 506. HVUS has also purchased some of the equipment that was not included in the bids, and has dug trenches for some of the lines that go to the plant. Tr. 507.

III. PROCEDURAL HISTORY

On October 9, 2014, the Office of Consumer Advocate (“OCA”) filed a formal complaint (“OCA Complaint”) against HVUS. In addition to the OCA and HVUS, the Hidden Valley Foundation, Inc. (the “Foundation”), Robert J. Kollar and Kellie A. Kuhleman were Parties to the proceeding. A hearing was held on November 17, 2015. The record was closed on June 8, 2016. On September 9, 2016, Administrative Law Judge Watson issued an Initial Decision sustaining the OCA’s Complaint.

Exceptions and Replies to Exceptions were filed and the Commission ultimately issued the January 2018 Order finding that HVUS violated 66 Pa. C.S. § 1501. The Commission did not impose a penalty on HVUS. Instead, it ordered the Company to perform certain tasks and, pursuant to its authority at 66 Pa. C.S. § 703(e), gave the Company time to comply with its order.

HVUS subsequently filed its Petition for Reconsideration, which the Commission granted in part and denied in part in the May 2018 Order. Of particular importance to this proceeding, the May 2018 Order restated Ordering Paragraph 6 of the January 2018 Order (ordering HVUS to obtain an engineer's report from an independent, third party engineer), but modified Ordering Paragraph 8 of the January 2018 Order (ordering HVUS to implement the engineer's recommendations within one year).

In the January 2018 Order, p. 31, the Commission stated “[i]f additional time is deemed critical [to comply with the Order], the Company may petition the Commission for relief to modify the deadline pursuant to Section 5.572(d) of the Code.” On October 18, 2018, HVUS filed its Petition to Amend, primarily requesting a modification of the one-year deadline in Ordering Paragraph 8(1) for eliminating the rust or brown-colored water provided to customers. The Petition to Amend noted that the April 2018 Engineer's Report indicated that neither a new water treatment plant, nor an interconnection to an alternative water source, could be constructed by April 18, 2019. HVUS proposed that Ordering Paragraph 8 be modified to establish a series of deadlines for significant milestones in the design/construction/permitting process. In the alternative, HVUS requested that the Commission replace the one-year deadline in Ordering Paragraph 8(1) with a four-year deadline.

The OCA, Mr. Kollar and Ms. Kuhleman opposed HVUS's Petition to Amend. In an Opinion and Order entered on January 17, 2019 (the “January 2019 Order”), the Commission denied HVUS's Petition for Amendment. “[I]n light of the possible evidentiary questions related to the estimated schedules provided by the Company's engineer and the financing plans for any of such proposals,” the Commission ordered hearings to be held regarding the Company's Petition to Amend. January 2019 Order p. 31.

On February 19, 2019, HVUS filed a Petition for Review with the Commonwealth Court of Pennsylvania (“Commonwealth Court”). The Commission filed a Motion to Quash arguing that the January 2019 Order was not a final order on the Petition to Amend, but rather was an interlocutory order because it ordered hearings pursuant to 66 Pa. C.S. § 703(g). The Commission represented to the Court that HVUS would have an opportunity to appeal the Commission's ultimate decision to grant or deny the Petition to Amend after the instant proceedings are completed. HVUS Exhibit JMK-11 pp. 6-7.

The Commonwealth Court quashed HVUS's appeal in a Memorandum Opinion. *Hidden Valley Utility Services, L.P. v. Pa. Pub. Util. Comm'n*, 187 C.D. 2019 (May 15, 2019) ("*HVUS v. PUC*"), HVUS Exhibit JMK-12. The Commonwealth Court noted that the Commission "directed future evidentiary hearings on the validity of the recommendations and proposed time schedules contained in the engineer's report." *Id.*, at 8. The Court therefore ordered a hearing to be held "regarding the sufficiency of both the engineer's report and the previously ordered one-year compliance deadline. It is from the Commission's determination following such hearing that [HVUS] may appeal." *Id.* at 10.

On January 28, 2019, Ms. Sharon Howard-Frieri filed a formal complaint against HVUS at Docket No. C-2019-3008093 ("Howard-Frieri Complaint") alleging poor water quality and requesting to be joined as a party to the OCA's Complaint. On June 4, 2019, HVUS filed a Motion to Hold in Abeyance and to Consolidate, arguing that the Howard-Frieri Complaint should be stayed until such time as it could properly be consolidated with the OCA's Complaint. The ALJ granted this motion in her Second Interim Order. The ALJ's Corrected Third Interim Order required the parties to the Howard-Frieri Complaint to file a status report by December 31, 2019. HVUS's status report argued that the Howard-Frieri Complaint should continue to be stayed until such time as it could be consolidated with the OCA's Complaint. The OCA concurred in this request.

On February 7, 2020, the Parties were notified of the prehearing conference in this matter and the ALJ issued her Prehearing Conference Order. The Prehearing Conference Order listed the issues that would be considered in this proceeding. At the Prehearing Conference, the ALJ orally ordered the Howard-Frieri Complaint consolidated with the OCA's Complaint.

The Parties subsequently engaged in discovery and served testimony. A trial was held telephonically on May 20, 2020. HVUS filed responses to on-the-record data requests on May 27, 2020. On June 5, 2020, the OCA requested that one of the on-the-record data requests be admitted into the record as OCA Late-Filed Exhibit 1. On June 10, 2020, HVUS filed two documents that were discussed at the hearing, Tr. 524-525, and requested that they be admitted into the record as HVUS Late-Filed Exhibit 1 and HVUS Late-Filed Exhibit 2. The ALJ granted both the OCA's request and HVUS's request in her First

Post-Hearing Order, issued on June 12, 2020. The ALJ's Second Post-Hearing Order, also issued on June 12, 2020, revised the litigation schedule in this proceeding. On June 17, 2020, the ALJ issued her Interim Order Correcting the Transcript. On June 18, 2020, the ALJ issued her Third Post-Hearing Order further revising the litigation schedule.

IV. LEGAL STANDARDS

In this proceeding, HVUS primarily seeks a modification to Ordering Paragraph 8(1) of the May 2018 Order and conforming changes in other Ordering Paragraphs.³ 52 Pa. Code § 5.572(d) states “[p]etitions for rescission or amendment may be filed at any time according to the requirements of section 703(g) of the act (relating to fixing of hearings).” 66 Pa. C.S. § 703(g) states:

(g) Rescission and amendment of orders.--The commission may, at any time, after notice and after opportunity to be heard as provided in this chapter, rescind or amend any order made by it.

In this proceeding, the Parties had notice of and an opportunity to be heard on HVUS's Petition to Amend. They not only had an opportunity to file Answers to the Petition to Amend, they also had an opportunity to present evidence at hearings on the Petition to Amend.

In *Application of Susquehanna Valley Limousine, Inc.*, Docket Nos. A-2013-2395502 and A-00110765 (Order entered November 13, 2014) p. 4, the Commission stated:

A petition to amend a final Commission Order may only be granted judiciously and under appropriate circumstances, because such an action results in the disturbance of final orders. *City of Pittsburgh v. Pennsylvania Department of Transportation*, 490 Pa. 264, 416 A.2d 461 (1980). Additionally, we recognize that, while a petition under Section 703(g) may raise any matter designed to convince us that we should exercise our discretion to amend or rescind a prior order, at the same time “[p]arties . . . , cannot be permitted by a second motion to review and reconsider, to raise the same questions which were specifically considered and decided against them.” *Duick v. Pennsylvania Gas and Water Company*, 56 Pa. P.U.C. 553 (Order entered December 17, 1982 (quoting *Pennsylvania Railroad Co. v. Pennsylvania Public Service Commission*, 179 A. 850, 854 (Pa. Super. Ct. 1935)). Such petitions are likely to succeed only when they raise “new and novel arguments” not

³ The OCA also proposed amendments to Ordering Paragraph 8 of the May 2018 Order to establish a usage allowance for customers and to immediately commence a Section 529 Investigation of HVUS, OCA St. 2S p. 5, but those proposals are beyond the scope of this proceeding. *See, e.g.*, Tr. 484.

previously heard or considerations which appear to have been overlooked or not addressed by the Commission. *Duick* at 559.

As the party requesting relief from the Commission, HVUS bears the burden of proof pursuant to Section 332(a) of the Pennsylvania Public Utility Code (“Code”). 66 Pa. C.S. § 332(a). The “burden of proof” is composed of two distinct burdens: the burden of production and the burden of persuasion. *Hurley v. Hurley*, 754 A.2d 1283 (Pa. Super. 2000).

The burden of production, also called the burden of producing evidence or the burden of coming forward with evidence, determines which party must come forward with evidence to support a particular proposition. This burden may shift between the parties during the course of a trial. If the party with the burden of production fails to introduce sufficient evidence, the opposing party is entitled to receive a favorable ruling. That is, the opposing party would be entitled to a compulsory nonsuit, a directed verdict, or a judgment notwithstanding the verdict.

Once the party with the initial burden of production introduces sufficient evidence to make out a *prima facie* case, the burden of production shifts to the opposing party. If the opposing party introduces evidence sufficient to balance the evidence introduced by the party having the initial burden of production, the burden then shifts back to the party who had the initial burden to introduce more evidence favorable to its position. The burden of production goes to the legal sufficiency of a party’s case.

Having passed the test of legal sufficiency, the party with the burden of proof must then bear the burden of persuasion to be entitled to a verdict in its favor. “[T]he burden of persuasion never leaves the party on whom it is originally cast, but the burden of production may shift during the course of the proceedings.” *Riedel v. County of Allegheny*, 633 A.2d 1325, 1328 n. 11 (Pa. Cmwlth. 1993). To establish a sufficient case and satisfy its burden of proof, the party with the burden of proof must show, by a preponderance of the evidence, that it is entitled to the relief it is seeking. *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm’n*, 578 A.2d 600 (Pa. Cmwlth. 1990), *alloc. denied*, 602 A.2d 863 (Pa. 1992). That is, that party’s evidence must be more convincing, by even the smallest amount, than that presented by any opposing party. *Se-Ling Hosiery, Inc. v. Margulies*, 70 A.2d 854 (Pa. 1950).

Additionally, the Commission's order must be supported by substantial evidence in the record. 66 Pa. C.S. § 332(b); *Lyft v. Pa. Pub. Util. Comm'n*, 145 A.3d 1235 (Pa. Cmwlth. 2016). More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. Evidence is substantial when relevant and of a nature that a reasonable mind might accept as adequate to support a conclusion. *Norfolk & Western Ry. Co. v. Pa. Pub. Util. Comm'n*, 413 A.2d 1037 (Pa. 1980).

V. SUMMARY OF ARGUMENT

The ALJ should recommend, and the Commission should grant, HVUS's Petition to Amend. HVUS has satisfied the legal standards for modifying a Commission Order pursuant to 66 Pa. C.S. § 703(g) and *Duick*. It has raised a new and novel issue: The Company's request for an extension meets the requirements of 66 Pa. C.S. § 703(e) and 52 Pa. Code § 1.15(a)(1) because the Company filed a motion requesting an extension before the deadline of April 18, 2019 and the Company demonstrated good cause for the extension (the one-year compliance deadline in Ordering Paragraph 8(1) was insufficient to accomplish the designated task – implementing a recommendation to eliminate the rust or brown-colored water provided to customers).

HVUS has also raised issues that were overlooked or not addressed by the Commission previously. The April 2018 Engineer's Report included estimated implementation schedules that indicated the one-year compliance deadline in Ordering Paragraph 8 of the January 2018 Order was insufficient, but the Commission overlooked or failed to address this evidence when it issued the May 2018 Order (which amended Ordering Paragraph 8 in the January 2018 Order).

Finally, HVUS has introduced extensive evidence in the instant proceedings that did not exist and therefore was not available to it when the record closed in this proceeding in June, 2016. This evidence establishes that:

- The one-year compliance deadline in Ordering Paragraph 8(1) was not sufficient to accomplish the designated task; and
- HVUS has provided the Commission with reasonable assurances that it will meet a revised compliance deadline.

HVUS has established a *prima facie* case that the April 2018 Engineer's Report was sufficient in that it included all of the items required by Ordering Paragraph 6 of the January 2018 Order. In particular, HVUS has demonstrated that the January 2018 Order required the April 2018 Engineer's Report to estimate the cost of implementing each recommendation, but did not require the engineer to develop a "financing plan" in the sense of a plan for HVUS to pay those estimated costs (e.g., by increasing tariffed rates, obtaining a loan and/or selling an ownership interest in the Company).

HVUS has established a *prima facie* case that the April 2018 Engineer's Report properly recommended that the Company implement any one of four projects to eliminate the rust or brown-colored water provided to customers. HVUS also established a *prima facie* case that the April 2018 Engineer's Report included appropriate estimated implementation schedules for each viable recommended project and appropriate cost estimates for each recommended project.

HVUS has established a *prima facie* case that the one-year compliance deadline in Ordering Paragraph 8(1) was insufficient. No evidence whatsoever was introduced during 2015-2016 indicating that HVUS could accomplish the designated task (implementing a recommendation for eliminating the rust or brown-colored water provided to customers) in a twelve month period. In the instant proceedings, HVUS introduced extensive evidence demonstrating that compliance with the one-year deadline was impossible. The preponderance of the evidence introduced during the entire course of this proceeding demonstrates that one year was not a sufficient time period to accomplish the designated task.

The OCA is the only other party to introduce testimony in this case, and that testimony is insufficient to rebut HVUS's *prima facie* case on any issue. The OCA's witnesses barely discussed the April 2018 Engineer's Report. Moreover, OCA Witness Fought recommended that the Commission establish a new deadline of July 31, 2021 for HVUS to complete the water treatment plant and related tasks to eliminate the rust or brown-colored water provided to customers.

OCA Witness Eastman contradicted Mr. Fought by suggesting that the Commission should not extend the one-year compliance deadline. Mr. Eastman speculated that the Company may not have the financial resources necessary to complete the water treatment plant. Mr. Eastman then contradicted himself

by recommending that the Commission deny the Company the very financial resources it needs to complete that project (by imposing a customer usage allowance and forcing the Company to litigate a Section 529 Investigation at this time).

The Commission should grant HVUS's request for an extension of the one-year compliance deadline in Ordering Paragraph 8(1) of the May 2018 Order because HVUS has satisfied the legal tests for extending that deadline. The preponderance of the evidence demonstrates that the one-year compliance deadline in Ordering Paragraph 8(1) was insufficient. If that deadline is not extended, HVUS would be subject to penalties for failing to meet a deadline that was impossible to meet. Additionally, that deadline is not supported by substantial evidence. It is therefore invalid and unenforceable; it is in the public interest that it be replaced with a deadline that is valid and enforceable.

Additionally, HVUS has demonstrated that it meets the criteria for an extension pursuant to 66 Pa. C.S. § 703(e) and 52 Pa. Code § 1.15(a)(1) (HVUS requested an extension in advance of the deadline and proved that it has good cause for the extension). The new deadline should be after the Commission enters its final order in this proceeding to ensure that HVUS has a "reasonable opportunity to comply" with the Commission's order in this proceeding. 66 Pa. C.S. § 703(e).

Finally, HVUS has provided the Commission with adequate assurances that the new compliance deadline will be met. HVUS has demonstrated that it has made substantial progress toward the construction of a water treatment plant and intends to complete that project. The 2018 Orders contain monitoring and enforcement mechanisms that continue to give the Company a strong incentive to complete that project in a timely manner.

HVUS's primary recommendation is that Ordering Paragraph 8(1) be amended to establish a series of deadlines based on the remaining steps in the process of designing/permitting/constructing a water treatment plant and related tasks to eliminate the rust or brown-colored water provided to customers. In order to give the Company a reasonable opportunity to comply with the new deadline, consistent with 66 Pa. C.S. § 703(e) and the 2018 Orders, that deadline must be *after* the Commission issues its final order in this case. HVUS's secondary recommendation is that the ALJ and the Commission set an April 18, 2022

deadline for the Company to complete all work necessary to eliminate the rust or brown-colored water provided to customers.

At this time, the ALJ should not recommend, and the Commission should not impose, a penalty on HVUS for violating Ordering Paragraph 6 of the January 2018 Order. The April 2018 Engineer's Report complied with that Ordering Paragraph. Even if it did not, the factors in the Statement of Policy at 52 Pa. Code § 69.1201(c) weigh against imposing a penalty here. Most importantly, a penalty here would deprive the Company of financial resources, potentially hampering the Company's ability to complete the water treatment plant and related tasks. In any event, since any violation was not a continuing violation, the maximum civil penalty is \$1,000 for that violation. 66 Pa. C.S. § 3301(a). For the same reasons, the ALJ should not recommend, and the Commission should not impose, a customer usage allowance or customer refund at this time.

Nor should HVUS be penalized for failing to comply with the one-year deadline in Ordering Paragraph 8(1). If the Commission grants the Petition to Amend, and extends the compliance deadline to a future date, HVUS would not be in violation of Ordering Paragraph 8(1). Even if the Commission does not extend the compliance deadline, imposing a penalty would be premature because the May 2018 Order specifies the procedure for imposing a penalty if HVUS is unable to meet a deadline established in that Order. That procedure has not yet been triggered – and will not be triggered until such time as the Commission and the appellate courts issue a final order on HVUS's Petition to Amend.

VI. ISSUES

A. **The validity of Ordering Paragraph 6 from the January 2018 Order and Ordering Paragraph 8 from the May 2018 Order**

HVUS will not address this issue in its Main Brief. HVUS reserves the right to address this issue in its Reply Brief, if necessary.

B. The sufficiency of the engineer's report filed April 18, 2018

The question presented is whether the April 2018 Engineer's Report complied with Ordering Paragraph 6 of the January 2018 Order. That Ordering Paragraph stated:

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.

HVUS respectfully submits that the April 2018 Engineer's Report complied with Ordering Paragraph 6. The report contained all of the required elements. The substance of the report's recommendations, implementation schedules, cost estimates and financing plans will be addressed in Section VI.C., below.

1. HVUS obtained and timely filed with the Commission a written report from an independent or third-party engineer concerning its water system

The April 2018 Engineer's Report was completed in part by CME and in part by EADS. CME is an independent engineering firm that was hired by HVUS. HVUS St. 1 p. 5. EADS is also an independent engineering firm that was hired by HVUS. HVUS St. 2 p. 6. Among other things, the report "evaluate[d] the water system iron and manganese removal alternatives." HVUS Exhibit JFL-2 p. 1.

HVUS filed the report with the Commission on April 18, 2018, HVUS Exhibit JFL-2, which is ninety days after the January 2018 Order was entered on January 18, 2018. The cover letter and certificate of service demonstrate that the report was, on that same date, served on the Bureau of Technical Utility Services ("TUS") and the individuals and entities who were parties to this proceeding at that time. *Id.*

2. The report discussed the adequacy of the water distribution system and water source

HVUS has an adequate supply of water for its customers. HVUS St. 3 p. 5. However, in the Initial Decision issued in September 2016, ALJ Watson stated that HVUS had failed to “provide an *adequate water supply sufficient for regular household purposes.*” Initial Decision pp. 19-20 (emphasis added). Consequently the issue is the quality of water, not the quantity of water, provided to customers. By recommending ways to remove iron and manganese from the water, the April 2018 Engineer’s Report discussed the adequacy of HVUS’s water distribution system and water source.

3. The report recommended that the Company complete any one of four projects for eliminating the rust or brown-colored water provided to customers, and included a cost analysis of each recommended project

Ordering Paragraph 6 (emphasis added) states that the 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 ..., *and proposed remedy* to reassess the need size and cost of the treatment plant ... *as well as* alternative sources of supply.” Consequently, the April 2018 Engineer’s Report recommended that HVUS implement any one of four projects for eliminating the iron and manganese from its water. Two of these recommended projects concerned the construction of a water treatment plant and two concerned interconnections to alternative sources of supply. The April 2018 Engineer’s Report also included a cost analysis for each of these recommended projects. HVUS Exhibit JFL-2.

The April 2018 Engineer’s Report did not state that the Company should implement one of the four recommended projects rather than the other three. Nevertheless, HVUS respectfully submits that the 2018 Engineer’s Report complied with Ordering Paragraph 6.

Ordering Paragraph 6 required the report to contain “recommendations” (plural) not “a recommendation” (singular). The April 2018 Engineer’s Report clearly included “recommendations.” “Recommend” has been defined as:

Put forward (someone or something) with approval as being suitable for a particular purpose or role. “*George had recommended some local architects.*”⁴

The April 2018 Engineer’s Report put forward four projects as each being suitable for the particular purpose of eliminating the iron and manganese from HVUS’s water. In fact, as discussed below, the four recommended projects were the best options for HVUS to eliminate the iron and manganese from its water. There can be no doubt that the April 2018 Engineer’s Report recommended that the Company implement any one of those projects.

Additionally, Ordering Paragraph 6 explicitly required the engineer’s report to include recommendations addressing several different approaches, including constructing a water treatment plant and interconnecting to an alternative source of supply. The April 2018 Engineer’s Report did that.

Nothing in Ordering Paragraph 6 explicitly requires the April 2018 Engineer’s Report to direct utility management to choose one project over all others. Perhaps the engineer was *permitted* to make such a recommendation, but Ordering Paragraph 6 does not explicitly *require* him to do so. A Commission order, which is enforceable by civil penalties, 66 Pa. C.S. § 3301, should be strictly construed, just as penal statutes are strictly construed. 1 Pa. C.S. § 1928(b)(1). Ambiguities as to what was required by the January 2018 Order should be construed in favor of the Company. *Cf., Commonwealth v. Darush*, 389 A.2d 1156, 1158 (Pa. Super. 1978) (penal statutes are to be strictly construed in favor of the accused).

HVUS’s interpretation of Ordering Paragraph 6 is consistent with the management discretion doctrine, which gives utility management the responsibility of making decisions for the utility unless the Commission intervenes. *See Pa. Pub. Util. Comm’n v. Philadelphia Electric Company*, 561 A.2d 1224, 1226 (Pa. 1989) (citing *Lower Chichister Township v. Pa. Pub. Util. Comm’n*, 119 A.2d 674, 678 (Pa. 1976)); *see also National Fuel Gas Distribution Corporation v. Pa. Pub. Util. Comm’n*, 464 A.2d 546, 558 (Pa. Cmwlth. 1983). The role of utility management is to select among projects recommended by an independent engineer; it is not the role of an independent engineer to dictate to utility management which

⁴ <https://www.bing.com/search?q=recommend&q&form=QBRE&sp=-1&pq=recommend&sc=8-9&sk=&cvid=6428803150A545BAA7ED7833C4CFDF2F> (emphasis added).

project it must construct. The 2018 Engineer's Report, which recommended that the Company implement any one of four projects to eliminate the iron and manganese from its water, complied with Ordering Paragraph 6.

4. The report included an implementation schedule for each viable recommended project

The April 2018 Engineer's Report included one implementation schedule that applied to both recommended projects for building a water treatment plant. HVUS Exhibit JFL-2; HVUS St. 2 p. 10. The report also included an implementation schedule for constructing a connection from HVUS to the Bakersville Water System (a/k/a the JTWSA). HVUS St. 2 p. 9, HVUS St. 2-R p. 2.

The April 2018 Engineer's Report did not include an implementation schedule for connecting the HVUS system to the SSMA system, although that was one of the four projects recommended in the April 2018 Engineer's Report. CME's cost estimates indicated that connecting the HVUS water system to the SSMA water system would cost more than a million dollars more than any other recommended project. HVUS Exhibit JFL-2. Consequently, HVUS management decided not to pursue that alternative. Under these circumstances, it would not have been reasonable and prudent for HVUS to incur the cost of having EADS prepare an implementation schedule for this recommended project. HVUS St. 3 p. 11.

5. The report included a schedule to replace and/or test customer meters in accordance with 52 Pa. Code § 65.8(b) that results in compliance by April 30, 2019

The April 2018 Engineer's Report included a table entitled "Hidden Valley Utility Services, L.P. Water Service Meter Breakdown," which included a schedule for replacing and/or testing customer meters that was designed to result in compliance with 52 Pa. Code § 65.8(b) by April 30, 2019. HVUS Exhibit JFL-2; HVUS St. 2 p. 7.

6. Ordering Paragraph 6 did not require the April 2018 Engineer's Report to include a plan for HVUS to pay the cost of any recommended project

Ordering Paragraph 6 stated that the April 2018 Engineer's Report was to include "recommendations and a *cost analysis* to correct any found deficiencies" (emphasis added). It also stated "[i]n addition to *estimating costs*" (emphasis added), the report was to include implementation schedules.

Finally, Ordering Paragraph 6 stated that the report was to include “an evaluation and proposed remedy to reassess the need, size and *cost* of the treatment plant” (emphasis added). The plain language of the January 2018 Order required the engineer to estimate the cost for HVUS to implement the recommendations discussed in his report, which he did. The engineer, however, was *not* tasked with recommending a plan for paying those costs (e.g., increasing tariffed rates, obtaining a loan and/or selling an ownership interest in the Company).

The concept of a “financing plan” – a plan for HVUS to pay the estimated costs of a project – was introduced into this case when HVUS filed its Petition to Amend in October 2018. In that document, HVUS offered to file plans for a project with the Commission, together with a plan for how the Company would pay for that project. Petition to Amend p. 8.⁵

The Commission’s January 2019 Order, p. 31, noted “possible evidentiary questions related to the estimated schedules provided by the Company’s engineer and the financing plans for any of such proposals,” but the Company’s compliance with the January 2018 Order must be determined by construing the terms of *that Order*, not by the terms of an order entered nine months after the April 2018 Engineer’s Report was filed. Ordering Paragraph 6 did not explicitly require the April 2018 Engineer’s Report to include a “financing plan.” As discussed above, a Commission order, which is enforceable by civil penalties, 66 Pa. C.S. § 3301, should be strictly construed, just as penal statutes are strictly construed. 1 Pa. C.S. § 1928(b)(1). Ambiguities as to what was required by the January 2018 Order should be construed in favor of the Company. Consequently, HVUS respectfully submits that the April 2018 was not required to include a “financing plan” for any recommended project.

C. The propriety of the recommendations, proposed time schedules and financing plans for the recommendations contained in the April 2018 engineer’s report

This issue requires the Commission to evaluate the substance of the April 2018 Engineer’s Report. HVUS submits that the substance of the April 2018 Engineer’s Report was proper.

⁵ The cost estimates for HVUS’s on-going project to construct a water treatment plant are discussed in Section VI.E.2.c, below. A financing plan for that project is also discussed in that section.

1. The propriety of the recommendations contained in the April 2018 Engineer's Report

As discussed above, the April 2018 Engineer's Report appropriately recommended that the Company implement any of four projects for eliminating the rust or brown-colored water provided to customers. Two recommended projects involved the construction of a water treatment plant and two recommended projects involved the construction of an interconnection to an alternative source of supply. HVUS Exhibit JFL-2. The engineer recommended these four projects, in part, because "to eliminate the rust or brown-colored water, HVUS needs to either treat its water or develop an alternative source of supply." HVUS St. 1 p. 8; *see also*, HVUS Exhibit JMK-3 (Surrebuttal Testimony of OCA Witness Fought from November 3, 2015) pp. 11-12; HVUS Exhibit JMK-10 p. 312 (testimony of OCA Witness Fought in *HVUS Rate Case*).

The four recommended projects discussed in the engineer's report were the four best options available to HVUS for addressing the iron and manganese in its water. CME considered interconnections with the JTWSA and the SSMA systems because they are geographically the closest public water supply systems to HVUS. CME considered the conventional iron filter water treatment upgrade because that is a very common treatment method for removing iron and manganese. CME considered the WesTech Type II Aeralater system because it is a more innovative technology. HVUS St. 1 pp. 8-9. Consequently, the recommendations in the April 2018 Engineer's Report were proper.

2. The propriety of the proposed time schedules for the recommendations contained in the April 2018 Engineer's Report

As discussed above, the April 2018 Engineer's Report included two implementation schedules. HVUS Exhibit JFL-2. One schedule applied to both of the recommended projects for constructing a water treatment plant. HVUS St. 2 p. 10. The other implementation schedule applied to the recommended interconnection to the JTWSA. *Id.* p. 9. No schedule was prepared for connecting to the SSMA because HVUS management had already eliminated that project from consideration based on the estimated cost of that project. HVUS St. 3 p. 11.

Ordering Paragraph 6 stated that each implementation schedule was to include “completion of the design, repairs or improvements, obtaining permits, obtaining bids, awarding contracts, and completion of construction/start of operation.” Each of the implementation schedules in the April 2018 Engineer’s Report included each of these steps. HVUS Exhibit JFL-2.

Each implementation schedule was prepared by an engineer with extensive experience in developing such schedules. HVUS St. 2 p. 8. HVUS Witness Stinebiser, who prepared the implementation schedules, noted that the projects were at the conceptual stage at the time the implementation schedules were prepared. This means very few design details were developed and the schedules needed to account for considerable unpredictability and uncertainty. For example, the estimated implementation schedule for interconnecting with the JTWSA system included 270 days for negotiating an agreement with up to three municipal bodies. HVUS St. 2 p. 11. The implementation schedule for upgrades to the HVUS water treatment plant included 270 days for a pilot water treatment program. Including a pilot program in the implementation schedule for constructing a water treatment plant was reasonable at the time, especially because the specific filtration method was not worked out beyond a conceptual stage. JLF-2; HVUS St. 2 p. 13.

HVUS Witness Stinebiser identified the milestones that had to be met, the logical sequence of these milestones, and the estimated reasonable amounts of time in which each milestone could be completed. HVUS St. 2 p. 10. The implementation schedules estimated that constructing a water treatment plant would take 1,475 days and constructing an interconnection to the JTWSA would take 1,535 days. HVUS Exhibit JFL-2. HVUS Witness John F. Larimer subsequently reviewed the implementation schedules and concluded that they were reasonable. HVUS St. 1 p. 6.

In January 2019, Mr. Stinebiser updated his implementation schedules. The updated schedule estimated that constructing a water treatment plant would take 1,245 days and constructing an interconnection to the JTWSA would take 1,215 days. HVUS St. 2 p. 15; HVUS Exhibit BRS-2. The fact that Mr. Stinebiser’s implementation schedule changed from 2018 to 2019 does not mean that his 2018 estimates were improperly prepared. To the contrary, the January 2019 schedule is consistent with the

April 2018 schedule in demonstrating that HVUS could not complete the process of designing/permitting/constructing either a water treatment plant or an interconnection to an alternative water source in twelve months.

No party challenged either Mr. Stinebiser's expertise in developing implementation schedules or the methodology that he used to develop his implementation schedules. Furthermore, there is no evidence in the record whatsoever that questions Mr. Stinebiser's implementation schedules for constructing an interconnection to the JTWSA.

In his Direct Testimony, OCA Witness Fought noted that the schedule Mr. Stinebiser submitted to DEP in February 2020 for HVUS's current water treatment plant project differed from the schedule he included in the April 2018 Engineer's Report. He noted that the February 2020 schedule estimated that the water treatment plant could be completed approximately eight months after the Company received its DEP permit, whereas the April 2018 schedule estimated that the plant could be completed twenty-one months after receiving the DEP permit. OCA St. 1 p. 12.

Mr. Fought's testimony does not demonstrate that the implementation schedules in the April 2018 Engineer's Report were improperly prepared or that they were incorrect based on the information available to Mr. Stinebiser in 2018. As Mr. Fought himself notes, the February 2020 schedule was based on more detailed information. OCA St. 1 p. 12.

More importantly, the February 2020 schedule, unlike the April 2018 schedule, included only a portion of the time necessary to go from start to finish on the water treatment plant project. Mr. Stinebiser's 2018 schedule included 270 days for a pilot water treatment program, 120 days for preliminary design, 120 days to prepare and submit permit applications, and 270 days to receive approvals from appropriate agencies – a total of 780 days *even before* the Company received its DEP permit. JFL-2. Mr. Fought did not question these estimates.

Additionally, the April 2018 schedule included sixty days *after* the completion of construction to obtain appropriate agency review and inspection of the water treatment plant. HVUS Exhibit JFL-2. The February 2020 schedule did not include this step. OCA Exhibit TLF-4. Mr. Stinebiser explained at the

hearing that a water treatment plant cannot be used to supply water to customers until after DEP issues an operating permit for the facility. Tr. 597-598, 600. Therefore, the February 2020 schedule reinforces, rather than undermines, the conclusion of the April 2018 implementation schedules that HVUS could not complete the design/construction/permitting process for a water treatment plant in twelve months.⁶

At the hearing, Mr. Fought opined that schedules for constructing the water treatment plant in two, three or four years were “just not acceptable to me.” Tr. 577. Mr. Fought’s testimony is a bald assertion; it is not evidence on which the Commission may rely. *MidAtlantic Power Supply Association of Pennsylvania v. Pa. Pub. Util. Comm’n*, 746 A.2d 1196, 1200 (Pa. Cmwlth. 2000) (citing *Pa. Bureau of Corrections v. City of Pittsburgh*, 532 A.2d 12, 14 (Pa. 1987) (“Mere bald assertions, personal opinions or perceptions do not constitute evidence.”)). Mr. Fought does not indicate whether Mr. Stinebiser’s implementation schedule included unnecessary steps or whether he believes any particular step was estimated to take an unreasonably long time (and if so, why). The ALJ and the Commission should give Mr. Fought’s testimony no weight.

In summary, the preponderance of the evidence demonstrates that the implementation schedules included in the April 2018 Engineer’s Report were proper.

3. The propriety of the financing plans for the recommendations contained in the April 2018 Engineer’s Report

As discussed above, Ordering Paragraph 6 did not explicitly require the April 2018 Engineer’s Report to include a “financing plan” in the sense of a plan for HVUS to pay the costs of any recommended project. Ordering Paragraph 6 only explicitly required that the report include “cost estimates” and “cost analyses” of the recommended projects. Any ambiguities in the 2018 Orders should be construed in favor of the Company since the Company could be subject to penalties for failing to comply with those orders.⁷

⁶ For additional information regarding the insufficiency of the one-year compliance deadline, see Section VI.D, below.

⁷ As noted in note 5 above, the estimated costs of, and a financing plan for, HVUS’s on-going water treatment plant project are discussed in Section VI.E.2.c, below.

The April 2018 Engineer's Report included a cost estimate for each of the four recommended projects. HVUS Witness Larimer, who prepared the cost estimates, testified that he has extensive experience in developing such estimates. He further testified that his cost estimates were based on filter equipment vendors, estimated labor costs to install the equipment for similar projects, and his experience. Operations and maintenance costs were estimated based on typical costs for similar plants. The RE Means estimating prices were also considered. HVUS St. 1 p. 9.

Mr. Larimer estimated that the cost of constructing a conventional iron filter water treatment plant was \$1,081,366, the cost of constructing a WesTech Type II Aeralater System was \$1,157,000, the cost of constructing an interconnection to the JTWSA was \$852,000, and the cost of constructing an interconnection to the SSMA was \$2,389,000.

HVUS Witness Stinebiser testified that, in October 2018, he updated the cost estimates prepared by Mr. Larimer. Mr. Stinebiser testified that he has extensive experience on drinking water projects, including the preparation of project cost estimates. HVUS St. 2 pp. 16-17. Mr. Stinebiser estimated the cost of constructing a water treatment plant was \$1,527,825. OCA Exhibit NDE-1.

In January 2019, Mr. Stinebiser again updated Mr. Larimer's cost estimates. Mr. Stinebiser developed his own list of work items and quantities. He also included some items in his estimate that were not included in Mr. Larimer's estimates. For the water treatment plant project, this included work items and costs for handling backwash wastewater. HVUS St. 2 p. 17; Tr. 494; OCA Exhibit NDE-1. Mr. Stinebiser estimated that the cost of constructing a connection to the JTWSA was \$1,468,740 whereas the cost of constructing a water treatment plant was estimated to be \$1,924,087. BRS-2 p. 5.

The fact that Mr. Stinebiser's cost estimates were higher than Mr. Larimer's does not demonstrate that Mr. Larimer's estimates were prepared improperly or were incorrect based on the information available to him at the time. Mr. Stinebiser's January 2019 report was based on more detailed information than was available to Mr. Larimer. For example, Mr. Stinebiser included work items and costs for handling backwash wastewater, which Mr. Larimer did not include in his estimate. HVUS St. 2 p. 17.

No party to this proceeding has questioned Mr. Larimer's expertise in preparing the cost estimates in the April 2018 Engineer's Report, nor has any party argued that the cost estimates in the April 2018 Engineer's Report were improperly prepared based on the information available to Mr. Larimer at the time. In fact, no party introduced any testimony whatsoever that questioned the cost estimates prepared in April 2018. The preponderance of the evidence clearly demonstrates that the cost estimates for the recommended projects in the April 2018 Engineer's Report were proper.

D. The sufficiency of the previously ordered one-year compliance deadline

66 Pa. C.S. § 703(e) states that, in its order on a complaint, "[t]he commission may grant and prescribe such additional time as, in its judgment, is reasonably necessary to comply with the order, and may, on application and for good cause shown, extend the time for compliance fixed in its order." In the 2018 Orders, the Commission ordered the Company to complete certain tasks and gave the Company time to come into compliance with its Orders. The question presented therefore is whether the Commission gave HVUS the time "reasonably necessary to comply with the order."⁹

Ordering Paragraph 8, as amended by the May 2018 Order, states:

8. That, within one (1) year from [sic] 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.

The May 2018 Order, pp. 17 and 22, made clear that Ordering Paragraph 8 established the same one-year deadline for two different tasks. The one-year deadline for completing the task described in Ordering Paragraph 8(2) of the May 2018 Order was sufficient and HVUS in fact met the deadline. HVUS St. 2 p. 27; HVUS St. 3 p. 25. The one-year deadline for completing the task described in Ordering Paragraph 8(1), however, was not sufficient and should be modified.

1. The one-year deadline in Ordering Paragraph 8(2) was sufficient and HVUS met this deadline

Ordering Paragraph 8(2) of the May 2018 Order provided that HVUS “shall comply with all recommendations from the engineer in order ... (2) to reassess the need, size and cost of treatment plant to permanently solve the problems caused by iron and manganese.” One of the projects recommended in the April 2018 Engineer’s Report was the construction of a conventional iron filter water treatment plant. HVUS Exhibit JFL-2. In late 2018, HVUS management and its independent engineer identified an existing conventional iron filter water treatment plant near Hidden Valley that was no longer in use. HVUS and its engineers analyzed the equipment and concluded that it would work for HVUS. HVUS management and its engineer then met with DEP staff on November 7, 2018 to make sure DEP agreed with the treatment process. In January 2019, HVUS made an offer to purchase the plant. HVUS St. 3 p. 25, HVUS St. 2 p. 27.

Clearly, HVUS management had reassessed the need, size and cost of a water treatment plant long before April 2019, had determined to build such a treatment plant, and had taken steps toward implementing that recommendation. Therefore, Ordering Paragraph 8(2) does not need to be modified. HVUS’s primary recommendation proposed re-stating the existing Ordering Paragraph 8(2), HVUS St. 2-R p. 9; Tr. 495, but HVUS has no objection to deleting Ordering Paragraph 8(2) from the May 2018 Order. Tr. 495.

2. The one-year deadline in Ordering Paragraph 8(1) was not sufficient

Ordering Paragraph 8(1) of the May 2018 Order states that, within one year of receiving the engineer’s report, HVUS “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.” Therefore, the question presented is whether HVUS could have complied with all recommendations, including a remedy to eliminate the rust or brown-colored water provided to customers, within one year of April 18, 2018.

In its Petition for Reconsideration, the Company expressed confidence that it had already implemented many (but not all) of the recommendations that it expected to be included in the April 2018 Engineer's Report. Petition for Reconsideration p. 3. The Petition for Reconsideration, however, was filed on February 2, 2018. At that time, Company management had not received the engineer's estimated implementation schedules for those recommendations.

As discussed below, the preponderance of the evidence demonstrates that the one-year deadline in Ordering Paragraph 8(1) was not sufficient. No Party introduced any evidence demonstrating that a one-year deadline was sufficient before that deadline was recommended in the 2016 Initial Decision and adopted in the January 2018 Order. The overwhelming weight of the evidence introduced since January 2018 demonstrates that the one-year deadline was not sufficient. Consequently, the preponderance of the evidence introduced *over the entire course of this proceeding* demonstrates that the one-year compliance deadline in Ordering Paragraph 8(1) was not sufficient.

a. The one-year deadline was not supported by any evidence of record when it was adopted

Mr. Kettler reviewed in detail the origin of the one-year deadline in Ordering Paragraph 8(1), and clearly demonstrated the lack of any evidentiary support for that deadline at the time it was adopted. HVUS St. 3 pp. 14-20. In his Direct Testimony, submitted on July 8, 2015, OCA Witness Fought proposed that HVUS's engineer be required to complete a report within ninety days of the entry of the Commission's order. He recommended that this report include a schedule for implementing recommendations, but Mr. Fought did not recommend establishing any deadline for completing the implementation of those recommendations. HVUS Exhibit JMK-2.⁸

In his Surrebuttal Testimony dated November 3, 2015, Mr. Fought again recommended that HVUS be required to complete an engineering study within 90 days of the entry of the Commission's order. He

⁸ After the Initial Decision was issued, however, the OCA changed its position, contending "it is critical that the resolution of this case provides a remedy within a fixed period." OCA's Replies to Exceptions p. 8. At the hearing on May 2020, Mr. Fought stated that he believes it is important to have a deadline for start-up of the water treatment plant, Tr. 577, even though he did not recommend such a deadline in his previous testimony in this proceeding.

also recommended that HVUS's engineer be authorized to begin designs within 60 days after the completion of the engineering study. He recommended that the rest of the schedule be based on the company's engineering study, but he believed it would be reasonable for the company to obtain bids 60 days after obtaining all permits, and to award contracts 60 days after obtaining bids. Again, Mr. Fought did not recommend a deadline for ultimate completion of the project. *See* HVUS Exhibit JMK-3. The OCA's Main Brief asked the Commission to adopt Mr. Fought's proposal. HVUS Exhibit JMK-4.

The reasonable time periods for completing the three steps discussed in Mr. Fought's surrebuttal testimony (authorizing the engineer to begin designs, obtaining bids, and awarding contracts), together account for 180 days, or one-half of the compliance period in Ordering Paragraph 8(1). In addition, Mr. Fought acknowledged at the hearing in 2015 that an additional four-five months would be necessary for obtaining the DEP Public Water Supply Permit, and that additional zoning or other permits might be necessary. Tr. 336-37. Thus, Mr. Fought has already accounted for ten-eleven months of the twelve-month compliance period, without even considering the time necessary to design the project, construct the project, and obtain an operating permit for the project from DEP. HVUS St. 3 pp. 15-16. Not surprisingly, no evidence was introduced during 2015-2016 demonstrating that all of these additional steps together could be completed in one-two months.

The Initial Decision, Ordering Paragraph 6, was the first time that anyone in this proceeding mentioned a one-year deadline for implementing a recommendation to eliminate the rust or brown-colored water provided to customers. The Commission adopted this deadline in its January 2018 Order. Neither the Initial Decision nor the January 2018 Order cited any evidence in the record indicating that the one-year compliance period was sufficient to accomplish the designated task. This is not surprising considering that, at the time, it was impossible to know what recommendation HVUS management would implement to eliminate the rust or brown-colored water provided to customers. The January 2018 Order cited the need for an "objective guideline for compliance," but cited no evidence in the record to support the use of one year, as compared to two years or three years, as the appropriate "objective guideline for compliance." January 2018 Order p. 31.

b. The preponderance of the evidence introduced since January 2018 demonstrates that the one-year deadline was not sufficient

To eliminate the rust or brown-colored water, HVUS needs to either treat its water or develop an alternative source of supply. HVUS St. 1 p. 8; *see also*, HVUS Exhibit JMK-3 (Surrebuttal Testimony of OCA Witness Fought from November 3, 2015) pp. 11-12; HVUS Exhibit JMK-10 p. 312 (testimony of OCA Witness Fought in *HVUS Rate Case*). The April 2018 Engineer's Report included estimated implementation schedules demonstrating that, regardless of whether utility management opted to construct a water treatment plant or to interconnect with another water system, completion of the project would take well over twelve months. HVUS Exhibit JFL-2. As discussed in Section VI.C.2. above, those implementation schedules were properly prepared by an experienced professional acting on the information available to him at the time.

In January 2019, HVUS Witness Stinebiser updated his implementation schedules. The updated schedule for interconnecting with the JTWSA was 1,215 days (rather than the 1,535 days in the April 2018 estimate), and the updated schedule for constructing a water treatment plant was 1,245 days (rather than the 1,475 days in the April 2018 estimate). These updated schedules again demonstrated that neither a water treatment plant, nor an interconnection to an alternative water source, could have been started in April 2018 and been operational by April 18, 2019. HVUS St. 2 p. 15; HVUS Exhibit BRS-2.

HVUS introduced the testimony of two witnesses who are very familiar with HVUS's water system. Each witness stated that the one-year compliance deadline in Ordering Paragraph 8(1) was insufficient. HVUS St. 1 pp. 6-7; HVUS St. 2 pp. 8, 20. Mr. Larimer was asked "In your professional opinion, could HVUS have done anything that would have eliminated the rust or brown-colored water provided to customers between April 18, 2018 and April 18, 2019?" He answered: "No. To eliminate the rust or brown-colored water, HVUS needs to either treat its water or develop an alternative source of supply. In either case, implementation of a remedy takes longer than the time indicated." HVUS St. 1 p. 8.

Similarly, Mr. Stinebiser testified:

Q. In your professional opinion, could HVUS have done anything to "eliminate the rust or brown-colored water provided to customers" by April 18, 2019?

- A. No. It is my understanding that others, including the PUC, have concluded that the sequestering of iron and manganese has proven ineffective. Therefore, the options are to either treat the existing sources to filter out iron and manganese, or to replace the source of supply by connecting to another public water supply. In my opinion, neither construction of a treatment plant nor connection to another public water supply could have been accomplished by April 18, 2019.

HVUS St. 2 p. 19.

There is no evidence in the record whatsoever contradicting the estimated implementation schedules for the construction of an interconnection to the JTWSA. These implementation schedules demonstrate that, *even if* HVUS had begun implementing that project in April 2018, that project could not have been operational by April 18, 2019.

With respect to the construction of a water treatment plant, HVUS's ongoing project to construct a water treatment plant further demonstrates that the one-year compliance period was insufficient. HVUS held its Public Water Supply Permit pre-application meeting with DEP on May 17, 2019, and submitted its Public Water Supply Permit Application to DEP on November 27, 2019. HVUS St. 2 p. 27. HVUS received its permit from DEP on March 9, 2020. HVUS St. 2 p. 27. In February, 2020, HVUS's engineer estimated that the project could be completed during November, 2020. OCA Exhibit TLF-4. Generally, another three to eight weeks would be required to obtain an operating permit from DEP. Tr. 600.

The period from the pre-application meeting to the projected date of obtaining a DEP operating permit is nineteen to twenty months – well over the one-year deadline contained in Ordering Paragraph 8(1). Mr. Fought testified that this period “could be considerably reduced down to a few months, anyway, if you assume that the engineer[’s] schedule did not allow him to get on it right away.” Tr. 585. The Commission, of course, cannot make a decision based on an assumption. There is no evidence of record to demonstrate that the period between the Company's pre-application meeting and its submission of a Public Water Supply Permit Application was unreasonably long. Additionally, HVUS had no control over the period of time DEP required to review HVUS's application. Finally, even Mr. Fought must believe the

February 2020 schedule for completing the water treatment plant is reasonable, since he recommends that the Commission adopt a schedule almost identical to it. OCA St. 2 p. 11.⁹

The only evidence in the record that suggests HVUS could have started working on the water treatment plant project in April 2018, and completed it by April 2019, was testimony at the hearing by OCA Witness Fought. Tr. 551, 584. Mr. Fought admitted, however, that he was not aware of a single example of a water treatment plant project going from start of design to completion of construction within one year. Tr. 584. Moreover, Mr. Fought later admitted that an operating permit for the plant could not be obtained before the expiration of the one-year compliance deadline, Tr. 559, and that, without the operating permit, HVUS could not remove the rust or brown-colored water provided to customers. Tr. 564.

Mr. Fought's opinion that a water treatment plant could be constructed within one year of issuance of the April 2018 Engineer's Report is a bald assertion; it is not evidence on which the Commission may rely. *MidAtlantic Power Supply Association of Pennsylvania, supra*. Mr. Fought cited no record evidence supporting his conclusion that HVUS could have started the project to construct a water treatment plant in April 2018 and completed that plant by April 18, 2019.

Even if Mr. Fought's opinion was evidence, it is not credible evidence because it is inconsistent with Mr. Fought's own testimony in this proceeding. As discussed above, during the proceedings in this matter in 2015-2016, Mr. Fought stated that ten-eleven months would be a reasonable period for the Company to (i) authorize its engineer to begin designs, (ii) obtain bids, (iii) award contracts, and (iv) obtain necessary DEP permits.¹⁰ This leaves only one-two months for the Company to design the project, construct

⁹ It is worth noting that the Application was submitted on November 27, 2019 and the February 2020 schedule estimates that construction could be completed during November 2020 – about a year from the date that the application was submitted. Of course, this period does not include (a) the time necessary to design the project before even submitting an application to DEP, or (b) the time necessary to obtain an operating permit from DEP after completion of construction.

¹⁰ In interrogatory responses dated March 9, 2020, Mr. Fought stated that he continued to recommend that, within 60 days after receiving necessary DEP permits, HVUS should obtain contractor bids for the project and, within 60 days after receiving bids, HVUS should award the necessary contracts. HVUS Exhibit BRS-3 Interrogatory 7. Since HVUS received its DEP permit on March 9, 2020, HVUS Exhibit BRS-4, this would mean HVUS should award the necessary contracts by early July 2020. Mr. Fought subsequently changed his position in his written testimony, claiming that HVUS should select its contractor during May 2020. OCA St. 1 p. 17; OCA St. 1S p. 11.

the project, and obtain an operating permit after construction is complete. At the May 20, 2020 hearing, Mr. Fought changed his testimony, asserting that engineering design should take three months, obtaining the DEP permit should take three months, and construction should take six months. Tr. 555. Mr. Fought's changing opinions should be given little weight.

Significantly the May 2018 Order did not require HVUS to complete construction of a water treatment plant or interconnection with another water system by April 18, 2019; it required HVUS to eliminate the rust or brown-colored water provided to customers by April 18, 2019. Mr. Fought testified that HVUS will need to complete additional work *after* the water treatment plant is operational to eliminate the rust or brown-colored water provided to customers. Tr. 555. According to Mr. Fought, HVUS will also need to: (1) remove iron and manganese sediment from the Company's 250,000 gallon storage tank, (2) flush the distribution system, and (3) request that customers flush the water in their homes. OCA St. 1 p. 5; *see also*, Tr. 580. Mr. Fought testified that it would be reasonable to require HVUS to complete the removal of the iron and manganese sediment from the 250,000 gallon storage tank by July 31, 2021. OCA St. 1 p. 17; OCA St. 1-S p. 3. That date is *more than two years* after HVUS's pre-application meeting with DEP. Mr. Fought's testimony therefore provides further evidence that the one-year compliance deadline in Ordering Paragraph 8(1) was insufficient.

c. The preponderance of the evidence introduced over the entire course of this proceeding demonstrates that the one-year compliance deadline in Ordering Paragraph 8(1) was not sufficient

To satisfy its burden of proof, HVUS is required to establish, by a preponderance of the evidence, that the one-year compliance deadline is insufficient. *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 578 A.2d 600 (Pa. Cmwlth. 1990), *alloc. denied*, 602 A.2d 863 (Pa. 1992). To meet that standard, HVUS's evidence must be more convincing, by even the smallest amount, than that presented by any opposing party. *Se-Ling Hosiery, Inc. v. Margulies*, 70 A.2d 854 (Pa. 1950).

HVUS has satisfied this burden. The preponderance of the evidence introduced *over the entire course of this proceeding* demonstrates that *even if* HVUS had begun to build a water treatment plant or an interconnection to an alternative source of supply in April 2018, the Company could not have eliminated

the rust or brown-colored water provided to customers by April 18, 2019. Consequently, the May 2018 Order did not give HVUS the time “reasonably necessary to comply with the order.” 66 Pa. C.S. § 703(e).

E. Whether the Commission should grant the request of HVUS to extend the one-year compliance deadline

The initial question presented is whether the Commission should extend the compliance deadlines established in Ordering Paragraph 8 of the May 2018 Order. Ordering Paragraph 8(2) of the May 2018 Order does not need to be extended; as discussed above, HVUS timely complied with that deadline. However, HVUS respectfully submits that the ALJ should recommend, and the Commission should adopt, a modification of the compliance deadline in Ordering Paragraph 8(1). Consequently, HVUS will address the related question of how the Commission should modify that deadline.

1. Has HVUS satisfied the legal standards for modifying the Commission Order?

On October 18, 2018, HVUS filed its Petition to Amend, pursuant to 66 Pa. C.S. § 703(g) and 52 Pa. Code § 5.572(d). Section 5.572(d) states that a petition to amend may be filed at any time, in accordance with the requirements of 66 Pa. C.S. § 703(g), which provides:

(g) Rescission and amendment of orders.--The commission may, at any time, after notice and after opportunity to be heard as provided in this chapter, rescind or amend any order made by it.

In this proceeding, the Parties had notice and an opportunity to be heard on HVUS’s request for an amendment of the May 2018 Order. They not only had an opportunity to file Answers to HVUS’s Petition to Amend, they also had an opportunity to introduce evidence into the record in these proceedings.

The Commission’s January 2019 Order found that HVUS’s Petition to Amend failed to satisfy the standards established in *Duick*. In that case, the Commission stated:

We view the situation as follows:

1. A petition for rehearing, under the provisions of 66 Pa. C.S. § 703(f), properly must seek the reopening of the record for the introduction of additional evidence of some sort. As grounds therefore it must allege newly discovered evidence, not discoverable through the exercise of due diligence prior to the close of the record. *Public Utility Commission v. Reading Co.* (1975) 21 Pa. Cmwlt. 334, 338, 345 A.2d 311; *Mobilfone v. Pennsylvania Pub. Utility Commission* (1975) 24 Pa. Cmwlt. 243, 355 A.2d 611; *Abramson v. Pennsylvania Pub. Utility Commission* (1980) 489 Pa. 267, 414 A.2d 60.

2. A petition seeking reopening of the record (more properly one for rehearing) may be entertained as a petition for reconsideration, under the provisions of 66 Pa. C.S. § 703(g), if the newly discovered evidence, was not in existence, or was not discoverable through the exercise of due diligence, prior to the expiration of the time within which to file a petition for rehearing, under the provisions of 66 Pa. C.S. § 703(f). *Pennsylvania R. Co. v. Pennsylvania Pub. Service Commission* (1935) 118 Pa. Super. Ct. 380, 179 Atl. 850; *Beaver Valley Water Co. v. Pennsylvania Pub. Utility Commission* (1940) 140 Pa. Super. Ct. 297, 35 PUR NS 119, 14 A.2d 205; *Pennsylvania Dept. of Highways v. Pennsylvania Pub. Utility Commission* (1962) 197 Pa. Super. Ct. 350, 178 A.2d 820; *Crooks v. Pennsylvania Pub. Utility Commission* (1971) 1 Pa. Cmwlth. 583, 276 A.2d 364.

3. 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 said that “[p]arties . . . , cannot be permitted by a second motion to review and reconsider, to raise the same questions which were specifically considered and 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 or not addressed by the Commission. Absent such matters being presented, we consider it unlikely that a party will succeed in persuading us that our initial decision on a matter or issue was either unwise or in error.

As discussed in more detail below, in this proceeding, HVUS has satisfied the *Duick* standards. HVUS has raised new and novel issues that were not considered by the Commission previously. HVUS has demonstrated that it meets the criteria for an extension pursuant to 66 Pa. C.S. § 703(e) (permitting the Commission to extend the time for compliance for good cause shown) and 52 Pa. Code § 1.15(a)(1), which provides:

Except as otherwise provided by statute, whenever under this title or by order of the Commission, or notice given thereunder, an act is required or allowed to be done at or within a specified time, the time fixed or the period of time prescribed may, by the Commission, the presiding officer or other authorized person, *for good cause be extended upon motion made before expiration of the period originally prescribed* or as previously extended.

Id. (emphasis added). HVUS has good cause for the extension because the original one-year compliance deadline was insufficient.

Second, HVUS has raised issues that were not addressed by the Commission previously. The April 2018 Engineer’s Report included implementation schedules demonstrating that the one-year compliance period in Ordering Paragraph 8 of the January 2018 Order was not sufficient. The Commission did not

address this issue when it rendered the May 2018 Order amending Ordering Paragraph 8. The January 2019 Order directed that the instant hearings consider those implementation schedules. January 2019 Order p. 31.

Third, HVUS has introduced extensive evidence that did not exist, and therefore was not available to it, when the record closed in June, 2016. The preponderance of the evidence introduced over the course of this entire proceeding demonstrates that the one-year deadline in Ordering Paragraph 8(1) was not sufficient for HVUS to eliminate the rust or brown-colored water provided to customers. Additionally, HVUS has introduced evidence providing the Commission with reasonable assurances that subsequent compliance deadlines will be met.

2. Should the Commission modify the deadline of April 18, 2019?

(a) The deadline of April 18, 2019 was not sufficient and is not supported by substantial evidence

In Section VI.D.2.a. above, HVUS demonstrated that the one-year deadline in Ordering Paragraph 8(1) was not supported by any evidence when it was adopted in the September 2016 Initial Decision and the January 2018 Order. Prior to the issuance of the Initial Decision, no party even asked the Commission to establish a one-year deadline for eliminating the rust or brown-colored water provided to customers. At the time the one-year deadline was established, it was impossible for the Commission to know what recommended project Company management would select to achieve the stated objective. Consequently, it was impossible to know whether one year would give the Company the time “reasonably necessary to comply” with the Commission’s Order. While the Commission’s desire for an “objective compliance deadline” is understandable, there must be evidence in the record to support the selected “objective compliance deadline.” When the one-year compliance deadline was adopted, there was absolutely no evidence in the record to demonstrate that HVUS could eliminate the rust or brown-colored water provided to customers within one year of receiving the engineer’s report.

Additionally, as discussed in Section VI.D.2.b. above, in this proceeding, HVUS has introduced extensive evidence that did not exist, and so was not available to it, at the time of the proceedings in 2015-

2016. This evidence includes the April 2018 Engineer's Report, which was overlooked or not addressed by the Commission in rendering the May 2018 Order. In addition, HVUS introduced the testimony of Mr. Larimer (and the exhibits attached thereto) concerning the April 2018 Engineer's Report, the testimony of Mr. Stinebiser (and the exhibits attached thereto) concerning the April 2018 Engineer's Report and subsequent developments (e.g., additional engineering work he performed concerning HVUS's water system) and the testimony of Mr. Kettler (and the exhibits attached thereto) regarding the April 2018 Engineer's Report and subsequent developments (e.g., HVUS's on-going project to construct a water treatment plant). The OCA also introduced evidence that was not available in 2015-2016.

As discussed in Section VI.D.2.c. above, the preponderance of the evidence introduced over the entire course of this proceeding demonstrates that the one-year compliance deadline in Ordering Paragraph 8(1) of the May 2018 Order is not sufficient. If the Commission does not extend the deadline, HVUS would be subject to penalties for failing to meet a deadline that was impossible to meet. Therefore, the Commission should exercise its discretion to modify the deadline.

Put another way, the evidence introduced in this evidentiary hearing demonstrates that the one-year compliance deadline is not supported by substantial evidence.¹¹ If the Commission's May 2018 Order is not supported by substantial evidence, it is not valid and enforceable. It is in the public interest that the deadline be revised to be valid and enforceable.

(b) HVUS has satisfied the standards in 66 Pa. C.S. § 703(e) and 52 Pa. Code § 1.15(a)(1) for modifying the Commission's May 2018 Order

The Commission has never considered the argument that HVUS's request for an extension satisfies the requirements of 66 Pa. C.S. § 703(e) and 52 Pa. Code § 1.15(a)(1). Although HVUS's Petition to Amend did not explicitly reference this statute and regulation, the Petition to Amend clearly requested an

¹¹ In the January 2019 Order, p. 29, the Commission found that HVUS failed to satisfy the *Duick* standards, in part, because the Commission had already considered and rejected the argument that the one-year compliance deadline was arbitrary. In this proceeding, the Commission must consider this issue anew because additional evidence has been introduced on this issue. The evidence introduced *over the course of this entire proceeding* demonstrates that the one-year compliance deadline is arbitrary and is not supported by substantial evidence.

extension of a deadline established in a Commission Order in a complaint proceeding and claimed good cause for the extension (the implementation schedules in the April 2018 Engineer’s Report demonstrated that the May 2018 Order did not give the Company the time “reasonably necessary to comply” with the Commission Order). Petition to Amend pp. 1-2 and ¶¶ 2, 6, 10-12, 16, 18 and 20. These allegations sufficiently raised the issue of the applicability of Section 703(e) of the Code and Section 1.15(a)(1) of the Commission’s regulations, but the January 2019 Order did not address the issue.

Additionally, HVUS’s Petition to Amend complied with Section 1.15(a)(1) in that it was filed on October 18, 2018 (approximately six months before the expiration of the relevant compliance period). The Commission criticized HVUS for not filing the Petition to Amend sooner, January 2019 Order p. 30, but the Petition to Amend was timely filed pursuant to Section 1.15(a)(1).

In this proceeding, the preponderance of the evidence demonstrates good cause for the requested extension – the one-year compliance period was not sufficient for HVUS to eliminate the rust or brown-colored water provided to customers. The one-year deadline therefore did not give the Company a “reasonable opportunity to comply” with the Commission’s Order, and the Company has established good cause for an extension. 66 Pa. C.S. § 703(e); 52 Pa. Code § 1.15(a)(1). Therefore, consistent with that statute and regulation, as well as the 2018 Orders (that gave the Company time to comply with those Orders), the deadline in Ordering Paragraph 8(1) should be extended to give the Company a “reasonable opportunity to comply” with the 2018 Orders.¹²

¹² HVUS’s Petition to Amend should not be denied on the grounds that, as of the date of the order in this proceeding, HVUS has already had a reasonable opportunity to comply with Ordering Paragraph 8(1). First, the preponderance of the evidence demonstrates that a reasonable period for eliminating the rust or brown-colored water has not expired. The April 2018 Engineer’s Report estimated that more than four years would be needed to construct a water treatment plant, EADS’s January 2019 report estimated that more than three years would be necessary to construct a water treatment plant, and the period from HVUS’s pre-application meeting with DEP to Mr. Fought’s proposed deadline of July 31, 2020 for HVUS’s on-going water treatment plant project and related projects is more than twenty-six months. Second, HVUS requested an extension in October 2018 and, in January 2019, the Commission ordered hearings on that request pursuant to 66 Pa. C.S. 703(g). If HVUS is deemed ineligible for an extension at this time, the Company has been denied due process on its request for an extension. Finally, the evidence in this proceeding demonstrates that the one-year compliance deadline was insufficient. If that deadline is not extended, HVUS would be subject to penalties for failing to meet a deadline that was impossible to meet.

Of course, to give the Company a “reasonable opportunity to comply” with the Commission’s Orders, the Commission must establish a new deadline that is *after* the Commission issues its order in this proceeding. HVUS requested an extension approximately six months before the one-year compliance deadline expired and this proceeding involves a hearing on that request for an extension. 66 Pa. C.S. § 703(g). Granting the request for an extension, but establishing a deadline that has already passed, would serve no useful purpose; it would not give the Company a “reasonable opportunity to comply” with the Commission’s Order in the instant proceeding.

(c) HVUS has provided the Commission with reasonable assurances that subsequent compliance deadlines will be met

In the January 2019 Order, the Commission refused to exercise its discretion to extend the deadline in Ordering Paragraph 8(1), in part, because HVUS did not provide “assurances that subsequent compliance deadlines would be met.” January 2019 Order p. 31. At that time, HVUS had not determined whether it would build a water treatment plant or interconnect with an alternative source of supply, nor had HVUS developed a plan for financing that project. Petition to Amend p. 8.

In this proceeding, in contrast, HVUS has provided the Commission with reasonable assurances that subsequent compliance deadlines will be met. HVUS has demonstrated that it has decided to construct a water treatment plant and has made substantial progress toward completing that project. This evidence was not available to HVUS during the proceedings in this matter in 2015-2016.

As discussed above, in late 2018, HVUS and its engineers identified an existing water treatment plant in proximity to Hidden Valley that was no longer in use. HVUS and its engineers analyzed the equipment and concluded that it would work for HVUS. They met with DEP staff about the project twice, including a meeting in November, 2018. HVUS St. 3 p. 25; HVUS St. 2 p. 27. HVUS management bought the plant in late May, 2019. HVUS St. 3 p. 25. The plant is currently on site at Hidden Valley. HVUS St. 3 p. 26.

On June 20, 2019, HVUS signed an engineering agreement with EADS for design and permitting work for the construction of a water treatment facility at Hidden Valley to include equipment previously

utilized by Rolling Rock Farms. HVUS St. 2 p. 27. The Public Water Supply Permit Application for the project was submitted to DEP on November 27, 2019, and DEP issued the Public Water Supply Permit for construction of the project on March 9, 2020. HVUS St. 2 p. 27; HVUS Exhibit BRS-4. A February 2020 schedule for the project estimated that construction of the water treatment plant could be completed during November, 2020. OCA Exhibit TLF-4. Maintaining this schedule depends on many factors, including some outside the control of HVUS (such as the duration and impact of the COVID-19 Pandemic Emergency). HVUS St. 2 pp. 28-29. Nevertheless, HVUS plans on continuing its efforts to construct the water treatment plant while this case is pending. HVUS St. 2 p. 22.

In January 2019, the Company borrowed \$206,529 for engineering, legal and other expenses relating to the project. OCA Late-Filed Exhibit 1. As of the hearing on May 20, 2020, HVUS had already paid most of the engineering costs of the project. Tr. 510. HVUS management estimates that the cost of constructing the water treatment plant (the “sticks and bricks” portion of the project) will be approximately \$600,000, of which \$75,000-95,000 has already been invested. Tr. 510 and 533. In December 2019, HVUS borrowed \$400,000 to pay part of these costs. Tr. 519. HVUS management estimates that tariffed rates will provide the cash flow necessary to cover the remaining costs. Tr. 519-520.

In March 2020, HVUS requested bids for the construction of the water treatment plant. HVUS St. 3 p. 26. It received two bids. HVUS St. 3-R p. 3; Tr. 505. On April 17, 2020, HVUS obtained a waiver of Act 537 planning from DEP for the discharge of the Hidden Valley water treatment plant filter backwash water to HVUS Sewage Treatment Plant No. 1. HVUS St. 3-R p. 2; HVUS Exhibit BRS-6. HVUS has purchased some of the equipment that was not included in the bids, and has dug trenches for some of the lines that go to the plant. Tr. 507. On May 19, 2020, HVUS applied for a county minor land development approval, which is necessary before applying for a building permit. Tr. 506.

Significantly, HVUS’s recommendation in this case provides the Commission with additional assurances that HVUS will meet the new deadlines it has requested. HVUS recommends that the reporting requirement in Ordering Paragraph 17 of the May 2018 Order remain in effect while the plant is being constructed. This would enable the Commission to continue to monitor the Company’s progress on the

project. HVUS St. 2 p. 24. HVUS also recommends that the enforcement provisions in Ordering Paragraphs 21, 26 and 27 remain in effect to ensure that the project remains “on track” through final completion. *Id.* Finally, HVUS recommends that the Commission maintain (with conforming changes) the enforcement provisions found in Ordering Paragraphs 19 and 20 of the May 2018 Order. As a result, the Company continues to have a strong incentive to eliminate the rust or brown-colored water provided to customers in a timely manner.

The OCA speculates that the Company will suddenly walk away from the project after investing two years and thousands of dollars in the project. There is no evidence to support this speculation. To the contrary, the evidence clearly demonstrates that the Company has made substantial progress toward completing a water treatment plant and intends to see this project through to completion. In addition, in this proceeding, the Company has agreed to additional steps after the completion of the water treatment plant to eliminate the rust or brown-colored water provided to customers, as recommended by the OCA’s expert witness. See Section VI.E.3, below. In summary, in this proceeding, HVUS has provided the Commission with adequate assurances that subsequent compliance deadlines will be met.

(d) No Party has rebutted HVUS’s *prima facie* case supporting an extension of the one-year deadline in Ordering Paragraph 8(1)

The only other Party to introduce evidence in this proceeding was the OCA. Its contradictory testimony is not sufficient to rebut HVUS’s *prima facie* case for extending the deadline in Ordering Paragraph 8(1).

No OCA witness explicitly stated that the Commission should not extend the deadline in Ordering Paragraph 8(1). OCA Witness Eastman nevertheless suggested that HVUS may not have the financial resources necessary to complete the water treatment plant. OCA St. 2 p. 4; OCA St. 2S pp. 1-2. His recommended solution, however, was to deny the Company the very financial resources it needs to complete the project (by imposing a customer usage allowance and forcing HVUS to litigate a Section 529 Investigation immediately). OCA St. 2 pp. 5-6; OCA St. 2S pp. 4-6. This “solution” would only exacerbate the problem about which Mr. Eastman purports to be concerned.

Additionally, Mr. Eastman expressed concern about the rate impact of the project. OCA St. 2 pp. 4-5; OCA St. 2S p. 4. This testimony is irrelevant. The issue presented is whether the Commission should modify the compliance deadline in Ordering Paragraph 8(1). The water treatment plant will impact customers' rates regardless of the deadline in Ordering Paragraph 8(1). Additionally, Mr. Eastman's testimony is speculative. The Commission retains ultimate authority to set just and reasonable rates in a rate proceeding and it is impossible to know at this time how the Commission will exercise its rate-making authority. Finally, when the Commission issued the 2018 Orders, it surely knew that those orders would have rate implications for customers. That foreseeable result is no reason to deny HVUS's request for an extension of the deadline at this time.

Finally, OCA Witness Fought recommended that the Commission adopt a schedule by which HVUS would have until July 31, 2021 to complete the water treatment plant and associated work to eliminate the rust or brown-colored water provided to customers. OCA St. 1-S p. 11. OCA Witness Fought clearly recommends that the deadline in Ordering Paragraph 8(1) be extended. As a result, the OCA has not rebutted HVUS's *prima facie* case.

3. If the Commission extends the deadline, how should the Ordering Paragraphs in the January and May 2018 Orders be modified?

In its Petition to Amend, HVUS's primary recommendation was that the Commission establish deadlines based on key milestones in the design/construction/permitting process that are within HVUS's control. Petition to Amend p. 8. This recommendation was similar to the approach that the OCA advocated in its Main Brief, filed in this proceeding on January 20, 2016. HVUS St. 2 pp. 20-21; HVUS Exhibit JMK-4. Neither the OCA's original recommendation, nor the primary recommendation in HVUS's Petition to Amend, included a deadline for ultimate completion of the project.¹³ In the alternative, HVUS's Petition to Amend recommended that the one-year compliance deadline in Ordering Paragraph 8(1) be replaced

¹³ As noted in note 8 above, the OCA changed its position after the Initial Decision was issued.

with a four-year compliance deadline, based on the implementation schedules in the April 2018 Engineer's Report. Petition to Amend p. 9.

In his Direct Testimony, HVUS Witness Stinebiser explained that HVUS continues to offer a primary and a secondary recommendation. The secondary recommendation continues to be that the Commission replace the one-year deadline for eliminating the rust or brown-colored water provided to customers with a four-year deadline for achieving that objective, based on the implementation schedules in the April 2018 Engineer's Report, HVUS St. 2 p. 26, and the implementation schedules that Mr. Stinebiser developed in January 2019.¹⁴

HVUS's primary recommendation has changed, however, based on events occurring after the Commission entered its January 2019 Order. HVUS now recommends that the Commission order the Company to complete a specific project – the water treatment plant for which HVUS has received a public water supply permit. Additionally, HVUS's recommended milestones have changed to reflect the remaining steps in the process of designing/constructing/permitting that specific project. HVUS St. 2 p. 26.

In his Rebuttal Testimony, Mr. Stinebiser updated the recommendation of HVUS based on progress on the project. HVUS St. 2-R pp. 7-9. Several steps were removed from the recommendation he described in his Direct Testimony because those milestones had already been reached. Mr. Fought's Surrebuttal Testimony criticized this revised recommendation for failing to address the scenario in which HVUS never completes its water treatment plant. OCA St. 2-S p. 11. HVUS does not believe that scenario needs to be addressed, because it intends to complete the project. Nevertheless, Mr. Stinebiser modified his recommendation at the hearing to address this concern. Tr. 496.

¹⁴ Additionally, the new deadline in Ordering Paragraph 8(1) should be within a reasonable time *after* the Commission enters its final order in this proceeding. At this time, it is impossible to predict when the Commission will enter its Opinion and Order in this matter, whether any Party might request reconsideration of that decision, and when that decision on reconsideration might be entered.

As so modified, the Company's primary recommendation is to amend Ordering Paragraph 8 as follows:

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~~

(1) Hidden Valley Utility Services, L.P. ("HVUS") shall proceed with the construction of the water treatment plant for which it has received a public water supply permit, in order to ensure that customers receive adequate service from the improved water facilities, as follows:

a. Within thirty days after the entry of the Commission Order in this proceeding, HVUS shall award a contract to construct the water treatment plant. Within ten days after awarding this contract, Hidden Valley Utility Services, L.P., shall notify the Commission, all parties to this proceeding, and the Bureau of Technical Utility Services ("TUS").

b. Within ten days after construction of the water treatment plant is completed, HVUS shall notify the Commission, all parties to this proceeding, and the BTUS, and shall apply to DEP and all other appropriate agencies for final review and inspection.

c. Within ten days after receiving final approvals from DEP and all other appropriate agencies, HVUS shall notify the Commission, all parties to this proceeding, and the BTUS.

d. By the later of August 31, 2021 or thirty days after receiving final approvals from DEP and all other appropriate agencies, HVUS shall remove the iron and manganese sediment from its 250,000 gallon storage tank.

e. Within thirty days after removing the iron and manganese sediment from its 250,000 gallon storage tank, HVUS shall flush its distribution system and shall notify customers to flush the water in their homes to remove iron and manganese from the system.

f. HVUS shall not be liable for any failure to comply with any provision of this Ordering Paragraph 8(1), where such failure is wholly or partially due to circumstances occasioned by or in consequence of the COVID-19 pandemic, which are not reasonably within HVUS's control and which HVUS by the exercise of due diligence is unable to prevent or overcome.

g. Within ten days after abandoning construction of the water treatment plan for which it has received a public water supply permit, HVUS shall notify the Commission, all parties to this proceeding, and the BTUS.

(2) Within one (1) year from the date of the engineer's report, Hidden Valley Utility Services, L.P. shall reassess the need, size and cost of treatment plant to permanently solve the problems caused by iron and manganese.

...

19. That, within thirty days after the deadline set forth in Ordering Paragraph 8(1)(e), 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 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, within two months after the deadline set forth in Ordering Paragraph 19 or after receiving the notice described in Ordering Paragraph 8(1)(g) 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.

HVUS St. 2-R pp. 8-9; Tr. 497-498.

HVUS's primary recommendation calls for all deadlines to occur within a reasonable period *after* the Commission enters its final order in this proceeding, so that the Company has a "reasonable opportunity to comply" with the Commission's Order in this proceeding. This is consistent with 66 Pa. C.S. § 703(e) and the 2018 Orders, which gave the Company an opportunity to comply with the Commission's Orders. HVUS also respectfully submits that this recommendation is consistent with due process; a utility that is required to meet a deadline must have reasonable advance notice of that deadline in order to comply with it. At this time, it is unclear when the Commission's final order will be entered. HVUS recommends that the deadlines be established in a manner that ensures they will occur after the Commission's final order is entered.

The Commission's 2018 Orders acknowledge that construction is a long process involving many steps. For example, Ordering Paragraph 6 of the January 2018 Order instructed the independent engineer to prepare implementation schedules for "completion of the design, repairs or improvements, obtaining permits, obtaining bids, awarding contracts, and completion of construction/start of operation." By

establishing a deadline for various stages in this long process, rather than one deadline for completing the project, the Commission can ensure that the project stays “on track.” HVUS St. 2 p. 25. Significantly, HVUS’s primary recommendation calls for the Commission to set deadlines for milestones that are within HVUS’s control. HVUS should not be subject to penalties, for example, if DEP is delayed in issuing an operating permit. HVUS St. 2-R p. 10.

HVUS recommends that the Commission continue to require HVUS to submit status reports every sixty days, as currently required by Ordering Paragraph 17 of the May 2018 Order, enabling the Commission to monitor HVUS’s progress in completing the project. HVUS St. 3 p. 24. Additionally, HVUS’s primary recommendation requires HVUS to keep the Commission, TUS, and the other Parties to this proceeding advised of progress in meeting the required milestones.

HVUS’s primary recommendation is consistent with the 2018 Orders, which stress the need for an objective way of determining that HVUS is complying with those orders and the need for an appropriate enforcement mechanism in the event that HVUS does not comply with those orders. By setting objective deadlines for significant milestones, and utilizing the existing enforcement mechanisms in the 2018 Orders, HVUS’s primary recommendation satisfies both of these goals. HVUS St. 2 p. 25.

HVUS’s primary recommendation incorporates some of the tasks recommended by OCA Witness Fought (e.g., removing the iron and manganese sediment from the Company’s 250,000 gallon storage tank, flushing HVUS’s distribution system, and advising customers to flush the water in their homes). OCA St. 1 p. 5. HVUS agrees that these steps will help to eliminate the rust and brown-colored water provided to customers.

HVUS, however, disagrees with some of Mr. Fought’s recommendations, including his recommendation that the Company be *required* to follow the recommendation of its consulting engineer and/or its tank inspection contractor on whether to sandblast and repaint the interior of its water storage tank upon completion of the water treatment plant. OCA St. 2-S p. 9. It is the role of utility management, not an independent contractor, to decide whether to undertake a project. The Commission should be

particularly reluctant to require the Company to follow the recommendation of a private contractor who would benefit monetarily from recommending that additional work be completed.

Mr. Fought's recommendation is based on the report of a contractor who "suggested" that the interior of the water storage tank be sandblasted and repainted. OCA Exhibit TLF-7 p. 8; Tr. 582. There is nothing in the contractor's report that in any way demonstrates that the sandblasting and repainting of the storage tank is related to eliminating the rust or brown-colored water provided to customers. Mr. Fought admitted at the hearing that repainting the interior of the storage tank is a maintenance concern, not a water quality concern. Tr. 582. Since this proceeding concerns HVUS's request for an extension of the deadline for eliminating the rust or brown-colored water provided to customers, it is beyond the scope of this proceeding to recommend that the Company perform routine maintenance projects.¹⁵ For all of these reasons, HVUS submits that the Commission should reject Mr. Fought's recommendation regarding repainting the interior of the water treatment tank.

Finally, in an attempt to avoid future litigation over another extension of the deadline in Ordering Paragraph 8(1), HVUS's primary recommendation includes a "force majeure" provision that would be triggered if the COVID-19 Pandemic prevents HVUS from meeting any of the deadlines in the revised Ordering Paragraph 8(1). HVUS St. 2 p. 23.

The only other party to offer a recommendation for extending the deadline in Ordering Paragraph 8(1) is the OCA. The ALJ should not recommend, and the Commission should not adopt, the OCA's ambiguous recommendation. Mr. Fought's written testimony seems to recommend that the Commission establish deadlines for certain milestones in the construction process, including some deadlines that have already passed. OCA St. 1 p. 17; OCA St. 1S p. 11. At the hearing, Mr. Fought was asked "if the Commission would adopt your recommendation, how would the Commission enforce it? Would they enforce missing the April 2020 deadline, or any of these dates [that would pass before the Commission

¹⁵ For the same reasons, Mr. Fought's recommendation for annual flushing of the system in perpetuity, OCA St. 1 p. 8, is a routine maintenance item that should not be adopted by the Commission in this proceeding.

issues its Order] or just the July 2021 deadline?” He responded “I have no idea. That is a matter for the Commission.” Tr. 570. On re-direct, Mr. Fought stated that he was not recommending that the Commission adopt the milestones as enforceable deadlines; the important point was to ultimately resolve the problem by July 31, 2021. Tr. 574-75.

The Commission should modify Ordering Paragraph 8(1) in a manner that clearly notifies HVUS what it is required to do and when. This approach would provide the “objective compliance deadline” that the Commission sought in the January 2018 Order. January 2018 Order p. 31. The OCA’s ambiguous proposal would not produce such a result; it would contribute to additional litigation over whether HVUS has or has not complied with the Commission’s Order. Instead, the Commission should adopt HVUS’s detailed, specific recommendation for modifying Ordering Paragraph 8(1) based on significant milestones in the design/construction/permitting process.

F. Whether the Commission should impose penalties on HVUS at this time

This proceeding involves HVUS’s request to modify Ordering Paragraph 8(1) of the May 2018 Order based, in part, on the April 2018 Engineer’s Report required by Ordering Paragraph 6 of the January 2018 Order. Therefore, the question presented is whether HVUS should be penalized for failing to comply with Ordering Paragraph 6 of the January 2018 Order and/or Ordering Paragraph 8 of the May 2018 Order.

The April 2018 Engineer’s Report complied with Ordering Paragraph 6. Therefore, HVUS should not be penalized for violating Ordering Paragraph 6 of the January 2018 Order.

HVUS complied with the compliance deadline in Ordering Paragraph 8(2) of the May 2018 Order. The compliance deadline in Ordering Paragraph 8(1) should be replaced with a new deadline that is after the Commission enters its final order on HVUS’s Petition to Amend. If the Commission grants this request, HVUS would not be in violation of Ordering Paragraph 8. Therefore, HVUS should not be penalized for violating Ordering Paragraph 8 of the May 2018 Order.

1. Should the Commission impose penalties on HVUS for failing to comply with Ordering Paragraph 6 of the January 2018 Order?

Even if the ALJ and the Commission find that the April 2018 Engineer's Report was "deficient" in some respect, a civil penalty, customer refund or usage allowance should not be imposed at this time; the factors in 52 Pa. Code § 69.1201 weigh against the imposition of any penalty. Moreover, the ALJ should not recommend, and the Commission should not deny, HVUS's request for an extension of the compliance deadline in Ordering Paragraph 8(1) as a penalty for a "deficiency" in the April 2018 Engineer's Report.

a. The factors in 52 Pa. Code § 69.1201 weigh against imposing a civil penalty at this time

On balance, the ten factors in the Commission's statement of policy at 52 Pa. Code § 69.1201 ("Factors and standards for evaluating litigated and settled proceedings involving violations of the Public Utility Code and Commission regulations") weigh against imposing a civil penalty. In this case, the most important factor is "other relevant factors." 52 Pa. Code § 69.1201(c)(10). HVUS is currently in the process of building a water treatment plant to eliminate the rust or brown-colored water provided to customers. It has also proposed performing additional, related projects to achieve that objective. Imposing a civil penalty on HVUS at this time could hamper the Company's ability to complete those projects in a timely manner, which would not be in the public interest.

In its January 2018 Order, the Commission gave the Company time to comply with its order pursuant to 66 Pa. C.S. § 703(e). In addition, it refused to impose civil penalties on HVUS because such remedies could hamper the Company's ability to make the improvements required by the Commission. January 2018 Order pp. 24 and 25. There is no reason for the Commission to change course at this point, particularly considering that the Company has provided the Commission with reasonable assurances that it will comply with a subsequent compliance deadline. The Commission should not deny HVUS the resources it needs to complete the on-going project to provide its customers with better water. If the Company fails to complete its ongoing project to construct a water treatment plant and related projects in a timely manner, Ordering Paragraph 20 of the May 2018 Order provides a procedure for the Commission to impose penalties on HVUS at that time.

Another factor weighing against the imposition of a penalty is “[w]hether the conduct was of a serious nature,” such as willful fraud or misrepresentation. 52 Pa. Code § 69.1201(c)(1). There is no evidence in this case that the April 2018 Engineer’s Report was “deficient” in any respect due to willful fraud or misrepresentation. Similarly, there is no evidence that the engineer’s report was intentionally “deficient” in any respect. 52 Pa. Code § 69.1201(c)(3) therefore also weighs against imposing a penalty on HVUS at this time.

Additionally, 52 Pa. Code § 69.1201(c)(7) weighs against any penalty. There is no evidence of bad faith, active concealment of violations or attempts to interfere with a Commission investigation in connection with the April 2018 Engineer’s Report. To the contrary, HVUS filed its engineer’s report with the Commission as a public document in a timely manner. Moreover, in reliance on that report, the Company filed a Petition to Amend Ordering Paragraph 8(1) approximately six months before the deadline established in that Ordering Paragraph.

52 Pa. Code § 69.1201(c)(2) (regarding the seriousness of the consequences of the conduct) weighs against the imposition of a penalty in this case. As discussed several times above, the one-year compliance deadline in Ordering Paragraph 8(1) was insufficient; no “deficiency” in the April 2018 Engineer’s Report caused HVUS to be unable to meet that deadline.

Similarly, no customers were affected by a “deficiency” in the April 2018 Engineer’s Report, since no such “deficiency” caused HVUS to be unable to meet the one-year compliance deadline in Ordering Paragraph 8(1). 52 Pa. Code § 69.1201(c)(5) (regarding the number of customers affected by the violation) therefore also weighs against the imposition of a penalty in this case.

52 Pa. Code § 69.1201(c)(4) does not weigh either for or against a penalty. That section asks “[w]hether the regulated entity made efforts to modify internal practices and procedures to address the conduct at issue and prevent similar conduct in the future.” The instant case involves an independent engineer’s report that was provided to the president of the utility, who is not an engineer. The engineer’s report was a one-time requirement established in the January 2018 Order. There is no evidence in the record

as to how the Company could or should have modified its internal practices and procedures to address any alleged “deficiency” in the April 2018 Engineer’s Report in order to prevent similar conduct in the future.

Neither does 52 Pa. Code § 69.1201(c)(9) (concerning prior Commission decisions in similar cases) weigh for or against a penalty in this proceeding. HVUS’s research has not found any cases in which a public utility was ordered to obtain the recommendations of an independent third party engineer within a specified time period, but the engineer’s report was found to be “deficient.”*

52 Pa. Code § 69.1201(c)(6) (compliance history of the Company) weighs in favor of a penalty because the January 2018 Order found the Company in violation of 66 Pa. C.S. § 1501. Similarly, 52 Pa. Code § 69.1201(c)(8) (amount of fine necessary to deter future violations) weighs in favor of a penalty to deter future violations.

Nevertheless, on balance, it is respectfully submitted that the ten factors listed in 52 Pa. Code § 69.1201(c) weigh against imposing a civil penalty on HVUS at this time, in the event that the Commission finds that the April 2018 Engineer’s Report was “deficient” in some respect. The policy of the law should be to encourage good service, not to destroy the utility. *Pa. Pub. Util. Comm’n, et al. v. Lake Latonka Water Company*, 1989 Pa. PUC LEXIS 231 *45 (Recommended Decision of Administrative Law Judge Herskovitz, Final Order entered October 16, 1989). HVUS is trying to provide customers with better quality water by constructing a water treatment plant and completing related projects. Imposing a penalty at this time would hamper those efforts to the detriment of both the Company and its customers.

b. In the event that a civil penalty is imposed, the Commission cannot impose a civil penalty of more than \$1,000 per violation

Section 3301(a) of the Code allows the Commission to impose a civil penalty of up to \$1,000 per violation if a public utility fails to comply with a Commission Order. The \$1,000 civil penalty may be imposed for each day of a continuing violation, 66 Pa. C.S. § 3301(b), but the courts have held that continuing offenses are proscribed activities that are of an ongoing nature and cannot be feasibly segregated into discrete violations so as to impose separate penalties. *Newcomer Trucking, Inc. v. Pub. Util. Comm’n*, 531 A.2d 85 (Pa. Cmwlth. 1987). Here, HVUS was required to file one engineer’s report and did so timely.

If the ALJ or the Commission concludes that the April 2018 Engineer's Report was "deficient" in some respect, it was a one-time violation, rather than a violation of an on-going nature. Consequently, the maximum civil penalty for each "deficiency" is \$1,000.

c. The Commission should not order a customer refund or usage allowance at this time

For the same reasons discussed above, in connection with the possible imposition of a civil penalty, the Commission should not order HVUS to give customers a refund or usage allowance at this time. Imposing such a penalty on HVUS at this time could hamper the Company's ability to complete its on-going project to construct a water treatment plant and complete related projects to provide better water to customers. If the Company fails to complete those projects in a timely manner, Ordering Paragraph 20 of the May 2018 Order provides the Commission with a procedure for ordering customer refunds or usage allowances at that time.

d. HVUS's request to extend the compliance deadline in Ordering Paragraph 8 of the May 2018 Order should not be denied as a penalty for violating Ordering Paragraph 6 of the January 2018 Order

As discussed in Section VI.E. above, HVUS has carried its burden of satisfying the legal tests for amending the one-year compliance deadline in Ordering Paragraph 8(1). Among other things, HVUS has established that it filed a written request for an extension before the applicable deadline and had good cause for the requested extension – the one-year compliance deadline in Ordering Paragraph 8(1) of the May 2018 Order was insufficient. In this proceeding, HVUS did not rely exclusively on the April 2018 Engineer's Report; it introduced extensive additional evidence from the period 2018-2020 to demonstrate that *even if* HVUS had begun to build a water treatment plant or an interconnection to an alternative source of water in April 2018, the Company could not have eliminated the rust or brown-colored water provided to customers by April 18, 2019. The Commission should not deny the requested extension as a penalty for any "deficiency" in the April 2018 Engineer's Report.

2. Should the Commission impose penalties on HVUS for failing to comply with Ordering Paragraph 8 of the May 2018 Order?

The Commission should not impose penalties on HVUS for failing to comply with Ordering Paragraph 8(2) because HVUS complied with that deadline. By April 18, 2019, HVUS management had: (a) reassessed the need, size and cost of the treatment plant to permanently solve the problems caused by iron and manganese; (b) decided to install a specific water treatment plant; and (c) took several steps toward accomplishing that objective.

Nor should the Commission impose penalties on HVUS at this time for failing to comply with the one-year compliance deadline in Ordering Paragraph 8(1). Ordering Paragraph 20 of the May 2018 Order describes the procedure to be followed “[i]f the recommended repairs, modifications, rehabilitative and maintenance procedures have not been accomplished within the time frame structured herein.” According to that paragraph, if HVUS would improperly fail to meet the compliance deadline in Ordering Paragraph 8(1):

... 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 instant proceeding is not the proceeding described above. The instant proceeding is an evidentiary hearing pursuant to 66 Pa. C.S. § 703(g) to determine whether the Commission should grant HVUS’s Petition to Amend. January 2019 Order; *HVUS v. PUC, supra*. As a result, the instant proceeding did not offer HVUS the opportunity to present evidence regarding the adequacy of the water system, the quality of the water, and the other issues described in Ordering Paragraph 20 of the May 2018 Order.

Additionally, the Commonwealth Court’s Opinion made very clear that the Commission’s order in the instant proceeding, granting or denying HVUS’s Petition to Amend, would be a final order subject to appeal. HVUS Exhibit JMK-12 p. 8. Only if and when the Commission and the courts issue a final order

denying HVUS's Petition to Amend can a penalty proceeding commence pursuant to Ordering Paragraph 20.

VII. CONCLUSION AND REQUEST FOR RELIEF

WHEREFORE, for all of the foregoing reasons, HVUS respectfully requests that the Honorable Administrative Law Judge Katrina L. Dunderdale recommend, and the Commission order:

(1) That the "Petition of Hidden Valley Utility Services, L.P. for an Amendment of the Opinion and Order Entered May 3, 2018," filed on October 18, 2018, be granted;

(2) That the Opinion and Order entered in this matter on May 3, 2018 be amended as follows:

~~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~~

(1) Hidden Valley Utility Services, L.P. ("HVUS") shall proceed with the construction of the water treatment plant for which it has received a public water supply permit, in order to ensure that customers receive adequate service from the improved water facilities, as follows:

a. Within thirty days after the entry of the Commission Order in this proceeding, HVUS shall award a contract to construct the water treatment plant. Within ten days after awarding this contract, Hidden Valley Utility Services, L.P., shall notify the Commission, all parties to this proceeding, and the Bureau of Technical Utility Services ("TUS").

b. Within ten days after construction of the water treatment plant is completed, HVUS shall notify the Commission, all parties to this proceeding, and the BTUS, and shall apply to DEP and all other appropriate agencies for final review and inspection.

c. Within ten days after receiving final approvals from DEP and all other appropriate agencies, HVUS shall notify the Commission, all parties to this proceeding, and the BTUS.

d. By the later of August 31, 2021 or thirty days after receiving final approvals from DEP and all other appropriate agencies, HVUS shall remove the iron and manganese sediment from its 250,000 gallon storage tank.

e. Within thirty days after removing the iron and manganese sediment from its 250,000 gallon storage tank, HVUS shall flush its distribution system and shall notify customers to flush the water in their homes to remove iron and manganese from the system.

f. HVUS shall not be liable for any failure to comply with any provision of this Ordering Paragraph 8(1), where such failure is wholly or partially due to circumstances occasioned by or in consequence of the COVID-19 pandemic, which are not reasonably within HVUS's control and which HVUS by the exercise of due diligence is unable to prevent or overcome.

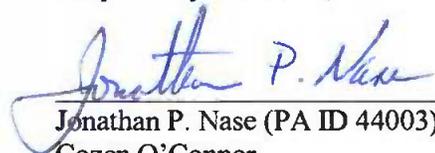
g. Within ten days after abandoning construction of the water treatment plan for which it has received a public water supply permit, HVUS shall notify the Commission, all parties to this proceeding, and the BTUS.

(2) Within one (1) year from the date of the engineer's report, Hidden Valley Utility Services, L.P. shall to-reassess the need, size and cost of treatment plant to permanently solve the problems caused by iron and manganese.

19. That, within thirty days after the deadline set forth in Ordering Paragraph 8(1)(e), 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 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, within two months after the deadline set forth in Ordering Paragraph 19 or after receiving the notice described in Ordering Paragraph 8(1)(g) 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.

Respectfully submitted,



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Date: June 30, 2020

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

APPENDIX A. PROPOSED FINDINGS OF FACT

The Parties

1. HVUS is a public utility that owns and operates a water treatment and distribution system and a wastewater collection and treatment system in Somerset County, Pennsylvania. HVUS St. 3 p. 3.

2. OCA is a Commonwealth agency created by Act 161 of 1976 to represent the interests of consumers before the Commission. 71 P.S. § 309-2.

3. I&E serves as the Commission's prosecutory bureau for the purposes of representing the public interest in ratemaking and service matters, and enforcing compliance with the Pennsylvania Public Utility Code ("Code") and Commission Regulations and Orders. *See Implementation of Act 129 of 2008; Organization of Bureaus and Offices*, Docket No. M-2008-2071852 (Order entered August 11, 2011).

4. Sharon Howard-Frieri is a customer of HVUS. *Sharon Howard-Frieri v. Hidden Valley Utility Services, L.P.*, Docket No. C-2019-3008093 (Third Corrected Interim Order dated November 20, 2019).

5. Intervenors Robert J. Kollar, and Kellie A. Kuhleman are customers of HVUS. *McCloskey v. Hidden Valley Utility Services, L.P.*, Docket Nos. C-2014-2447138 and C-2014-2447169 (Initial Decision issued September 9, 2016), Findings of Fact 6 and 7.

HVUS's Water System

6. HVUS's water system currently serves 1,160 residential customers, 16 non-residential customers, and 54 private fire protection service customers, as well as availability customers. HVUS St. 3-R pp. 8-9.

7. Hidden Valley is a seasonal community. HVUS St. 2-R p. 5. Many of HVUS's customers are part-time residents. OCA St. 1 p. 11 n. 5.

8. The HVUS water system consists of two groundwater wells with Well No. 1 being the primary well and Well No. 2 serving as an alternate source. The wells pump to treatment facilities located at the same site occupied by HVUS Sewage Treatment Plant No. 1. At this site, the groundwater is treated with a sequestering chemical for iron and manganese in the well water, followed by the addition of sodium hypochlorite for disinfection. The treated water passes through underground chlorine contact tanks, and then flows to the clearwell building where high service pumps deliver it into the distribution system, with system finished water storage at a 250,000 gallon water storage tank. HVUS St. 2 pp. 2-3; HVUS St. 1 p. 2.

9. In July 2008, the Company received a permit from DEP to treat its water using sequestration. OCA St. 1 p. 11.

The April 2018 Engineer's Report

10. On April 18, 2018, HVUS filed with the Commission the April 2018 Engineer's Report regarding the Company's water system. Copies were provided to the Bureau of Technical Utility Services ("TUS") and the individuals and organizations who were Parties to this proceeding at that time. HVUS Exhibit JFL-2.

11. The April 2018 Engineer's Report was completed in part by CME Engineering LP ("CME") and in part by The EADS Group ("EADS"). HVUS St. 1 p. 5 and HVUS St. 2 p. 6.

12. CME is an independent engineering firm that performs work for HVUS. HVUS St. 1 p. 5.

13. CME was hired to evaluate alternatives for removing iron and manganese from the water in the Company's system. HVUS St. 1 p. 3.

14. EADS is an independent engineering firm that performs work for HVUS. HVUS St. 2 p. 6.

15. EADS completed the tables entitled "Estimated Schedule for Hidden Valley connection to Bakersville Water System," "Estimated Schedule for upgrades to Hidden Valley Water Treatment Plant"

and “Hidden Valley Utility Services, L.P. Water Service Meter Breakdown” in the April 2018 Engineer’s Report. HVUS St. 2 p. 4.

16. HVUS has an adequate supply of water for its customers. HVUS St. 3 p. 5.

17. The April 2018 Engineer’s Report recommended that the Company implement any one of four projects for eliminating the rust or brown-colored water provided to customers. Two recommended projects involved the construction of a water treatment plant and two recommended projects involved the construction of an interconnection to an alternative source of water supply. HVUS Exhibit JFL-2.

18. The April 2018 Engineer’s Report did not direct the Company to choose one recommended project over the other three. HVUS St. 1 p. 5.

19. The April 2018 Engineer’s Report recommended the construction of a conventional iron filter water treatment plant because that is a very common treatment method for removing iron and manganese. The report recommended the WesTech Type II Aeralater system because it is a more innovative technology. HVUS St. 1 pp. 8-9.

20. The April 2018 Engineer’s Report recommended interconnections with the JTWSA and the SSMA systems because they are geographically the closest public water supply systems to HVUS. HVUS St. 1 pp. 8-9.

21. The April 2018 Engineer’s Report included a cost analysis for each of the four recommended projects in that report. Those estimates ranged from \$852,000 to \$2,389,000. HVUS Exhibit JFL-2.

22. John F. Larimer, who prepared the cost estimates in the April 2018 Engineer’s Report, has extensive experience in developing such estimates. HVUS St. 1 p. 9.

23. Mr. Larimer’s cost estimates were based on filter equipment vendors, estimated labor costs to install the equipment for similar projects, and his experience. Operations and maintenance costs were estimated based on typical costs for similar plants. The RE Means estimating prices were also considered. HVUS St. 1 p. 9.

24. In October, 2018, Bradley R. Stinebiser, P.E., updated the cost estimates prepared by Mr. Larimer. Mr. Stinebiser has extensive experience on drinking water projects, including extensive experience in the preparation of cost estimates. HVUS St. 2 pp. 16-17.

25. In January 2019, Mr. Stinebiser again updated the cost estimates of Mr. Larimer. Mr. Stinebiser's January 2019 estimates were based on more recent information than was available to Mr. Larimer in April 2018. HVUS Exhibit BRS-2.

26. Mr. Stinebiser developed his own list of work items and quantities. He included some items in his estimate that were not included in Mr. Larimer's estimates. For the water treatment plant project, this included work items and costs for handling backwash wastewater. HVUS St. 2 p. 17; Tr. 494.

27. The April 2018 Engineer's Report included one implementation schedule that applied to both recommendations for building a water treatment plant. HVUS Exhibit JFL-2; HVUS St. 2 p. 10.

28. The April 2018 Engineer's Report included an implementation schedule for constructing a connection from HVUS to the Bakersville Water System (a/k/a the JTWSA). HVUS Exhibit JFL-2; HVUS St. 2 p. 9, HVUS St. 2-R p. 2.

29. The April 2018 Engineer's Report did not include an implementation schedule for connecting the HVUS system to the SSMA system. HVUS Exhibit JFL-2. CME's cost estimates indicated that connecting the HVUS water system to the SSMA water system would cost more than a million dollars more than any other recommendation. HVUS Exhibit JFL-2. Consequently, HVUS management decided not to pursue that recommendation. HVUS St. 3 p. 11.

30. The estimated implementation schedules in the April 2018 Engineer's Report were prepared by Mr. Stinebiser, an engineer with extensive experience in developing such schedules. HVUS St. 2 p. 8.

31. In preparing the estimated implementation schedules, Mr. Stinebiser identified the milestones that had to be met, the logical sequence of these milestones, and the estimated reasonable amounts of time in which the milestones could be completed. HVUS St. 2 p. 10.

32. Each estimated implementation schedule included each of the following steps; completion of the design of the repairs or improvements; obtaining permits; obtaining bids; awarding contracts; and completion of construction/start of operation. HVUS Exhibit JFL-2.

33. Projects were at the conceptual stage at the time the estimated implementation schedules were prepared. Consequently, few design details were developed at that time. HVUS St. 2 p. 10.

34. The estimated implementation schedules in the April 2018 Engineer's Report estimated that 1,475 days would be necessary for HVUS to construct a water treatment plant and 1,535 days would be necessary to connect to an alternative source of supply. HVUS Exhibit JFL-2.

35. Mr. Larimer subsequently reviewed the implementation schedules prepared by Mr. Stinebiser and concluded that they were reasonable. HVUS St. 1 p. 6.

36. In January 2019, Mr. Stinebiser updated his implementation schedules. The updated schedule estimated that 1,215 days would be necessary for interconnecting with the JTWSA and 1,245 days would be necessary for constructing a water treatment plant. HVUS St. 2 p. 15; HVUS Exhibit BRS-2.

37. The April 2018 Engineer's Report included a schedule for the replacement and/or testing of customer meters that was designed to result in compliance with 52 Pa. Code § 65.8(b) by April 30, 2019. HVUS Exhibit JFL-2; HVUS St. 2 p. 7.

Events Since April 2018

38. In late 2018, HVUS and its engineers identified an existing water treatment plant in proximity to Hidden Valley that was no longer in use. HVUS and its engineers analyzed the equipment and concluded that it would work for HVUS. They met with staff from the Pennsylvania Department of Environmental Protection ("DEP") on November 7, 2018 to review the system and to ensure that DEP agreed with the treatment process. In that meeting, it was decided that the treatment plant was sufficient for the treatment of iron and manganese at Hidden Valley. HVUS St. 3 p. 25; HVUS St. 2 p. 27.

39. The proposed water treatment plant is expected to remove iron and manganese from the water being delivered from the treatment plant. HVUS St. 2 p. 28.

40. HVUS management made an offer to purchase the water treatment plant in early 2019, and the contract to purchase the equipment was signed in late May, 2019. HVUS St. 3 p. 25.

41. The water treatment plant has been moved to Hidden Valley for installation. HVUS St. 3 p. 26.

42. HVUS and its engineers held a second meeting with DEP, which served as the Public Water Supply Permit pre-application meeting with DEP. This meeting was held in Pittsburgh on May 17, 2019. HVUS St. 2 p. 27.

43. On June 20, 2019, HVUS signed an engineering agreement with EADS for design and permitting work for the construction of a water treatment facility at Hidden Valley to include the equipment previously utilized by Rolling Rock Farms. HVUS St. 2 p. 27.

44. HVUS applied for a Public Water Supply Permit from DEP on November 27, 2019. HVUS St. 2 p. 27.

45. HVUS filed revisions to its Public Water Supply Permit Application, including a schedule for completing the water treatment plant. That schedule estimated that HVUS could complete construction of its water treatment plant in November 2020. Exhibit TLF-4.

46. HVUS did not intend the February 2020 schedule to be a binding, enforceable schedule. Tr. 495.

47. DEP does not treat the schedule in a Public Water Supply Permit Application as a binding schedule and does not impose penalties on permittees for failing to meet that schedule. Tr. 495.

48. Mr. Stinebiser, who developed the February 2020 schedule, would have prepared a different schedule if he had known that the schedule would be used as a binding, enforceable schedule. He would have included additional time for unforeseen developments. Tr. 496.

49. Maintaining the February 2020 schedule depends on many factors, including some outside the control of HVUS (such as the duration and impact of the COVID-19 Pandemic Emergency). HVUS St. 2 pp. 28-29.

50. The February 2020 schedule did not estimate the date on which DEP would issue an operating permit for the water treatment plant. OCA Exhibit TLF-4.

51. A water treatment plant cannot be used to supply water to customers until after DEP issues an operating permit for the facility. Tr. 597-598.

52. Generally, three to eight weeks can pass from the time DEP is asked to inspect a completed water treatment plant to the time that DEP issues an operating permit for that facility. Tr. 600.

53. On March 9, 2020, DEP issued a Public Water Supply Permit to HVUS for construction of a water treatment plant. HVUS St. 2 p. 27; HVUS Exhibit BRS-4.

54. HVUS plans on continuing its efforts to construct the water treatment plant while this case is pending. HVUS St. 2 p. 22.

55. In March 2020, HVUS requested bids for the construction of the water treatment plant. HVUS St. 3 p. 26. It received two bids, which it is currently reviewing. HVUS St. 3-R p. 3; Tr. 505.

56. On April 17, 2020, HVUS obtained a waiver of Act 537 planning from DEP for the discharge of the Hidden Valley water treatment plant filter backwash water to HVUS Sewage Treatment Plant No. 1. HVUS St. 3-R p. 2; HVUS Exhibit BRS-6.

57. On May 19, 2020, HVUS applied for a county minor land development approval, which is necessary to apply for a building permit. Tr. 506.

58. HVUS has purchased some of the equipment that was not included in the bids, and has dug trenches for some of the lines that go to the plant. Tr. 507.

59. In January 2019, the Company borrowed \$206,529 for engineering, legal and other expenses relating to the project. OCA Late-Filed Exhibit 1.

60. As of the hearing on May 20, 2020, HVUS had already paid most of the engineering costs of the project. Tr. 510.

61. HVUS management estimates that the cost of constructing the water treatment plant (the “sticks and bricks” portion of the project) will be approximately \$600,000, of which \$75,000-\$95,000 has already been invested. Tr. 510 and 533.

62. In December 2019, HVUS borrowed another \$400,000 to pay part of the remaining costs of constructing the water treatment plant. Tr. 519.

63. HVUS management estimates that tariffed rates will provide the cash flow necessary to cover the remaining costs of constructing the water treatment plant. Tr. 519-520.

The Sufficiency of the One-Year Compliance Deadline in Ordering Paragraph 8(1)

64. In his Direct Testimony, submitted on July 8, 2015, OCA Witness Fought proposed that HVUS's engineer be required to complete a report within ninety days of the entry of the Commission's Order. He recommended that this report include a schedule for implementing recommendations, but Mr. Fought did not recommend establishing any deadline for completing the implementation of those recommendations. HVUS Exhibit JMK-2.

65. In his Surrebuttal Testimony, Mr. Fought again recommended that HVUS be required to complete an engineering study within 90 days of the entry of the Commission's order. He also recommended that HVUS's engineer be authorized to begin designs within 60 days after the completion of the engineering study. He recommended that the rest of the schedule be based on the company's engineering study, but he believed it would be reasonable for the company to obtain bids 60 days after obtaining all permits, and to award contracts 60 days after obtaining bids. Again, Mr. Fought did not recommend a deadline for ultimate completion of the project. See HVUS Exhibit JMK-3.

66. The OCA's Main Brief asked the Commission to adopt Mr. Fought's proposal. HVUS Exhibit JMK-4.

67. In interrogatory responses dated March 9, 2020, Mr. Fought stated that he continued to recommend that, within 60 days after receiving necessary DEP permits, HVUS should obtain contractor bids for the project and, within 60 days after receiving bids, HVUS should award the necessary contracts. HVUS Exhibit BRS-3 Interrogatory 7.

68. Mr. Fought acknowledged at the hearing in 2015 that four-five months would be necessary for obtaining the DEP Public Water Supply Permit, and that additional zoning or other permits might be necessary. Tr. 336-37.

69. When, in January 2018, the Commission adopted the one-year compliance deadline for HVUS to eliminate the rust or brown-colored water provided to customers, the Commission could not have known the project that HVUS would implement to achieve this objective. HVUS St. 1 p. 18.

70. To eliminate the rust or brown-colored water, HVUS needs to either treat its water or develop an alternative source of supply. HVUS St. 1 p. 8; *see also*, HVUS Exhibit JMK-3 (Surrebuttal Testimony of OCA Witness Fought from November 3, 2015) pp. 11-12; HVUS Exhibit JMK-10 p. 312 (testimony of OCA Witness Fought in *HVUS Rate Case*).

71. Mr. Stinebiser opined that HVUS could not build a water treatment plant or develop an alternative source of water within one year. HVUS St. 2 p. 19.

72. Mr. Larimer opined that HVUS could not build a water treatment plant or develop an alternative source of water within one year. HVUS St. 1 p. 8.

73. At the hearing of May 20, 2020, OCA Witness Fought testified that HVUS could not have started to design the water treatment plant and received an operating permit from DEP for that plant within twelve months. Tr. 559.

APPENDIX B. PROPOSED CONCLUSIONS OF LAW

1. This Commission has jurisdiction over the subject matter and parties to this proceeding. 66 Pa. C.S. § 701.

2. The Commission may amend any order made by it, following notice and opportunity to be heard. 66 Pa. C.S. § 703(g) and 52 Pa. Code § 5.572(d).

3. The Parties to this proceeding had notice of, and an opportunity to be heard on, the Petition of Hidden Valley Utility Services, L.P. for an Amendment of the Opinion and Order Entered May 3, 2018.

4. A petition to amend a final Commission Order may only be granted judiciously and under appropriate circumstances, because such an action results in the disturbance of final orders. *Application of Susquehanna Valley Limousine, Inc.*, Docket Nos. A-2013-2395502 and A-00110765 (Order entered November 13, 2014) p. 4.

5. When considering a Petition to Amend a Commission Order, the Commission considers the standards established in *Duick v. Pennsylvania Gas and Water Company*, 56 Pa. P.U.C. 553 (Order entered December 17, 1982). While a petitioner may raise any matter designed to convince the Commission to amend or rescind a prior order, the Commission primarily considers new and novel arguments, issues or matters that appear to have been overlooked or not addressed previously, and evidence that did not exist or was not previously available to the parties despite the exercise of due diligence.

6. HVUS met its burden of raising new and novel issues, issues or matters that appear to have been overlooked or not previously addressed, and introducing evidence that did not exist at the time the record in this matter closed on June 8, 2016.

7. As the party seeking affirmative relief from the Commission, HVUS bears the burden of proof. 66 Pa. C.S. § 332(a).

8. To establish a sufficient case and satisfy its burden of proof, HVUS must show, by a preponderance of the evidence, that it is entitled to the relief it is seeking. *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 578 A.2d 600 (Pa. Cmwlth. 1990), *alloc. denied*, 602 A.2d 863 (Pa. 1992). Its evidence

must be more convincing, by even the smallest amount, than that presented by any opposing party. *Se-Ling Hosiery, Inc. v. Margulies*, 70 A.2d 854 (Pa. 1950).

9. The Commission's order must be supported by substantial evidence in the record. 66 Pa C.S. § 332(b); *see also Lyft v. Pa. Pub. Util. Comm'n*, 145 A.3d 1235 (Pa. Cmwlth. 2016). Evidence is substantial when relevant and of a nature that a reasonable mind might accept as adequate to support a conclusion. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & Western Ry. Co. v. Pa. Pub. Util. Comm'n*, 413 A.2d 1037 (Pa. 1980).

10. HVUS has met its burden of proving, by a preponderance of the evidence, that the April 2018 Engineer's Report included all of the items required by Ordering Paragraph 6 of the January 2018 Order.

11. HVUS has met its burden of proving, by a preponderance of the evidence, that April 2018 Engineer's Report included proper recommendations, proper implementation schedules for those recommendations, and proper cost estimates for those recommendations.

12. HVUS has met its burden of proving, by a preponderance of the evidence, that the one-year compliance deadline in Ordering Paragraph 8(1) of the May 2018 Order was insufficient, 66 Pa. C.S. § 703(e), and is not supported by substantial evidence of record. 66 Pa. C.S. § 332(b).

13. HVUS has met its burden of proving, by a preponderance of the evidence, that it complied with the one-year deadline in Ordering Paragraph 8(2) of the May 2018 Order for reassessing the need, size and cost of treatment plant to permanently solve the problems caused by iron and manganese by April 19, 2019. 66 Pa. C.S. § 332(b).

14. In a complaint proceeding, the Commission may grant and prescribe such additional time as, in its judgment, is reasonably necessary to comply with an order. 66 Pa. C.S. § 703(e).

15. Because the one-year compliance deadline in Ordering Paragraph 8(1) of the May 2018 Order was insufficient, the May 2018 Order did not provide HVUS with the time "reasonably necessary to comply with" that order. 66 Pa. C.S. § 703(e).

16. HVUS has met its burden of proving, by a preponderance of the evidence, that it filed a motion requesting an extension of the one-year compliance deadline in Ordering Paragraph 8(1) before the expiration of that deadline, and that it has good cause for the extension (e.g., the one-year compliance deadline in Ordering Paragraph 8(1) was insufficient). 66 Pa. C.S. § 703(e) and 52 Pa. Code § 1.15(a)(1).

17. The Commission has authority to impose a civil penalty of up to \$1,000 for each day a public utility violates a Commission Order. 66 Pa. C.S. § 3301(a) and (b).

18. Continuing offenses are proscribed activities that are of an ongoing nature and cannot be feasibly segregated into discrete violations so as to impose separate penalties. *Newcomer Trucking, Inc. v. Pub. Util. Comm'n*, 531 A.2d 85 (Pa. Cmwlth. 1987).

19. Because the April 2018 Engineer's Report was a one-time requirement that the Company filed timely, any "deficiency" in the report is not a continuing violation of the January 2018 Order. 66 Pa. C.S. § 3301(b).

20. Imposing a penalty on HVUS for failing to comply with Ordering Paragraph 6 is not warranted at this time. 52 Pa. Code § 69.1201 ("Factors and standards for evaluating litigated and settled proceedings involving violations of the Public Utility Code and Commission regulations").

21. Imposing a penalty on HVUS for failing to comply with the deadline in Ordering Paragraph 8(1) would be premature at this time. May 2018 Order, Ordering Paragraph 20.

APPENDIX C. PROPOSED ORDERING PARAGRAPHS

(1) That the Petition of Hidden Valley Utility Services, L.P. for an Amendment of the Opinion and Order Entered May 3, 2018, is granted;

(2) That the Opinion and Order entered in this matter on May 3, 2018 is amended as follows:

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~~

(1) Hidden Valley Utility Services, L.P. ("HVUS") shall proceed with the construction of the water treatment plant for which it has received a public water supply permit, in order to ensure that customers receive adequate service from the improved water facilities, as follows:

a. Within thirty days after the entry of the Commission Order in this proceeding, HVUS shall award a contract to construct the water treatment plant. Within ten days after awarding this contract, Hidden Valley Utility Services, L.P., shall notify the Commission, all parties to this proceeding, and the Bureau of Technical Utility Services ("TUS").

b. Within ten days after construction of the water treatment plant is completed, HVUS shall notify the Commission, all parties to this proceeding, and the BTUS, and shall apply to DEP and all other appropriate agencies for final review and inspection.

c. Within ten days after receiving final approvals from DEP and all other appropriate agencies, HVUS shall notify the Commission, all parties to this proceeding, and the BTUS.

d. By the later of August 31, 2021 or thirty days after receiving final approvals from DEP and all other appropriate agencies, HVUS shall remove the iron and manganese sediment from its 250,000 gallon storage tank.

e. Within thirty days after removing the iron and manganese sediment from its 250,000 gallon storage tank, HVUS shall flush its distribution system and shall notify customers to flush the water in their homes to remove iron and manganese from the system.

f. HVUS shall not be liable for any failure to comply with any provision of this Ordering Paragraph 8(1), where such failure is wholly or partially due to circumstances occasioned by or in consequence of the COVID-19 pandemic, which are not reasonably within HVUS's control and which HVUS by the exercise of due diligence is unable to prevent or overcome.

g. Within ten days after abandoning construction of the water treatment plan for which it has received a public water supply permit, HVUS shall notify the Commission, all parties to this proceeding, and the BTUS.

(2) Within one (1) year from the date of the engineer's report, Hidden Valley Utility Services, L.P. shall reassess the need, size and cost of treatment plant to permanently solve the problems caused by iron and manganese.

19. That, within thirty days after the deadline set forth in Ordering Paragraph 8(1)(e), 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 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, within two months after the deadline set forth in Ordering Paragraph 19 or after receiving the notice described in Ordering Paragraph 8(1)(g) 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.