

COMMONWEALTH OF PENNSYLVANIA



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June 30, 2020

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

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

Dear Secretary Chiavetta:

Attached for electronic filing please find the Office of Consumer Advocate's Main Brief in the above-referenced proceedings.

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

Respectfully submitted,

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Enclosures:

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

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CERTIFICATE OF SERVICE

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

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

Dated this 30<sup>th</sup> day of June 2020.

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BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Tanya J. McCloskey, Acting Consumer Advocate : C-2014-2447138  
: :  
v. : :  
: :  
Hidden Valley Utility Services, L.P. - Water :

Tanya J. McCloskey, Acting Consumer Advocate : C-2014-2447169  
: :  
v. : :  
: :  
Hidden Valley Utility Services, L.P. - Wastewater :

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MAIN BRIEF  
OF THE OFFICE OF CONSUMER ADVOCATE

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Dated: June 30, 2020

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## **I. INTRODUCTION**

The Office of Consumer Advocate (OCA) hereby submits this Main Brief regarding the Petition filed by Hidden Valley Utility Services, L.P. (HVUS or the Company) asking the Public Utility Commission (PUC or Commission) to extend the deadline for HVUS to fix its iron and manganese problem and provide water that is suitable for household purposes.

In 2005, the Commission gave the Company two years to submit a report on whether a treatment plant was needed to remove iron and manganese from the water. The report was not filed. By 2010, it was clear that the Company's alternative to installing treatment plant (adding chemicals to try to keep the iron and manganese suspended in the water) was not working. The brown and rusty water problems continued. In 2014, the OCA brought the matter to the PUC again. That round of litigation took four years. At its end, the Commission gave the Company a specific deadline – April 2019 – to follow an engineer's recommendation to either install a treatment plant or connect to another source. That fixed deadline assured HVUS customers there would be near-term relief; if the Company did not fix the water problems within one year, the Commission would initiate a Section 529 investigation through which a viable provider could be required to take over, and hold hearings to consider appropriate refunds and penalties.

It should not be ignored that the Company missed the April 2019 deadline. Or that, more than one year later, customers are still waiting for adequate water service. The one-year deadline was reasonable and sufficient. The Company did not comply, or even show good faith effort to comply. The May 2018 Order should stand and the hearing procedures set forth in the Order should proceed.

Because those proceedings will provide a measure of relief and protection to customers but will take some time to complete, the Commission can, at the same time, provide HVUS a deadline

to improve water service. The record shows that as the situation currently stands, the necessary actions – construction of a treatment plant and removal of existing iron and manganese sediment from the system – can be completed by July 31, 2021. This does not mean, however, that the deadline previously established by the Commission should be modified as HVUS has already missed that deadline and the remedies afforded customers for this failure should proceed. Rather, in an attempt to secure safe and adequate service for these customers who have waited so long, the Commission should set a deadline for HVUS to complete the steps that it has taken to date, even though those steps were woefully late. The Company’s compliance or failure to provide adequate water service by that deadline should be addressed in the Section 529 investigation and refund/penalty proceeding.

It is urgent that HVUS make the needed improvements or that another entity take over to do so. The outcome of this proceeding must provide **certain and timely relief** to customers.

## **II. STATEMENT OF THE CASE**

In 2005, HVUS executed a settlement with the OCA and customer complainants, which required the Company to address long-term service problems, which included brown or rust-colored water caused by high iron and manganese content.<sup>1</sup> The settlement required HVUS to submit a report to the Commission by July 15, 2007, regarding the need, size and cost of a treatment plant to remove iron and manganese. The Company failed to meet that and other deadlines in the settlement.<sup>2</sup>

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<sup>1</sup> *Application of Hidden Valley Utility Services Co., L.P.*, Docket Nos. A-00210117, A-00230101, R.D. at 5-6, 14-15, 18 (May 16, 2005) (*Application R.D.*). The settlement was approved without modification by Order entered on July 15, 2005.

<sup>2</sup> In 2015, HVUS had not complied with requirements to: (1) submit a report to the Commission and all parties reassessing the need, size and cost of treatment plant to permanently solve the problems caused by

In the current complaint proceedings, the Commission sustained the OCA complaints, finding that the water quality problems identified in 2005 persist, such that service remains inadequate and unreasonable.<sup>3</sup> The Commission recognized that remedial action should be expedient and provide permanent resolution to the service problems.<sup>4</sup> It stated:

It is apparent that the Company's customers have been suffering from poor water quality and unreasonable service for years. Any subsequent delays in failing to remediate the problems due to the failure to meet compliance deadlines would be unacceptable.<sup>5</sup>

The Commission afforded the Company three months, until April 2018, to obtain and submit an engineer's report on a treatment plant and other options to solve the iron and manganese problem, and until April 2019 to carry out the engineer's recommendation.<sup>6</sup> Failure to meet the April 2019 deadline would result in (1) a proceeding to consider penalties and refunds and (2) an investigation under Section 529.<sup>7</sup> HVUS submitted an engineer's report that identified four alternatives to solve the iron and manganese problem but did not construct any of them and, thus, did not resolve the water quality problems by April 2019.

During the year between submitting the engineer's report and the April 2019 deadline, the Company considered which of the alternatives to pursue.<sup>8</sup> In July 2019, HVUS reported that it

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iron and manganese, (2) replace 2,500 feet of mains serving troubled areas of the system and (3) hold semi-annual customer meetings. January 2018 Order at 9-10 (citing 2016 I.D. at 13-14 (Aug. 23, 2016)).

<sup>3</sup> Opinion and Order at 12, 23 (Jan. 18, 2018) (January 2018 Order); 66 Pa. C.S. § 1501. The Commission and ALJ also found that wastewater service does not meet the requirements of Section 1501. January 2018 Order at 12-13, 23.

<sup>4</sup> January 2018 Order at 30-31.

<sup>5</sup> *Id.* at 31.

<sup>6</sup> *Id.* at 30-31, 61-62 (Ordering Paragraph 6 (90 days for engineer's report) and Ordering Paragraph 8 (one year to correct deficiencies)).

<sup>7</sup> *Id.* at 66 (Ordering Paragraphs 20-21), 67 (Ordering Paragraphs 25-26).

<sup>8</sup> Petition of Hidden Valley Utility Services, L.P. for an Amendment of the Opinion and Order Entered May 3, 2018 at 4 (Oct. 18, 2018) (October 2018 Petition); Status Report on Compliance with Order Entered

had chosen to construct a water treatment plant and was in the process of applying to the Department of Environmental Protection (DEP) for necessary permits.<sup>9</sup> The Company's engineer estimates the plant can be installed by November 2020 and that a DEP operating permit can be obtained within two months, likely less.<sup>10</sup> The other necessary steps – obtaining DEP approvals to operate the new treatment plant and removing the existing iron and manganese sediment from the storage tank and distribution system can be accomplished by summer 2021.<sup>11</sup>

The matter currently before the Commission is HVUS's Petition to amend the April 2019 deadline.<sup>12</sup> The deadline was first established in the Commission's January 2018 Order. Following from a Petition by HVUS for clarification and amendment of that Order,<sup>13</sup> the Commission entered an Order in May 2018, which modified the language regarding the one-year deadline to make clear that April 2019 was the deadline for HVUS to carry out the necessary improvements to the water system.<sup>14</sup>

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January 18, 2018 and Reconsidered May 3, 2018 (Status Report) at 2 (Mar. 18, 2019); Status Report at 2 (May 16, 2019) (May 2019 Status Report).

<sup>9</sup> OCA St. 1 at 10 (citing HVUS St. 2 at 27); Petition of HVUS for an Amendment of the Opinion and Order Entered May 3, 2018 at 3 (October 2018 Petition); Status Report (July 16, 2019) (July 2019 Status Report).

<sup>10</sup> OCA Exh. TLF-5; *see also* OCA St. 1 at 12; Exh. TLF-4; Tr. 599-600 (Stinebiser).

<sup>11</sup> OCA St. 1 at 17; OCA St. 1S at 3-4, 8; Tr. 556 (Fought); HVUS St. 2R at 8.

<sup>12</sup> A copy of the Petition of Hidden Valley Utility Services, L.P. for an Amendment of the Opinion and Order Entered May 3, 2018 is provided in OCA Exhibit NDE-1S. This Petition is referred to herein as the October 2018 Petition or Petition to Amend.

<sup>13</sup> HVUS's Petition for Clarification, Reconsideration and Amendment of the January 2018 Order (February 2018 Petition), was filed on February 2, 2018.

<sup>14</sup> Ordering Paragraph 8, on page 27 of the Commission's Opinion and Order entered on May 3, 2018 (May 2018 Order) requires:

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 to correct any identified deficiencies including a remedy to eliminate the rust or brown-colored water provided to customers in order to ensure that customers shall receive adequate service from the improved water facilities, and to reassess the need, size and cost of treatment plant to permanently solve the problems caused by iron and manganese.

HVUS seeks to have the one-year deadline replaced with (1) a series of future deadlines beginning when the Commission enters an Order on the October 2018 Petition or (2) a four-year deadline.<sup>15</sup> The OCA opposes that request. It is the OCA's position that the May 2018 Order should remain undisturbed because the Company does not meet the legal standard for amending a final Order; it reiterates arguments already heard, considered and rejected by the Commission. Moreover, the OCA contends that the Company's actions do not support the Commission exercising its discretionary authority.

HVUS's failure to comply with the April 2019 deadline triggered proceedings to address refunds and penalties and to investigate putting the Company in receivership and/or transferring ownership to a capable utility. Recognizing the time those proceedings will take, and the steps remaining for HVUS to complete the water treatment plant project it has started, the OCA recommends the Commission set a date certain – July 31, 2021 – for the Company to provide adequate water service. Further, the OCA recommends that its compliance or non-compliance with that deadline should be addressed in the refund/penalty proceeding and Section 529 investigation.

### **III. PROCEDURAL HISTORY**

The OCA filed Formal Complaints against the Company on October 9, 2014, in which it averred that HVUS was failing to provide “adequate, efficient, safe, and reasonable service and facilities” pursuant to 66 Pa. C.S. § 1501. In an Opinion and Order entered on January 18, 2018, the Commission sustained the OCA's Complaints and required HVUS to make improvements to its water and wastewater service by April 2019.

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<sup>15</sup> October 2018 Petition at 8-9; HVUS St. 2R at 8-9; Tr. 496-98 (Stinebiser).

HVUS filed a Petition for Clarification on February 2, 2018, and the OCA filed an Answer on February 12, 2018. The Commission entered an Opinion and Order on the HVUS Petition for Clarification on May 3, 2018, which maintained and clarified the deadlines from the January 2018 Order.<sup>16</sup> On October 18, 2018, HVUS submitted a Petition for an Amendment of the May 2018 Opinion and Order, regarding the one-year deadline. The OCA filed an Answer on October 29, 2018 and, on January 17, 2019, the Commission issued an Opinion and Order denying the Petition.<sup>17</sup> Subsequently, on February 19, 2019, HVUS filed a Petition for Review of the January 2019 Order with Commonwealth Court. On May 15, 2019, the Petition for Review was quashed and the record remanded to the Commission with direction that “a hearing will be held forthwith before the Commission regarding the sufficiency of both the engineer’s report and the previously ordered one-year compliance deadline.”<sup>18</sup> On November 20, 2019, the OCA filed a letter giving notice the Company failed to meet deadlines in the January 2018 and May 2018 Orders to make improvements to its water and wastewater system.

On February 7, 2020, ALJ Dunderdale issued a Prehearing Order identifying issues to be addressed in the proceeding:

- a. The propriety of the recommendations, proposed time schedules and financing plans for the recommendations contained in the April 2018 engineer’s report;
- b. The sufficiency of the April 2018 engineer’s report;
- c. The sufficiency of the previously ordered one-year compliance deadline; and

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<sup>16</sup> The May 2018 Order also changed responsibility for investigating the Company’s quality of water and water and wastewater service from the OCA to the Commission’s Bureau of Technical Utility Services. May 2018 Order at 24, 31-32.

<sup>17</sup> Opinion and Order at 27-32 (Jan. 17, 2019) (January 2019 Order).

<sup>18</sup> *Hidden Valley Util. Services, L.P. v. Pa. P.U.C.*, 187 CD 2019, Memorandum Opinion at 10-11 (May 15, 2019).

- d. Whether the Commission should grant HVUS's request to extend the compliance deadlines proposed in the April 2018 engineer's report.<sup>19</sup>

On February 25, 2020, ALJ Dunderdale conducted a telephonic Prehearing Conference.<sup>20</sup>

On March 11, 2020, the ALJ issued a Prehearing Order directing I&E to notify the Commission's Secretary's Bureau to initiate a separate proceeding against HVUS (both the water and wastewater divisions) under 66 Pa. C.S § 529, pursuant to Ordering Paragraph 27 of the May 2018 Order.<sup>21</sup>

In the same Prehearing Order, ALJ Dunderdale also established a litigation schedule, subject to which HVUS submitted Direct Testimony by two engineers (HVUS Sts. 1 and 2) and James Kettler, President of HVUS (HVUS St. 3) on April 4, 2020. On April 24, 2020, the OCA submitted the Direct Testimony of Terry L. Fought<sup>22</sup> (OCA St. 1) and Noah D. Eastman<sup>23</sup> (OCA St. 2). The Company submitted Rebuttal Testimony (HVUS Sts. 2R and 3R) on May 8, 2020. The OCA filed the Surrebuttal Testimony of Mr. Fought (OCA St. 1S) and Mr. Eastman (OCA St. 2S) on May 19, 2020.

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<sup>19</sup> Prehearing Order at 2-3 (Feb. 7, 2020)

<sup>20</sup> Tr. 415-452.

<sup>21</sup> Prehearing Order at 2-3 (Mar. 11, 2020).

<sup>22</sup> Mr. Fought has been a licensed engineer in Pennsylvania since 1975, is licensed in New Jersey and Virginia (inactive) and has been a consulting engineer since 1983. He received his Bachelor of Civil Engineering from Cleveland State University. He has been involved in the design, construction and operation of water and wastewater facilities for over 40 years. He has also served as a consultant to the OCA for water and wastewater rate cases, complaint proceedings, investigations, and applications since 1984. Mr. Fought's background and qualifications are attached as Appendix A to OCA Statement 1.

<sup>23</sup> Mr. Eastman received his Bachelor of Science in Economics from Shippensburg University and is employed by the OCA as a Regulatory Analyst. His responsibilities include financial, economic and business operations analysis of utility filings. Mr. Eastman's qualifications are attached as Appendix A to OCA Statement 2.

On May 20, 2020, the parties participated in a telephonic Evidentiary Hearing at which HVUS presented additional testimony and all witnesses were subject to cross-examination.<sup>24</sup> In response to unopposed requests by HVUS and the OCA, in the Third Post-Hearing Order issued on June 18, 2020, the ALJ extended the deadline for filing Main Briefs and Reply Briefs to June 30, 2020 and July 14, 2020, respectively.

#### **IV. LEGAL STANDARDS**

Under Section 332 of the Public Utility Code, the burden of proof rests with the Company, who filed the Petition at issue. Section 332 states:

(a) Burden of proof. - Except as may be otherwise provided in section 315 (relating to burden of proof) or other provisions of this part or other relevant statute, the proponent of a rule or order has the burden of proof.<sup>25</sup>

Therefore, it is the Petitioner that has the burden of demonstrating by a preponderance of the evidence that the requested amendments to the May 2018 Order meet the requirements of Pennsylvania law.

The Pennsylvania Supreme Court has stated that the party with the burden of proof has a formidable task to show that the Commission may lawfully adopt its position. Even where a party has established a prima facie case, the party with the burden of proof must establish that “the elements of that cause of action are proven with substantial evidence which enables the party asserting the cause of action to prevail, precluding all reasonable inferences to the contrary.” *Burleson v. Pa. P.U.C.*, 461 A.2d 1234, 1236 (Pa. 1983). Furthermore, it is well-established that the “degree of proof before administrative tribunals as well as before most civil proceedings is satisfied by establishing a preponderance of the evidence.” *Lansberry v. Pa. P.U.C.*, 578 A.2d

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<sup>24</sup> Tr. 475-609.

<sup>25</sup> 66 Pa. C.S. § 332(a).

600, 602 (Pa. Cmwlth Ct. 1990). Additionally, the evidence must be substantial and legally credible, and cannot be mere “suspicion” or a “scintilla” of evidence. *Lansberry*, 578 A.2d at 602.

In its January 2019 Order in this proceeding, the Commission addressed the specific standard that applies to petitions for modification of a final Commission order, as follows:

Section 703(g) of the Code provides us with the discretionary authority to rescind or amend our orders. 66 Pa. C.S. § 703(g). However, a petition to modify or rescind 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) (*Duick*) (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 previously heard or considerations which appear to have been overlooked or not addressed by the Commission. *Duick* 56 Pa. P.U.C. at 559.<sup>26</sup>

## V. SUMMARY OF ARGUMENT

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

The record in this proceeding shows the one-year deadline was long enough for HVUS to fix, or make substantive progress toward fixing, the iron and manganese problem. HVUS has had

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<sup>26</sup> January 2019 Order at 7.

its engineer's report on four options for fixing the iron and manganese problem since April 2016 but took three years to decide which option to pursue. Another year later, the Company had not begun construction. Further, despite considerable debt, it determined to borrow an additional \$400,000 to fund the chosen water treatment project. This is all the more concerning because of the inaccuracies in HVUS's financial reports to the Commission.

Denial of the Petition means the remedies afforded by the January 2018 and May 2018 Orders will proceed. A record will be developed on which the Commission can direct refunds or penalties for the Company's failure to remediate the water quality by April 2019. An investigation under Section 529 will provide the Commission authority to transfer the system to a capable provider or direct alternatives to acquisition that will ensure that service is finally made adequate.

The Commission should also set a fixed deadline of July 31, 2021 for HVUS to complete the remaining steps needed to provide adequate water service. This is not a modification of the deadline in the April 2018 Order. It is a new deadline, established in the instant proceeding and based on the evidence provided by the HVUS and OCA engineers, and reflecting the steps that HVUS has belatedly taken to construct a water treatment plant. The July 2021 deadline will run concurrently with the refund/penalty proceeding and Section 529 proceeding and the Company's compliance or non-compliance with the deadline should be addressed in those proceedings.

The customers have been suffering water that is unsuitable for household purposes for at least two decades. The resolution of this matter must provide timely and certain relief.

## **VI. ISSUES**

The issues now before the Commission have a complicated background. To facilitate discussion, the OCA provides the following breakdown of the underlying Orders and engineering reports.

### Prior Orders

In the six years since the current proceeding began, the Commission has entered three Orders. For ease of reference, they are referred to as the January 2018 Order, May 2018 Order and January 2019 Order. The Ordering Paragraphs are substantively identical between the January 2018 and May 2018 Orders, with the exception of Ordering Paragraphs 8 and 20. (A redline showing the changes made to Ordering Paragraphs 8 and 20 is attached hereto as Appendix B.)

### Engineering Reports

Four engineer's reports have been entered into the evidentiary record of this proceeding, as follows:

- April 2018 Engineer's Report

On August 28, 2015, HVUS hired CME Engineering L.P. (CME) to evaluate alternatives for removing iron and manganese from the water.<sup>27</sup> John F. Larimer, working for CME, prepared and submitted a report to HVUS on April 27, 2016.<sup>28</sup> The CME report included an estimated cost for the four alternatives identified in the report.<sup>29</sup> HVUS filed the same report with the Commission on April 18, 2018 (April 2018 Report).<sup>30</sup>

HVUS witness Bradley R. Stinebiser, working for The EADS Group (EADS), supervised preparation of two schedules submitted with the CME Report – an estimated schedule for interconnecting with the Bakersfield Water System (more commonly referred to as the Jefferson

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<sup>27</sup> HVUS St. 1 at 3-4.

<sup>28</sup> *Id.* at 4.

<sup>29</sup> *Id.* at 3, 5.

<sup>30</sup> *Id.* at 4-5. HVUS filed a two engineer's reports on April 18, 2018, in response to Ordering Paragraph 6 of the January 2018 Order: one regarding the replacement/testing of water meters and one regarding possible ways to address the problems caused by iron and manganese in the water. The 2018 Petition and subsequent litigation have focused on the second report. Consistent with that, this Brief and references therein to the April 2018 Report are limited to the report addressing options to resolve the iron and manganese problems. The April 2018 Report is reproduced in HVUS Exhibit JFL-2.

Township Water and Sewer Authority (JTWSA) system) and an estimated schedule for water treatment upgrades.<sup>31</sup> Both schedules are dated April 16, 2018. EADS was hired to perform this work on March 15, 2018.<sup>32</sup>

- October 2018 Engineer’s Report

On October 15, 2018, EADS provided updated cost estimates for two of the four options identified in the CME engineer’s report filed in April 2018 – constructing an iron filter treatment plant and connecting to the JTWSA system.<sup>33</sup> This updated cost estimate was filed with the Commission as an attachment to HVUS’s October 2018 Petition.

- January 2019 Engineer’s Report

On November 5, 2018, HVUS hired EADS to provide a “preliminary study” of two project options: connecting to the JTWSA system and constructing treatment facilities, based on obtaining previously-used treatment equipment (from Rolling Rock Farms).<sup>34</sup> The study was submitted to HVUS on January 24, 2019 and attached to HVUS witness Stinebiser’s direct testimony (HVUS Exhibit BRS-2). For both options, EADS provided updated schedules and cost estimates and also estimated operation and maintenance costs and identified necessary permits and approvals.<sup>35</sup>

- February 2020 Engineer’s Report

EADS provided another report marked “November 2019, revised February 2020,” which HVUS submitted to DEP as part of its application for a Public Water Supply (PWS) Construction Permit for the water treatment plant (WTP) upgrades.<sup>36</sup> The report, titled as a “Revised Design

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<sup>31</sup> HVUS St. 1 at 6; HVUS St. 2 at 4.

<sup>32</sup> HVUS St. 2 at 5.

<sup>33</sup> The updated cost estimate for water treatment upgrades (only) is reproduced in OCA Exhibit NDE-1.

<sup>34</sup> HVUS St. 2 at 15.

<sup>35</sup> *Id.*

<sup>36</sup> OCA St. 1 at 4; OCA Exh. TLF-4.

Engineer's Report," contained a proposed project schedule, which anticipated completion of construction/start-up of the upgraded WTP in November 2020.<sup>37</sup> Mr. Stinebiser explained:

For the schedule included in the 2019 Public Water Supply Permit application, we estimated that if the Public Water Supply Permit authorizing construction of the project could be issued in March 2020, then it may be possible that the project could be constructed, barring any other unforeseen delays, prior to the end of 2020 and before the winter weather arrives at Hidden Valley.<sup>38</sup>

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

It is the OCA's understanding that, in its Main Brief, the Company will raise an argument that Ordering Paragraphs 6 and 8 are not lawful. The OCA will respond to such argument in its Reply Brief. The OCA addresses the reasonableness and sufficiency of the one-year deadline contained in Ordering Paragraph 8 of the May 2018 Order in the following Section.

**B. The Sufficiency of the Engineer's Report Filed April 18, 2018**

Ordering Paragraph 6 of the January 2018 Order required:

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

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<sup>37</sup> HVUS St. 2R at 4.

<sup>38</sup> *Id.* at 3. The 2020 Engineer's Report was moved into the record of this proceeding as OCA Exhibit TLF-4. The schedule (only) from the 2020 Engineer's Report was reproduced in OCA Exhibit TLF-5.

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.<sup>39</sup>

The report that HVUS filed on April 18, 2018 was not sufficient. First, the engineering report did not “recommend” a remedy to eliminate the rust or brown-colored water. Rather, the engineer identified four options to correct the problem.<sup>40</sup> HVUS witness Larimer confirmed this, stating:

The report evaluated four possible alternatives to provide adequate water quality. The report, however, does not recommend that management choose one alternative rather than another. We were instructed not to make such a recommendation.<sup>41</sup>

The Company obtained CME’s report in April 2016.<sup>42</sup> After filing the same report with the Commission in April 2018, HVUS took another year to choose and proceed with one of the four options.<sup>43</sup> As such, the failure of the report to contain a recommendation did not comply with Ordering Paragraph 6 *and* contributed to the delay in implementing a remedy.

Second, the 2018 Engineer’s Report addressed the removal of iron and manganese from the raw source water. It did not address removal of iron and manganese from the storage tank and distribution system. OCA witness Fought explained in this proceeding that the start-up and proper operation of the WTP, without more, will not eliminate the iron and manganese problems experienced by customers.<sup>44</sup> The WTP will remove iron and manganese from the raw water but sediment in the storage tank and distribution system water mains and service lines will continue to

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<sup>39</sup> January 2018 Order at 61-62 (emphasis added); *see also* May 2018 Order at 26-27.

<sup>40</sup> HVUS Exh. JFL-2; HVUS St. 3 at 6.

<sup>41</sup> HVUS St. 1 at 5.

<sup>42</sup> *Id.* at 3-4.

<sup>43</sup> On January 24, 2019, HVUS received another engineer’s report on two project options – interconnection with JTWSA and a conventional filtration system. HVUS St. 2 at 15; HVUS Exh. BRS-2. As of May 2019, HVUS was still reporting that it “is continuing to explore possible solutions for addressing the iron and manganese in the water.” May 2019 Status Report at 2; *see also* OCA St. 1 at 10 (citing HVUS St. 2 at 27).

<sup>44</sup> OCA St. 1 at 5; OCA St. 1S at 8.

contaminate the water. Thus, customers will continue to experience problems until existing iron and manganese sediment is removed.<sup>45</sup> The impact of precipitated iron and manganese in the storage tank and distribution system on water quality was also addressed in the record underlying the January 2018 Order, supporting the Commission’s requirement in Ordering Paragraph 6 that the engineer’s report and recommendations address the distribution system as well as the water source.<sup>46</sup>

HVUS witnesses Stinebiser and Kettler agree that existing iron and manganese must also be removed from the storage tank and distribution system.<sup>47</sup> The sediment is removed from the storage tank by a diver vacuuming it out.<sup>48</sup> It may be effective, from a cost and operations perspective, to do this at the same time as the storage tank is painted because, as part of repainting the inside of the tank, its interior is sandblasted. The sandblasting waste and the iron/manganese sediment can be removed from the tank at the same time.<sup>49</sup>

The sediment is removed from the distribution system by flushing the water mains by opening fire hydrants and blow-off valves.<sup>50</sup> Specifically, OCA witness Fought recommended

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<sup>45</sup> OCA St. 1 at 5; OCA St. 1S at 8; Tr. 574, 580 (Fought).

<sup>46</sup> 2016 I.D. at 17 (citing 2015 OCA St. 2-Water at 10), 18-19 (citing HVUS St. 1R at 22); *see also* OCA Exh. TLF-11 (DEP Letter to HVUS dated Nov. 14, 2005, which was also made part of the record as 2015 OCA Exh. TLF-1W).

<sup>47</sup> HVUS St. 2R at 5 (“I agree that removing the iron and manganese sediment from the storage tank will help clear iron and manganese from the system”); Tr. 521 (Kettler); Tr. 573-74 (Fought); OCA St. 1S at 8.

<sup>48</sup> OCA St. 1 at 5; Tr. 521 (Kettler).

<sup>49</sup> OCA St. 1 at 6; OCA Exh. TLF-7, Att. at 7; OCA St. 1S at 8-9 (“The Company should follow the recommendations of its consulting engineer and/or its tank inspection contractor to decide if the tank interior should be repainted upon completion of the WTP or at a later date”); *see also* Tr. 567-68 (Fought) (“in my surrebuttal testimony, I made it clear that I was not stating the tank had to be painted, I left that decision to be made by the company and its engineer or the tank inspection company”).

<sup>50</sup> OCA St. 1 at 7.

that the Company's consulting engineer provide a flushing plan and that the Company follow that plan.

In a previous case, the Company's engineer prepared a flushing plan to remove the sediment from the distribution system. Since then, the Company has made changes to the distribution system and the flushing plan should be reviewed and updated as necessary. It may be necessary to flush the system more than once to remove the sediment. If the sediment cannot be adequately removed in all the lines by flushing, it may be necessary to insert a "pig" in some of the lines to remove the sediment.<sup>51</sup>

Thus, by not addressing the removal of existing sediment, the report was insufficient because it did not comply with the full requirement of Ordering Paragraph 6: to include recommendations and cost analysis for "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."<sup>52</sup>

Third, the OCA disagrees with the proposed time schedule in the April 2018 report. HVUS witness Stinebiser contends that the April 2018 schedule "was performed competently based on the information available at the time."<sup>53</sup> The problem is that the information available – the information that was utilized by EADS to develop a project schedule in April 2018 – was the 2016 CME engineering report, which was "at the conceptual stage with very little design details developed."<sup>54</sup> Thus, the proposed time schedule in the April 2018 report was not insufficient due to any fault of the engineer. It was insufficient because the Company had not taken action to narrow the options and develop the design details between 2016 and 2018.

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<sup>51</sup> OCA St. 1S at 2-3.

<sup>52</sup> January 2018 Order at 61-62 (Ordering Paragraph 6).

<sup>53</sup> HVUS St. 2R at 3.

<sup>54</sup> HVUS St. 2 at 10. As such, EADS' provided an estimated schedule for treatment plant upgrades that was applicable to either of the two treatment plant options (conventional iron filter or an aeration filter) and an estimated schedule for interconnection with the JTWSA system. *Id.* at 5, 9-10.

As discussed in the next section, the OCA supports the updated time schedule for the treatment plant contained in the February 2020 Engineer's Report, with the modifications recommended by OCA witness Fought.

For these reasons, the April 2018 Engineer's Report was not sufficient to meet the requirements of Ordering Paragraph 6 of the January 2018 Order.

**C. The Propriety of the Recommendations, Proposed Time Schedules and Financing Plans for the Recommendations Contained in the April 2018 Engineer's Report**

**1. The Propriety of the Recommendations Contained in the April 2018 Engineer's Report**

The OCA does not challenge the correctness of the engineer's report for the four options identified to remove iron and manganese problem from the source water. As discussed above, the remedy must also include removal of existing iron and manganese sediment from the storage tank and distribution system.

**2. The Propriety of the Proposed Time Schedules for the Recommendations Contained in the April 2018 Engineer's Report**

The OCA disagrees with the estimated time schedule for upgrades to the water treatment plant that was included with the April 2018 report.<sup>55</sup> First, the schedule was unreasonably long. This is demonstrated by the fact that EADS substantially reduced the estimated time for the project in two later reports (January 2019 and February 2020).<sup>56</sup>

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<sup>55</sup> The estimated schedule for installing new WTP contained in the April 2018 Report is reproduced in OCA Exh. TLF-6.

<sup>56</sup> HVUS Exh. BRS-2 at 5 and Att. 4 at 3 (January 2019 Report); OCA Exh. TLF-5 (February 2020 Report).

The 2018 schedule estimated that it would take 4 years to complete the WTP project.<sup>57</sup> From the point of “receiving approvals from appropriate agencies,” EADS estimated it would take 635 days, or roughly 21 months, to complete construction.<sup>58</sup> In the 2020 Engineer’s Report submitted to DEP, Mr. Stinebiser estimated that it would take only 8 to 9 months to complete construction, following receipt of the DEP construction permit.<sup>59</sup> He estimated it would take another two months, likely less, for receipt of a DEP operating permit.<sup>60</sup>

Mr. Stinebiser explained why EADS substantially reduced the project schedule. He stated that the estimated schedules provided with the 2018 Engineer’s Report were developed when the treatment options were at a conceptual stage. By 2020, more information about the design details for the treatment options was available, including the 2019 purchase of water treatment plant equipment.<sup>61</sup>

OCA witness Fought provided further explanation why the April 2018 schedule was unreasonably long. It did not reflect that the project needed to be done quickly because the Company should have been aware since 2010 that sequestration was not working<sup>62</sup> and because the Commission had directed HVUS to complete the project by April 2019.<sup>63</sup> Nor did it reflect that the Company had already obtained CME’s report on the four project options two years earlier,

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<sup>57</sup> OCA Exh. TLF-4.

<sup>58</sup> 120 days for Final Design, 90 days to Bid Contract, 60 days to Award Contract, 365 Days for Construction. (120 + 90 + 60 + 365 = 635). OCA Exh. TLF-4; OCA St. 1 at 4, n.3.

<sup>59</sup> OCA Exh. TLF-5; *see also* OCA St. 1 at 12.

<sup>60</sup> Exh. TLF-4; Tr. 599-600 (Stinebiser).

<sup>61</sup> *See* HVUS St. 2R at 10; OCA St. 1 at 12.

<sup>62</sup> OCA St. 1 at 10-11 (“Customers’ continuing complaints about the problems caused by iron and manganese were documented in the record of the 2015 proceedings and again in 2018 in the base rate proceeding.”)

<sup>63</sup> January 2018 Order at 62.

in April 2016.<sup>64</sup> Therefore, narrowing down to one option and getting to the point of receiving agency approvals could have been accomplished more quickly.<sup>65</sup>

The second reason the OCA disagrees with the April 2018 schedule is that it did not include removal of existing iron/manganese sediment from the storage tank and distribution system, which the EADS engineer agrees should be done.<sup>66</sup>

For all of these reasons, and as discussed further below, as part of the relief granted in this proceeding, the OCA recommends the Commission require HVUS to follow the schedule recommended by OCA witness Fought to carry out its water treatment plant project and make other necessary improvements by July 31, 2021. Mr. Fought's schedule reflects the most recently updated EADS schedule, and affords additional time.<sup>67</sup> Specifically, Mr. Fought allowed one additional month for completing final design, beginning construction, and completing construction/start-up of the water treatment plant.<sup>68</sup> Mr. Fought's schedule also provides for removal of the existing iron and manganese sediment from the system.<sup>69</sup>

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<sup>64</sup> HVUS St. 1 at 3-4; HVUS St. 3 at 4-5.

<sup>65</sup> OCA St. 1 at 9-10 (The Company's "lack of response" to the CME 2016 Report and its 2018 Engineer's Report "seems to indicate that the Company thought it had more time to study which of four different options to implement"); *see also* Tr. 577 (Fought).

<sup>66</sup> HVUS St. 2R at 5; *see also* HVUS St. 3R at 7 ("HVUS has no objection to the recommendation that iron and manganese sediment be removed from its water storage tank after the water treatment plant is constructed.")

<sup>67</sup> OCA St. 1S at 3-4.

<sup>68</sup> OCA St. 1 at 17; OCA St. 1S at 3-4.

<sup>69</sup> *Id.*

Project Schedule Submitted to DEP		OCA Revised Recommended Schedule	
Complete Final Design	April 2020	Complete Final Design	May 2020
Select Contractor	May 2020	Select Contractor	May 2020
Begin Construction	May 2020	Begin Construction	June 2020
Complete Construction/Start-up	Nov. 2020	Complete Construction/Start-up	Dec. 2020
		Complete Removal of Existing Sediment from the Storage Tank and Distribution System	July 2021

As Mr. Fought explained, while he recommended the sediment removal should be done shortly after start-up of the WTP, he recognized the Company might need additional time to schedule removal of the iron/manganese sediment from the Storage Tank and Distribution System during non-freezing weather for proper diving and/or painting conditions and also to prevent freezing of roadways during main flushing.<sup>70</sup> If the WTP construction was completed at a different time of year, in April, for example, less time would be warranted for completing removal of existing sediment.<sup>71</sup>

In summary, the proposed time schedule filed with the Commission in April 2018 was not reasonable. The July 2021 deadline recommended by OCA witness Fought is an appropriate and reasonable schedule for HVUS to implement the WTP upgrades because it is based on the EADS schedule created after necessary design details had been developed for the chosen WTP project, it addresses existing iron and manganese in the storage tank and distribution system, and it reflects the need to provide timely relief to customers.

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<sup>70</sup> OCA St. 1 at 17; OCA St. 1S at 8; Tr. 556 (Fought).

<sup>71</sup> Tr. 556, 570-71 (Fought).

### 3. The Propriety of the Financing Plans for the Recommendations Contained in the April 2018 Engineer's Report

#### 2018

In the April 2018 engineer's report, CME estimated that a conventional iron filtration WTP project would cost roughly \$1 million.<sup>72</sup> No financing plan was provided for any of the project costs. Later, in October 2018, HVUS raised the need for the Company to investigate and choose a financing plan as a critical concern.<sup>73</sup> It stated:

Financing options are critical, considering the rate impact that any of the four options will have on the approximately 1,170 customers of the water system.<sup>74</sup>

#### Current

The most recent cost estimate provided by HVUS's engineer (January 2019) indicated that the conventional iron filtration WTP project would cost \$1.9 million to construct, with ongoing O&M costs of roughly \$200,000 per year.<sup>75</sup> The estimate was divided into construction costs of \$1.6 million and "associated costs," comprised primarily of engineering and legal costs, of \$300,000.<sup>76</sup> In May 2020, HVUS witness Kettler testified that he expects the construction costs will be lower, closer to \$600,000.<sup>77</sup> If so, that will reduce the total project cost to roughly \$900,000.<sup>78</sup> Mr. Kettler provided no update to the projected annual O&M of \$200,000. To be

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<sup>72</sup> HVUS Exh. JFL-2 at 6 and Table 1. This amount does not include ongoing Operation & Maintenance (O&M) expense.

<sup>73</sup> October 2018 Petition at 5.

<sup>74</sup> *Id.*

<sup>75</sup> HVUS Exh. BRS-2, Att. 4 (EADS cost estimate Jan. 24, 2019).

<sup>76</sup> *Id.* (\$1,479,170 + 10% contingency = \$1,627,087).

<sup>77</sup> Tr. 510 ("I use a number that -- sticks and bricks, it does not include engineering, it does not include legal, it does not include soft costs. But right now my budget to build the building, with the plant and the equipment, is \$600,000.").

<sup>78</sup> \$600,000 construction costs + \$297,000 associated costs = \$897,000.

clear, these costs address the water treatment plant only and do not include the costs of having existing sediment removed from the storage tank, whether or not the removal is done as part of a project to repair/repaint the interior of the tank.<sup>79</sup>

The Company's current financial plan appears to be continued borrowing and a planned future rate case.<sup>80</sup> According to Mr. Kettler, the WTP project costs will be financed through a \$400,000 loan obtained in December 2019 and "cash flow from the last rate increase and from just operations."<sup>81</sup> If the costs are recovered from customers in a future rate case, that will mean a significant rate increase. In April 2018, CME estimated that a \$1 million conventional iron filtration WTP project would increase customers' rates by roughly \$9.50 per month, or a 15% increase to current rates.<sup>82</sup> If the actual cost is closer to the \$1.9 million that EADS estimated in January 2019, the impact will be higher.<sup>83</sup>

The OCA has concerns whether the Company has the ability to finance the WTP project. HVUS has considerable debt on its books. The most recent Annual Report filed on May 8, 2020, as subsequently corrected by HVUS on May 27, 2020, indicates that HVUS has \$1.5 million in loans payable to Donald McCree at a 7% interest rate per year.<sup>84</sup> This does not include interest on the loans. The first \$880,000 loan, dated 10/24/2014, has accrued \$300,000 in interest through

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<sup>79</sup> Tr. 520-21 (Kettler), 567-68 (Fought); OCA St. 1 at 5. The 2018 estimate for repainting the interior of the storage tank was \$74,340. OCA St. 1 at 7; OCA Exh. TLF-8 (HVUS response to OCA XI-1).

<sup>80</sup> HVUS St. 3R at 3.

<sup>81</sup> Tr. 519-20 (Kettler).

<sup>82</sup> HVUS Exh. JFL-2 at 6 and Table 1. Rates have increased, since the 2018 CME estimate, such that a residential customer using 4,500 gallons pays \$61.21 per quarter or \$20.40 per month. OCA St. 2S at 4.

<sup>83</sup> OCA Exh. NDE-2.

<sup>84</sup> HVUS Post-Hearing Exh. 1 (PUC Annual Report (Water) for 2019); HVUS Post-Hearing Exh. 2 (PUC Annual Report (Wastewater) for 2019); OCA Late-Filed Exh. 1 (Revised Schedule 225 (Water) and Revised Schedule 225 (Wastewater)) (\$619,029 (water) + \$880,971 (wastewater) = \$1,500,000).

2019.<sup>85</sup> The revised pages from the Company's water and wastewater Annual Reports are reproduced below.<sup>86</sup>

*WATER.*

Hidden Valley Utility Services, LP			For the Year Ended December 31, 2019			
(Company Name)						
<b>225. NOTES PAYABLE SUPPORTING SCHEDULE - Account No. 232.0</b>						
This schedule should include a breakdown of the accounts that constitute the ending balance in Account No. 232.0 - Notes Payable						
Line No.	Name of Creditor (a)	Description of Transaction (b)	Date of Issue (c)	Date of Maturity (d)	Amount at End of Year (e)	Interest Rate Per Annum (f)
1	Donald McCree	Loan	10/24/2014	none	280500	7%
2	Donald McCree	Loan	01/02/2019	none	206529	7%
3	Donald McCree	Loan	12/01/2019	none	132000	7%
4						
5						
6						
7						
8				TOTAL	619029	

<sup>85</sup> \$280,500 (water) + \$569,500 (wastewater) = \$880,000 x 7% interest per year = \$59,500 x 5 years = \$297,500.

<sup>86</sup> OCA Late-Filed Exh. 1 (Revised Schedule 225 (Water) and Revised Schedule 225 (Wastewater)).

WASTE.

Hidden Valley Utility Services, LP			For the Year Ended December 31, 2019			
(Company Name)						
<b>225. NOTES PAYABLE SUPPORTING SCHEDULE - Account No. 232.0</b>						
This schedule should include a breakdown of the accounts that constitute the ending balance in Account No. 232.0 - Notes Payable.						
Line No.	Name of Creditor (a)	Description of Transaction (b)	Date of Issue (c)	Date of Maturity (d)	Amount at End of Year (e)	Interest Rate Per Annum (f)
1	Donald McCree	Loan	10/24/2014	none	569500	7%
2	Donald McCree	Loan	01/02/2019	none	43471	7%
3	Donald McCree	Loan	12/01/2019	none	268000	7%
4						
5						
6						
7						
8				TOTAL	880971	

No accrued interest is reported in the 2019 Annual Report for Wastewater. In the 2019 Annual Report for Water filed on May 8, 2020, HVUS reported \$210,000 as “accrued interest on water treatment plant.”<sup>87</sup> HVUS later stated that \$210,000 in accrued interest was incorrectly included in the report and removed it from Revised Schedule 225 (Water).<sup>88</sup> The failure to accurately calculate and report accrued interest on the loans is troubling, particularly because the Company had an outside consultant review the 2019 Annual Report before it was filed.<sup>89</sup> The errors in

<sup>87</sup> Schedule 204, line 1 (Construction Work in Progress); *see also* Schedule 200-3, line 8 (Accrued Interest) and Schedule 225, line 4 (Accrued Interest).

<sup>88</sup> OCA Late-Filed Exh. 1, HVUS Response to OCA on the Record Data Request 1.b. During the Evidentiary Hearing on May 20, 2020, HVUS counsel indicated the May 8, 2020 Annual Reports had been filed but not yet posted on the Commission website. Tr. 523-24 (Nase). HVUS also indicated that its subsequent corrections would be filed. OCA Late-Filed Exh. 1, HVUS Response to OCA on the Record Data Request 1.a.

<sup>89</sup> Tr. 530-31; HVUS Post-Hearing Exh. 1 (a cover letter signed by a Senior Project Manager for Gannett Fleming states: “We certify that we have reviewed and ensured the accuracy of the attached corrected Water and Sewer Annual Reports for the year 2019, based on the financial information provided to us by

reporting the loan amounts and accrued interest are the most recent examples showing that the financial information in HVUS's Annual Reports is unreliable.<sup>90</sup> The situation is exacerbated by the Company's failure to obtain an independent financial audit of its financial records, as directed by the Commission.<sup>91</sup> All of this contributes to concerns regarding HVUS's ability to finance and carry out the projects needed to permanently solve the iron and manganese problem. As such, the financing plan is insufficient.

#### **D. The Sufficiency of the Previously Ordered One-Year Compliance Deadline**

Ordering Paragraph 8 of the Commission's May 2018 Order required HVUS to make the improvements recommended by its engineer within one year of submitting its engineer's report, or by April 2019.<sup>92</sup> Specifically, the Commission required:

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.<sup>93</sup>

The one-year deadline was sufficient.

The purpose of the April 2019 deadline was to get relief to customers as soon as possible – by requiring aggressive action by HVUS to solve the iron and manganese problem and setting a date certain when hearing procedures would commence. These hearings are a protection for

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the Company"); *see also Pa. P.U.C. v. Hidden Valley Utility Services, L.P.*, Docket Nos. R-2018-3001306, R-2018-3001307, Order at 91 (Mar. 29, 2019) (*March 2019 Rate Order*).

<sup>90</sup> *March 2019 Rate Order* at 88.

<sup>91</sup> *Id.* at 89; *Pa. P.U.C. v. Hidden Valley Utility Services, L.P.*, Docket Nos. R-2018-3001306, R-2018-3001307, Order at 9-10 (Aug. 29, 2019) (*August 2019 Rate Order*).

<sup>92</sup> May 2018 Order at 27 (Ordering Paragraph 8).

<sup>93</sup> *Id.*

customers. The hearings on quality of service (Ordering Paragraph 20) provide a forum to address penalties and refunds.<sup>94</sup> The Section 529 investigation (Ordering Paragraphs 21 and 27) enables the Commission to remediate the inadequate service by, *inter alia*, ordering reorganization of the utility under new management, appointment of a receiver, merger with another utility or acquisition by a capable utility or other entity.<sup>95</sup>

It is important to recognize that the one-year deadline was not a hard stop for the Company to make improvements to its system. Rather, it was the starting point for hearing procedures. They are not mutually exclusive. In the evidentiary hearings regarding water quality, despite failing to meet the one-year deadline, HVUS has the opportunity to argue that no penalties or refunds are appropriate. Likewise, in the Section 529 investigation, HVUS has the opportunity to argue that acquisition or the alternatives to acquisition provided under Section 529 are not appropriate.

Instead of addressing the merits, however, we are in litigation over the timing of starting those proceedings. More than one-year after the one-year deadline expired, the customer protections that were supposed to be in place for customers do not exist. We have not begun to develop the record on which the Commission can order any alternative relief. At this time, customers' only option is to hope that the Company carries through with its planned treatment plant. That is unfortunate and it defies the balance struck in the Commission's January 2018 Order.

The one-year deadline struck a reasonable balance between bringing timely relief to customers and affording time for the Company to take action. On the one hand, it recognized that the customers have been suffering water that is unsuitable for household purposes for at least two

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<sup>94</sup> May 2018 Order at 31-32 (Ordering Paragraph 20).

<sup>95</sup> *Id.* at 32-33 (Ordering Paragraphs 21, 27); 66 Pa. C.S. § 529 (b),(g).

decades and resolution is needed in the short-term.<sup>96</sup> On the other hand, the one-year deadline was long enough for HVUS to resolve, or make substantive progress toward resolving, the iron and manganese problem. In 2005, DEP afforded the Company 90 days to submit an engineer's proposal for treatment plant to remove iron and manganese *and* apply for a PWS Construction Permit.<sup>97</sup> Here, the Commission gave the Company 90 days to submit its engineer's recommendations and an additional one year to carry out the recommendations before starting hearing procedures.<sup>98</sup>

OCA witness Fought testified that the time period was more than adequate for constructing a treatment plant. He stated that a viable company that wanted to quickly solve the iron and manganese problem could do so within one year.<sup>99</sup> After the engineer's report was completed, Mr. Fought estimated three months for engineering design, three months to receive the DEP construction permit, and six months for construction.<sup>100</sup> Again, the Company had the CME engineer's report in April 2016.

HVUS argues, to the contrary, that one year was not sufficient because the period from its pre-application meeting for its PWS Construction Permit (May 2019) and its anticipated completion of construction of the treatment plant (November 2020) is more than one year; it is

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<sup>96</sup> *Application R.D.* at 5-6, 14-15, 18; OCA Exh. TLF-1 (customer complaints logged by HVUS during 2018 and 2019); OCA St. 1 at 11 (citing OCA Statement 2 - Water (2015), pages 8-9, and OCA Statement 3, page 12 (2018 Base Rate - Water)).

<sup>97</sup> In the DEP's November 2005 letter, the DEP recommended iron and manganese removal rather than sequestration but allowed the Company to submit its engineer's proposed approach. OCA Exh. TLF-11. Sequestration "does not remove iron and manganese but treats the water with chemicals such as phosphate compounds that sequester the iron and manganese particles to prevent oxidation, precipitation and subsequent water quality problems (turbidity, color, staining, etc.)." 2016 I.D. at 17 (quoting 2015 OCA St. 2 at 4).

<sup>98</sup> May 2018 Order at 27, 31-32 (Ordering Paragraphs 8 and 20).

<sup>99</sup> Tr. 552, 556 (Fought).

<sup>100</sup> Tr. 556 (Fought).

closer to 18 months.<sup>101</sup> Also, that does not include time for the Company to get an operating permit (post-construction), estimated to take 3 to 8 weeks,<sup>102</sup> and remove iron and manganese from the distribution system, which depends on suitable weather conditions.<sup>103</sup> This does not show the one-year deadline was insufficient. As discussed above, the one-year deadline was not a hard stop for HVUS to complete improvements, rather, it was the starting point for hearings that were meant to provide customer protections. And, properly, the deadline was not based solely on the Company's timetable, it balanced the customers' interest in timely relief.

HVUS has known since at least 2010 that its sequestration approach was not solving the iron and manganese problem.<sup>104</sup> Affording the Company until April 2019 to construct a treatment plant or an interconnection before the start of further hearings was entirely reasonable and sufficient.

**E. Whether the Commission Should Grant the Request of HVUS to Extend the One-Year Compliance Deadline**

**1. Has HVUS Satisfied the Legal Standards for Modifying the Commission's Order?**

As set forth above, in Section IV, a petition for modification or rescission of a final Commission order must present new or novel arguments or considerations overlooked or not addressed by the Commission. Parties "cannot be permitted by a second motion to review and reconsider, to raise the same questions which were specifically considered and decided against them."<sup>105</sup> HVUS's 2018 Petition to amend the May 2018 Order does not meet the *Duick* standard.

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<sup>101</sup> HVUS St. 2 at 27; HVUS St. 2R at 4.

<sup>102</sup> Tr. 600 (Stinebiser).

<sup>103</sup> Tr. 556 (Fought).

<sup>104</sup> OCA St. 1 at 10-11.

<sup>105</sup> *Duick* at 559. Therein, the Commission stated:

The Company repeats the arguments it made in Exceptions to the Recommended Decision below, where it opposed the one-year deadline and asked the Commission to adopt a deadline that reflected the schedule in its upcoming engineer's report. As summarized by the Commission:

In its second Exception, HVUS argues that the ALJ erred in establishing an arbitrary and unrealistic one-year deadline for the completion of projects to improve the Company's system.

...

HVUS requests that the Commission modify the deadline for the completion of identified projects to align with the engineer's implementation schedule. HVUS Exc. at 3.

The Respondent asserts that the one-year deadline adopted by the ALJ is based on speculative arguments by the OCA's witness. In its experience, HVUS contends, the time-period for securing the required permits and approvals may be significantly longer. The Company avers that the Commission should reject an artificial deadline and adopt a timeframe that incorporates the completion of the permitting process pursuant to the experience of the engineer. *Id.* at 4.<sup>106</sup>

The Commission considered and rejected those arguments in the January 2018 Order because of its concerns about the delays in resolving the outstanding service problems.<sup>107</sup> It stated:

It is apparent that the Company's customers have been suffering from poor water quality and unreasonable service for years. Any subsequent delays in failing to remediate the problems due to the failure to meet compliance deadlines would be unacceptable. The one-year deadline for implementing the corrective measures established in the engineer's report sets an objective guideline for compliance.<sup>108</sup>

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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.

<sup>106</sup> January 2018 Order at 24, 28-29.

<sup>107</sup> *Id.* at 31.

<sup>108</sup> *Id.*

HVUS also claims that that it satisfied the *Duick* standard because the Commission overlooked that HVUS needed to time to investigate and choose a financing plan for the project.<sup>109</sup> This is not a new and novel argument; the cost and financing for improvements has always been a recognized component of the engineer's report and the Company carrying out the improvements. This evidenced by the requirement of Ordering Paragraph 6 that the engineer's evaluation include cost estimates for the proposed remedy.<sup>110</sup> The Company's ability to finance improvements was also considered at length in regard to whether a rate reduction or civil penalty should be imposed. The Commission did not impose a rate reduction or civil penalty based on its determination that diversion of resources could impair the Company's ability to finance any of the improvements to its system recommended in the engineer's report.<sup>111</sup>

Because the Commission has previously heard, considered and rejected the Company's arguments for extending the one-year deadline, in January 2018 and again in January 2019, HVUS has not satisfied the *Duick* standard and its Petition should be denied.

## **2. Should the Commission Modify the Deadline of April 18, 2019?**

The Commission should not modify the deadline of April 18, 2019 because the Company has not met the *Duick* standard, as discussed above.

Even if the Commission determines that HVUS has met the standard, the Commission should not exercise its discretion to modify the deadline. The OCA will discuss the record evidence countering the Company's request below. The fundamental reason, however, for upholding the original deadline is that customers have waited for HVUS to comply with PUC

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<sup>109</sup> January 2019 Order at 20.

<sup>110</sup> January 2018 Order at 61-62 (Ordering Paragraph 6).

<sup>111</sup> *Id.* at 56; *see also* 2016 I.D. at 35.

requirements to address the iron and manganese problems since 2005. If the Company had shown substantial effort to complete the WTP or interconnection project in one year, or something close to one year, the deadline would have served its purpose of accelerating a resolution. Instead the evidence demonstrates the Company did not take quick action to construct a water treatment plant or interconnection. The deadline is not the problem, thus, changing the deadline will not solve the problem. The problem will only be solved when HVUS or another provider begins treating the existing water source or supplies water from another source and removes the existing sediment from the storage tank and the distribution system. This is best ensured by moving forward with the hearing procedures, particularly, the Section 529 investigation.<sup>112</sup>

That is why, in January 2019, when HVUS's October 2018 Petition was first considered by the Commission, the Commission declined to exercise its discretion to modify the April 2019 deadline:

Adhering to the process outlined in our prior Orders is preferential to the amendments suggested by HVUS because the requested modifications would result in further delays without any assurances that subsequent compliance deadlines could be met or that proposed improvements could be adequately funded. Such an indeterminate approach would appear to be detrimental to the interest of the Company's customers who have suffered from the long term water service problems. Thus, we shall deny the Second Petition.<sup>113</sup>

Here again, the Commission should not exercise its discretion to modify the deadline. The evidence weighs strongly against it. First, the Company's actions during the three years leading up to the April 2019 deadline do not demonstrate good faith effort to solve the iron and manganese problem. HVUS obtained CME's report in April 2016, which identified four options for eliminating iron and manganese and estimated the cost for each.<sup>114</sup> Two years later, it filed the

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<sup>112</sup> May 2018 Order at 32 (Ordering Paragraphs 20 and 21); 66 Pa. C.S. § 529 (b)(g).

<sup>113</sup> January 2019 Order at 31.

<sup>114</sup> HVUS St. 1 at 3, 5; HVUS St. 3 at 4-6.

same report with the Commission, the only change being the addition of project schedules for the options.<sup>115</sup> The Company spent an additional year, considering which project to pursue.<sup>116</sup> It was not until July 2019 that HVUS reported that it was actively pursuing one option – conventional filtration treatment plant – and was in the process of applying to DEP for necessary permits.<sup>117</sup> The three years that it took HVUS to get to that point does not evidence any urgency on the Company’s part to solve the iron and manganese problem.<sup>118</sup> Had the Company selected its course of action more quickly, construction would likely be completed by now.<sup>119</sup>

Second, the October 2018 Petition should be denied because HVUS did not challenge the one-year deadline when it filed an earlier Petition seeking other changes to the January 2018 Order.<sup>120</sup> To the contrary, HVUS asserted in its February 2018 Petition that it was “confident” that it had already taken many of the steps that would be outlined in any engineering report and that the one-year deadline would be moot.<sup>121</sup>

Furthermore, the Company is confident that it has already taken many of the steps that would be outlined in any engineering report evaluating the water or wastewater

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<sup>115</sup> HVUS Exh. JFL-2; HVUS St. 1 at 3-4; HVUS St. 3 at 4-5.

<sup>116</sup> From April 2018 to October 2018, HVUS stated that it worked with engineers “to obtain additional information, so that it may select the best option for Hidden Valley and its customers.” On October 15, 2018, the engineer provided updated cost estimates for two options. October 2018 Petition at 4 and App. B. On January 2019, HVUS received another engineering report on two options. HVUS Exh. BRS-2. From October 2018 to April 2019, HVUS reported that it was “working with the engineers on 2 options to address iron and manganese treatment” and met with local officials and the DEP regarding the options. Status Report at 2 (Nov. 16, 2018); May 2019 Status Report at 2.

<sup>117</sup> “HVUS did not engage an engineer to work on one, single option until June 2019, when it signed an agreement for EADS to do the design and permitting work for the WTP option.” OCA St. 1 at 10 (citing HVUS St. 2 at 27); July 2019 Status Report at 3.

<sup>118</sup> OCA St. 1 at 9-10 (discussing the Company’s “lack of response”); *see also* Tr. 577 (Fought).

<sup>119</sup> Tr. 570-71; OCA St. 1 at 11; OCA St. 1S at 1-2.

<sup>120</sup> February 2018 Petition.

<sup>121</sup> *Id.* at 3; May 2018 Order at 17; January 2019 Order at 17.

system. For those measures that HVUS has undertaken already, the one-year deadline would be moot.<sup>122</sup>

Third, HVUS delayed filing the Petition to Amend until October 2018. As discussed above, in February 2018, the Company indicated there would be no difficulty complying with the one-year deadline.<sup>123</sup> It obtained the EADS schedule for the four project options in April 2018.<sup>124</sup> Six months, or one-half of the compliance deadline, passed before the Company filed the Petition to Amend.<sup>125</sup>

Fourth, there is no assurance that subsequent deadlines will be met. To this point, the Company has missed every deadline set by the Commission related to the WTP project. In 2005, the Company was required to submit an engineer's report reassessing the need, size and cost of the treatment plant by 2007.<sup>126</sup> The report was not obtained until 2016 and not filed until 2018.<sup>127</sup> In 2018, the Company was required to carry out the project to solve the iron and manganese problem by April 2019. As of May 2020, the Company had not hired a contractor to construct the WTP.<sup>128</sup> It should be noted that this is not the only deadline that HVUS has failed to meet; nor

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<sup>122</sup> February 2018 Petition at 3.

<sup>123</sup> *Id.*

<sup>124</sup> HVUS St. 2 at 4-5.

<sup>125</sup> The Commission stated on page 30 of its January 2019 Order:

It was incumbent upon the Petitioner to timely notify the Commission of any concerns with the one-year compliance deadline particularly in light of its apparent prior position that compliance would not be problematic. The delayed filing of its Second Petition is concerning and weighs against the Commission's exercising of its discretion to disturb the May 2018 Order.

<sup>126</sup> "With its next rate filing, but in no case later than two (2) years from the Effective Date, the Company will submit a report to FUS and all parties reassessing the need, size and cost of a treatment plant to permanently solve the problems caused by the levels of iron and manganese in its water." *Application R.D.* at 5-6; Settlement ¶ 9. (The effective date of the Commission Order approving the Settlement was July 15, 2005).

<sup>127</sup> HVUS St. 1 at 3-4; HVUS Exh. JFL-2.

<sup>128</sup> Tr. 505-06.

the only proceeding in which the Commission has declined to extend a deadline because of concerns about continued delays. In the Company's 2018 base rate proceeding, HVUS was ordered to complete an independent financial audit by July 2019. The Commission denied HVUS's exception to that deadline, stating as follows:

As the ALJs and all Parties to this proceeding agreed, given the Company's ongoing issues with filing inaccurate financial information, it would be in the public interest for HVUS to file corrected annual reports and to obtain an independent financial audit. However, we are not persuaded by the assertion of HVUS that the deadline set forth by the ALJs for the Company to complete the independent financial audit is unreasonable.... HVUS will have 120 days from the entry of this Opinion and Order, or until late July 2019, to cause the audit to be conducted and completed.

...

As the Foundation pointed out, in our *January 2019 McCloskey Order*, we reiterated our position that further delays in complying with the deadlines set forth in the McCloskey proceedings would be viewed as possibly indicative of the Company's lack of competency to operate. *January 2019 McCloskey Order* at 31. Our same reasoning applies here in rejecting HVUS's request for a longer period of time to file corrected annual reports.<sup>129</sup>

Twenty days before the deadline, HVUS filed a Motion to Extend the Time Period for Completing an Independent Financial Audit.<sup>130</sup> The Commission denied the Motion.<sup>131</sup> As of June 2020, there is no record that the required audit has been filed.

Given the Company's persistent failure to meet past deadlines, the Company's proposals for how to modify the one-year deadline are particularly troubling. As proposed by HVUS witness Stinebiser, the April 2019 deadline for completing the WTP project would be replaced by a list of milestones with no firm deadline to solve the iron and manganese problem and no trigger to start

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<sup>129</sup> *March 2019 Rate Order* at 88.

<sup>130</sup> *August 2019 Rate Order* at 9.

<sup>131</sup> *Id.* at 8-10.

hearing procedures.<sup>132</sup> OCA witness Fought explained what would happen if the Company's amendments to Ordering Paragraph 8 were adopted:

[i]f the Company never completes construction/start-up of the WTP, there would never be final approvals by DEP and therefore no compliance deadline for removing sediment from the storage tank or flushing the distribution system.

As Mr. Stinebiser proposes it, having no deadline for flushing the distribution system (Ordering Paragraph 8(1)(e)) also means there would never be evidentiary hearings on the adequacy of the water service and the Section 529 investigation (Ordering Paragraphs 20 and 21).<sup>133</sup>

When the OCA pointed out this loophole, the Company proposed that the hearing procedures could be started if the Company notifies the Commission that it has decided to permanently abandon construction of the WTP.<sup>134</sup> This does not establish a firm deadline – the Company could wait an indefinite amount of time to make that decision, if it ever does. In the meantime, it would be under no deadline to construct the WTP or remove existing sediment.

Fifth, as discussed in Section VI.C.3 (Propriety of the Recommended Financing Plan), there are no assurances that the WTP project will be adequately funded. This is demonstrated by:

- the \$1.5 million in outstanding loans and accruing interest (\$300,000 as of 2019)
- unreliable financial information in the Company's Annual Reports
- failure to complete the independent financial audit due in July 2019

For the foregoing reasons, the Commission should not grant HVUS's request to modify the original one-year deadline. While the Company has litigated the April 2019 deadline and while that deadline arrived and was missed, its customers have continued to suffer with water that is

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<sup>132</sup> HVUS St. 2R at 8-9.

<sup>133</sup> OCA St. 1S at 11.

<sup>134</sup> Tr. 497-98.

inadequately treated for iron and manganese. In 2018-2019 alone, the Company recorded 43 complaints about dirty water.<sup>135</sup> It is past time that these complaints are permanently resolved.

In January 2019, the Commission rejected the Company's arguments to extend the deadline and determined that the best course was to proceed with the hearings in Paragraph 20 and 21. For the reasons discussed above, the Commission should not modify the Order now.

Instead, the OCA recommends that the Commission proceed with an investigation under Section 529 of the Public Utility Code, 66 Pa. C.S. § 529. The Commission's May 2018 Order provided for initiation of a Section 529 investigation if the deadlines in the Order were not met.<sup>136</sup>

We believe that the provisions set forth in our Opinion and Order, including the initiation of a Section 529 proceeding should there be noncompliance with the deadlines in the order, represents a significant deterrent to future violations.<sup>137</sup>

The Commission provided two different triggers for the Section 529 investigation to begin. First, the Commission shall initiate a Section 529 proceeding if the Company fails to meet the deadline set forth in Ordering Paragraph 21 for making repairs and modifications to provide adequate water service and solve the iron and manganese problem.<sup>138</sup> Ordering Paragraph 21 states:

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

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<sup>135</sup> OCA Exh. TLF-1.

<sup>136</sup> May 2018 Order at 32, 33.

<sup>137</sup> January 2018 Order at 55-56.

<sup>138</sup> May 2018 Order at 32,33.

Second, the Commission shall initiate a Section 529 proceeding if the OCA notifies the Commission that HVUS failed to comply with any of the time deadlines in the Ordering Paragraphs. Ordering Paragraphs 26 and 27 state:

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

27. **That in the event a Notice as set forth in Ordering Paragraph No. 25 is received by the Commission, a separate proceeding shall be initiated pursuant to 66 Pa. C.S. § 529** (relating to directing a competent utility to operate or acquire a small sewer utility that has jeopardized public safety by failing to provide reasonable and adequate service).

The Company did not meet the Commission’s April 2019 deadline for complying with the recommendations in the 2018 Engineer’s Report. Also, in November 2019, the OCA filed a letter notifying the Commission that HVUS failed to comply with the April 2019 deadline.<sup>139</sup> In addition, the OCA notified the Commission that HVUS failed to comply with the engineer’s recommendations regarding wastewater service by the January 31, 2019 deadline established in Ordering Paragraph 11.<sup>140</sup> The OCA explained that it waited longer than 30 days after HVUS missed those deadlines to provide notice due to HVUS’s pending appeal before Commonwealth Court at 187 C.D. 2019 challenging the compliance deadlines at issue.<sup>141</sup> In addition, on May 15, 2019, the Commonwealth Court quashed the Petition for Review and remanded the record to the Commission with direction that “a hearing will be held forthwith before the Commission regarding

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<sup>139</sup> OCA Letter to Secretary Chiavetta, copied to Richard Kanaskie, Director, Bureau of Investigation and Enforcement and filed in Docket Nos. C-2014-2447169, C-2014-2447138 (Nov. 20, 2019) (OCA Notice). A copy of the OCA’s letter is attached, hereto, as Appendix C.

<sup>140</sup> Status Report at 5 (Mar. 16, 2020) (the Company reported in January 2019 that tasks remained outstanding and did not verify it had completed the remaining items until February 2020); *see* May 2018 Order at 29.

<sup>141</sup> App. C at 2.

the sufficiency of both the engineer’s report and the previously ordered one-year compliance deadline.”<sup>142</sup> The OCA awaited further hearings as directed by Commonwealth Court, but submitted the letter in November 2019 out of an abundance of caution.<sup>143</sup>

By Prehearing Order issued on March 11, 2020, ALJ Dunderdale ordered the Bureau of Investigation & Enforcement (I&E) to commence the Section 529 investigation. She stated:

That, pursuant to the request from the Office of Consumer Advocate on November 20, 2019, the Bureau of Investigation and Enforcement shall notify the Commission’s Secretary’s Bureau to initiate a separate proceeding against Hidden Valley Utility Services, L.P. (both the water and wastewater divisions), pursuant to the provisions in 66 Pa.C.S.A. § 529, *et seq.*, and as outlined under Ordering Paragraph No. 26 of the Commission’s Order dated May 3, 2018.<sup>144</sup>

The OCA submits that the Section 529 proceeding should commence without further delay. Section 529 requires that notice be given to the appropriate parties, that alternatives to acquisition be considered and that an extensive evidentiary record be developed before the Commission may order the acquisition of a small water utility.<sup>145</sup> The Commission may also, in its discretion, appoint a receiver.<sup>146</sup> Those notice and evidentiary requirements should be addressed now, so that the Commission is in position to order timely relief by putting a viable provider in place or implementing alternatives to acquisition.<sup>147</sup> As OCA witness Eastman explained:

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<sup>142</sup> *Hidden Valley Util. Services, L.P. v. Pa. P.U.C.*, 187 CD 2019, Memorandum Opinion at 10-11 (May 15, 2019).

<sup>143</sup> App. D at 2.

<sup>144</sup> Prehearing Order at 3 (Mar. 11, 2020).

<sup>145</sup> 66 Pa. C.S. § 529(a)-(c).

<sup>146</sup> 66 Pa. C.S. § 529(g).

<sup>147</sup> OCA St. 1 at 16; OCA St. 2 at 5.

The 529 investigation is like a safety net for customers. If, due to the cost of the project, absence of a financing plan, or otherwise, HVUS does not carry through with its plans to install a water treatment plant and remove iron/manganese from the storage tank and distribution system, we will be starting from square one. If the Section 529 proceeding is commenced now, however, we will have begun considering alternatives to acquisition, possible appointment of a receiver, and developing the evidentiary record on whether to order acquisition by a capable utility so that one of those remedies can be more quickly put into place. The point of the Section 529 proceeding is not to punish HVUS. The point is to remedy the inadequate water quality and to do so without avoidable delay.<sup>148</sup>

In the alternative, if a Section 529 proceeding is not initiated at this time, the OCA recommends the Commission require the Company to provide, going-forward, a credit to customers to recognize that right now, and until water treatment plant is installed or an interconnection to a new source of supply is constructed, customers are receiving water service that is not suitable for all household purposes. OCA witness Eastman explained why a usage allowance is a reasonable way to reflect this. He stated:

As discussed by OCA witness Everett in Statement 1 submitted in 2015, customers must flush water when it becomes discolored due to the high levels of iron and manganese in the system. This additional water is not used by the customer for anything other than flushing the water provided by HVUS, yet they are forced to pay for the additional usage. Not only do customers pay for the usage of the discolored water they have to flush out, because sewer bills are based on water usage, the flushing also affects their sewer bills. To allow customers to pay for water they use rather than for also paying for the discolored water that they have to flush out, a credit should be applied to each customer's bill until the service is no longer deemed inadequate.<sup>149</sup>

The OCA recommends that a usage allowance of 1,000 gallons per quarter be included in the current water customer charge (\$19 per quarter for water) and recommends the credit stay in place

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<sup>148</sup> OCA St. 2S at 6.

<sup>149</sup> OCA St. 2 at 6 (footnote omitted) (citing OCA Statement 1 (Water) at 5, 10, 17-18 (July 8, 2015)); *see* OCA St. 2S at 4-5.

until HVUS has resolved the problems caused by iron and manganese or the Company has transferred ownership of the water system to a capable provider.<sup>150</sup>

As discussed below, there is also basis for the Commission to impose civil penalties on HVUS for failing to fix the water quality, or even take substantial action to fix the water quality, by the April 2019 deadline.<sup>151</sup>

### **3. If the Commission Extends the Deadline, How Should the Ordering Paragraphs in the January and May 2018 Orders Be Modified?**

The Commission should not extend the April 2019 deadline for the reasons discussed above – failure to meet the *Duick* standard and continued delay by the Company to resolve the iron and manganese problem.

#### **F. Whether the Commission Should Impose Penalties on HVUS at This Time**

Refunds and penalties for HVUS's failure to remedy its water service by April 2019 will be considered in the evidentiary hearing outlined in Ordering Paragraph 20. If the Commission does not require the Section 529 proceeding to be initiated now, alternatively, the OCA has recommended the Commission provide immediate relief by reducing rates (usage allowance) until water quality is adequate.<sup>152</sup> Whereas refunds and rate reductions directly benefit the customers whose service is inadequate, penalties are paid to the Commonwealth.<sup>153</sup> For this reason, the OCA

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<sup>150</sup> OCA St. 2 at 6.

<sup>151</sup> See discussion, *infra*, Section VI.F.2.

<sup>152</sup> OCA St. 2 at 6.

<sup>153</sup> 66 Pa. C.S. § 3301(a) (Civil penalties for violations). This section provides:

(a) General rule.--If any public utility, or any other person or corporation subject to this part, shall violate any of the provisions of this part, or shall do any matter or thing herein prohibited; or shall fail, omit, neglect, or refuse to perform any duty enjoined upon it by this part; or shall **fail, omit, neglect or refuse to obey, observe, and comply with** any regulation or final direction, requirement, determination or **order made by the commission**, . . . such public utility, person or corporation for such violation, omission,

recommends penalties only as a supplement to, and not in lieu of, a rate reduction or customer refunds.

The Commission has promulgated a Policy Statement at 52 Pa. Code § 69.1201 that sets forth ten factors (Rosi Factors) that the Commission will consider in evaluating, *inter alia*, litigated proceedings and determining whether a fine for violating a Commission order, regulation or statute is appropriate. The factors and standards that will be considered by the Commission include the following:

- (1) Whether the conduct at issue was of a serious nature. When conduct of a serious nature is involved, such as willful fraud or misrepresentation, the conduct may warrant a higher penalty. When the conduct is less egregious, such as administrative filing or technical errors, it may warrant a lower penalty.
- (2) Whether the resulting consequences of the conduct at issue were of a serious nature. When consequences of a serious nature are involved, such as personal injury or property damage, the consequences may warrant a higher penalty.
- (3) Whether the conduct at issue was deemed intentional or negligent. This factor may only be considered in evaluating litigated cases. When conduct has been deemed intentional, the conduct may result in a higher penalty.
- (4) Whether the regulated entity made efforts to modify internal practices and procedures to address the conduct at issue and prevent similar conduct in the future. These modifications may include activities such as training and improving company techniques and supervision. The amount of time it took the utility to correct the conduct once it was discovered and the involvement of top-level management in correcting the conduct may be considered.
- (5) The number of customers affected and the duration of the violation.
- (6) The compliance history of the regulated entity which committed the violation. An isolated incident from an otherwise compliant utility may result in a lower penalty, whereas frequent, recurrent violations by a utility may result in a higher penalty.

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failure, neglect, or refusal, shall forfeit and pay to the Commonwealth a sum not exceeding \$1,000, to be recovered by an action of assumpsit instituted in the name of the Commonwealth.

(7) Whether the regulated entity cooperated with the Commission's investigation. Facts establishing bad faith, active concealment of violations, or attempts to interfere with Commission investigations may result in a higher penalty.

(8) The amount of the civil penalty or fine necessary to deter future violations. The size of the utility may be considered to determine an appropriate penalty amount.

(9) Past Commission decisions in similar situations.

(10) Other relevant factors.<sup>154</sup>

The Commission has previously considered the Rosi Factors with regard to HVUS's failure to comply with the 2005 Settlement. It determined not to apply a penalty in its January 2018 Order based on the following analysis:

The first factor is whether the conduct was of a serious nature. There is no evidence in the record to conclude that the Company's actions involved willful or fraudulent actions or misrepresentation. Although the service violations involved serious matters, this factor, by itself, does not merit a civil penalty. Moreover, we note that the Company did not violate primary drinking standards such that its water is unsafe to drink.

**The second factor is whether the consequences of the utility's conduct were of a serious nature resulting in damages to property or injury to persons. During the public input and evidentiary hearings, several customers testified about damages to appliances and discoloration of clothing and linens due to the high levels of iron and manganese. Moreover, some customers testified about the time and the apparent expense required to flush their lines. This testimony was unrefuted and supports the imposition of a penalty.**

**The third factor is whether the offending conduct was intentional or negligent. The record does not support a finding that the Company's actions were intentional. Rather, the Company's actions appear to be negligent when considering the extended time frame during which many of the service problems have persisted.**

**The fourth factor is whether the utility has modified its internal practices and procedures to address the offensive conduct at issue to deter and prevent similar conduct in the future. It is this area where we have concern. Although the Company has implemented some measures to improve service, HVUS has failed to fully comply with the 2005 Settlement. This factor supports a civil penalty.**

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<sup>154</sup> 52 Pa. Code § 69.1201(c).

**The fifth factor is the number of customers affected and the duration of the violation. Numerous customers testified about the problems resulting from brown and rust colored water and low water pressure which would support a civil penalty.**

The sixth factor is the compliance history of the offender. The record does not include a history of the Company's past offenses independent of this proceeding and the Parties did not provide evidence of a compliance history.

The seventh factor is whether the actions of the regulated entity were cooperative or discordant with a Commission investigation. This standard is not applicable as no formal investigation was conducted.

The eighth, ninth and tenth factors are inter-related in this case: the amount of a civil penalty required to deter future violations; prior Commission decisions in similar cases; and the "other relevant factors" standard. First, the OCA does not seek a civil penalty but requests certain remedial incentives to ensure compliance by the Company. While we have rejected the OCA's invitation to impose a rate reduction or a usage allowance, we have adopted several of the OCA's requested modifications to the Initial Decision. We believe that the provisions set forth in our Opinion and Order, including the initiation of a Section 529 proceeding should there be noncompliance with the deadlines in the order, represents a significant deterrent to future violations. Also, our rationale for rejecting the rate reduction or usage allowance is similarly relevant to our consideration of whether to apply a civil penalty. A civil penalty could impair the Company's ability to finance any of the improvements to its system recommended in the engineer's report. Therefore, upon consideration of all the factors, while some of the Company's actions merits or supports a civil penalty, we shall decline to issue or impose a civil penalty in this proceeding at this time.<sup>155</sup>

Given that, more than two years after the January 2018 Order, the Company has *still* not made the necessary improvements to its water system and is *still* providing its customers with water that is not suitable for all household purposes, the factors that the Commission determined to support imposing a penalty weigh even more heavily for that result. Further, no Section 529 proceeding has been initiated yet in response to the Company's noncompliance with the deadlines in the Order. The OCA submits it is appropriate to impose a civil penalty at this time.

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<sup>155</sup> January 2018 Order at 54-56 (emphasis added).

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

As discussed in Section VI.B above, the report that HVUS filed on April 18, 2018 was not sufficient because it did not “recommend” a remedy to eliminate the rust or brown-colored water; it identified four options.<sup>156</sup> The Company did not choose and proceed with an option for three years.<sup>157</sup> Thus, the Company’s failure to obtain a recommendation contributed to the delay in providing adequate service.

While the OCA does not recommend penalties for the Company’s failure to comply with Ordering Paragraph 6 alone, it is another reason why penalties should be imposed for the failure to improve water service as required by Ordering Paragraph 8.

**2. Should the Commission Impose Penalties on HVUS for Failing to Comply with Ordering Paragraph 8 of the May 2018 Order?**

Regarding the second Rosi factor, the OCA submits that consequences of a serious nature are involved. The Commission has already determined that the consequences of HVUS’s conduct were of a serious nature because they result in damages to property.<sup>158</sup> This was based on unrefuted testimony in this docket regarding damages to appliances, laundry and the time and expense required to flush lines.<sup>159</sup> Similar testimony was presented in the Company’s recent base

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<sup>156</sup> HVUS Exh. JFL-2; HVUS St. 1 at 5.

<sup>157</sup> HVUS St. 1 at 3-4; May 2019 Status Report at 2; *see also* OCA St. 1 at 10 (citing HVUS St. 2 at 27).

<sup>158</sup> January 2018 Order at 54.

<sup>159</sup> Tr. 54, 58, 70, 78, 83, 91, 100, 149, 198, 211, 212, 222, 234, 270-72 (stained laundry); Tr. 46, 50, 54, 59, 69, 115, 130, 149, 161, 179, 183, 185, 190, 213, 215, 230, 234, 290 (damage to water heaters); Tr. 50, 149, 199 (damage to washing machines); Tr. 59, 70, 129 (damage to dishwashers); Tr. 59, 149 (damage to garbage disposals); Tr. 50, 149, 190, 291 (damage to faucets); Tr. 50, 70, 149, 183, 215, 234, 291 (damage to toilets); Tr. 45, 58, 70, 79, 207-208, 212 (stained fixtures); OCA St. 1 at 10-16 (addressing costs incurred by customers due to flushing brown water, lost rental income, installing home filtration systems, and replacing stained laundry, appliances and fixtures).

rate proceeding.<sup>160</sup> Further, the Company recorded 43 complaints about dirty water in 2018-2019.<sup>161</sup> This supports the imposition of a penalty.

Regarding the fourth factor, the Commission raised specific concern in its January 2018 Order whether the utility had addressed the offensive conduct at issue to deter and prevent similar conduct in the future.<sup>162</sup> The evidence confirms that it has not. The Company has not solved the iron and manganese problem.<sup>163</sup> The Company has not complied with the Commission's Order to complete an independent financial audit by July 2019.<sup>164</sup> During the current proceeding, the Company continued to submit inaccurate financial information to the Commission.<sup>165</sup> This fourth Rosi factor strongly supports a civil penalty.

The fifth factor, the number of customers affected and the duration of the violation, also weighs strongly in favor of imposing a penalty. As discussed with regard to the second factor, numerous customers have testified about the problems resulting from iron and manganese in the water, in this proceeding and in the 2018 base rate proceeding.<sup>166</sup>

The sixth factor addresses HVUS's compliance history. In the January 2018 Order, the Commission found that the record did not include compliance history independent of this

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<sup>160</sup> *Pa. P.U.C. v. Hidden Valley Utility Services, L.P.*, Docket Nos. R-2018-3001306, R-2018-3001307, R.D. at 6-17 (Jan. 25, 2019).

<sup>161</sup> OCA Exh. TLF-1.

<sup>162</sup> January 2018 Order at 55.

<sup>163</sup> OCA St. 1S at 9-10 (The Company's actions since 2015 have not solved the poor water quality related to iron and manganese).

<sup>164</sup> *August 2018 Rate Order* at 9; *see* discussion, *supra*, Section VI.E.2.

<sup>165</sup> OCA Late-Filed Exh. 1, 1.a-b; *see* discussion, *supra*, Section VI.C.3.b.

<sup>166</sup> *See* discussion, *supra*, accompanying notes 158-160.

proceeding. Now, there is evidence of noncompliance with the Order from the base rate proceeding (failure to obtain an independent financial audit).<sup>167</sup> This, too, supports a penalty.

With regard to the amount of the civil penalty necessary to deter future violations (eighth Rosi factor), the OCA suggests that the Company's continued failure to meet deadlines related to improving water quality indicates that the provisions of the January 2018 Order were not sufficient deterrent, particularly because no Section 529 investigation has been started in response to the Company's failure to comply with the April 2019 deadline.

Because the OCA will also recommend customer refunds in the evidentiary hearing pursuant to Ordering Paragraph 20, the OCA recommends the penalty be a small but meaningful amount to reflect the extended time frame during which the service problems have persisted and to deter future violations. To that end, the OCA suggests \$5 per day for each day since April 19, 2019 until the Commission enters its final Order in this proceeding. As of the filing date for Reply Briefs, July 14, 2020, the recommended penalty is \$2,260 (452 days x \$5).

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<sup>167</sup> *March 2019 Rate Order* at 89; *August 2019 Rate Order* at 9-10.

## VII. CONCLUSION AND REQUEST FOR RELIEF

For the reasons set forth above, the Office of Consumer Advocate respectfully requests that the Commission deny Hidden Valley Utility Services, L.P.'s Petition to amend the May 3, 2018 Order. The Company has not demonstrated the original one-year deadline was unreasonable or insufficient. Nor has HVUS shown that it made good faith effort to meet it.

The original one-year deadline should be maintained. This allows the evidentiary proceedings set forth in Ordering Paragraphs 20, 21 and 27 of the May 3, 2018 Order to go forward as intended so the Commission is in position to provide timely relief to customers, whether or not the Company carries out its planned water treatment project. The Commission should also set a deadline of July 31, 2020 for HVUS to remediate the water problems, as an additional measure to try to secure safe and adequate service for customers.

Further, the OCA requests that the Commission consider what other relief is appropriate, including the imposition of civil penalties, to deter HVUS from future violations of the Commission's Orders. The long-standing inadequate service received by Hidden Valley customers needs to be addressed and further delay is not reasonable or in the public interest.

Respectfully Submitted,

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Dated: June 30, 2020

**OCA Proposed Findings of Fact, Conclusions of Law, and Ordering Paragraphs**

**OCA Proposed Findings of Fact**

Prior Settlement and Continued Inadequate Service

1. In 2005, HVUS executed a settlement with the OCA and customer complainants, which required the Company to address long-term service problems, which included brown or rust-colored water. *Application of Hidden Valley Utility Services Co., L.P.*, Docket Nos. A-00210117, A-00230101, R.D. at 5-6, 14-15, 18 (May 16, 2005) (*Application R.D.*).

2. The 2005 settlement required HVUS to submit a report to the Commission and all parties regarding the need, size and cost of a treatment plant to permanently solve the problems caused by iron and manganese no later than July 15, 2007. *Application R.D.* at 9; *Application of Hidden Valley Utility Services Co., L.P.*, Docket Nos. A-00210117, A-00230101, Order (July 15, 2005).

3. In 2015, HVUS had not complied with the 2005 Settlement requirements to: (1) submit a report to the Commission and all parties reassessing the need, size and cost of treatment plant to permanently solve the problems caused by iron and manganese, (2) replace 2,500 feet of mains serving troubled areas of the system and (3) hold semi-annual customer meetings. Opinion and Order at 9-10 (Jan. 18, 2018) (January 2018 Order) (citing Initial Decision at 13-14 (Aug. 23, 2016) (2016 I.D.)).

4. In the current complaint proceedings, the Commission sustained the OCA complaints, finding that the long-term water problems identified in 2005 persist, such that water service remains inadequate and unreasonable. January 2018 Order at 12-13, 23; 66 Pa. C.S. § 1501.

5. The Commission and ALJ also found that wastewater service does not meet the requirements of Section 1501. January 2018 Order at 12-13, 23.

6. The Commission afforded the Company three months, until April 2018, to obtain and submit an engineer's report on a treatment plant and other options to permanently solve the problems caused by iron and manganese and until April 2019 to carry out the engineer's recommendation. January 2018 Order at 30-31, 61-62 (Ordering Paragraph 6 (90 days for engineer's report) and Ordering Paragraph 8 (one year to correct deficiencies)).

7. HVUS submitted the engineer's report but did not construct any of the four project options and, thus, did not resolve the water quality problems by April 2019. HVUS St. 3 at 9, 20, 23, 26-27.

Engineering Reports

8. On August 28, 2015, HVUS hired CME Engineering L.P. (CME) to evaluate alternatives for removing iron and manganese from the water. HVUS St. 1 at 3-4.

9. John F. Larimer, working for CME, prepared and submitted a report to HVUS on April 27, 2016. HVUS St. 1 at 3-4. The CME report included an estimated cost for the four alternatives identified in the report. *Id.* at 3-5.

10. HVUS filed the same report with the Commission on April 18, 2018 (April 2018 Report). HVUS Exh. JFL-2; HVUS St. 3 at 4-5.

11. The April 2018 Report did not recommend one remedy to eliminate the rust or brown-colored water. Rather, the engineer identified four options to correct the problem. HVUS Exh. JFL-2; HVUS St. 3 at 6.

12. The April 2018 Report did not address removal of iron and manganese from the storage tank and distribution system. HVUS Exh. JFL-2.

13. In the April 2018 Report, CME estimated that a conventional iron filtration water treatment plant (WTP) project would cost roughly \$1 million. This amount does not include ongoing Operation & Maintenance (O&M) expense. HVUS Exh. JFL-2 at 6 and Table 1.

14. The April 2018 Report did not include a financing plan for any of the project costs.

15. HVUS witness Bradley R. Stinebiser, working for The EADS Group (EADS), provided a report marked “November 2019, revised February 2020,” which HVUS submitted to the Department of Environmental Protection (DEP) as part of its application for a Public Water Supply (PWS) Construction Permit for the WTP upgrades. OCA St. 1 at 4; OCA Exh. TLF-4.

16. The report, titled as a “Revised Design Engineer’s Report,” contained a proposed project schedule, which anticipated completion of construction/start-up of the upgraded WTP in November 2020.

#### Removal of Existing Iron and Manganese Sediment

17. The start-up and proper operation of the WTP, without more, will not eliminate the iron and manganese problems experienced by customers. OCA St. 1 at 5; OCA St. 1S at 8; Tr. 573-74, 580 (Fought); HVUS St. 2R at 5; Tr. 521 (Kettler); see also 2016 I.D. at 17 (citing 2015 OCA St. 2-Water at 10), 18-19 (citing HVUS St. 1R at 22); OCA Exh. TLF-11 (DEP Letter to HVUS dated Nov. 14, 2005, which was also made part of the record as 2015 OCA Exh. TLF-1W).

18. The sediment is removed from the storage tank by a diver vacuuming it out. OCA St. 1 at 5; Tr. 521 (Kettler).

19. It may be effective, from a cost and operations perspective, to do this at the same time as the storage tank is painted because, as part of repainting the inside of the tank, its interior is sandblasted. The sandblasting waste and the iron/manganese sediment can be removed from the tank at the same time. OCA St. 1 at 6; OCA Exh. TLF-7, Att. at 7; OCA St. 1S at 8-9

20. The sediment is removed from the distribution system by flushing the water mains by opening fire hydrants and blow-off valves. Specifically, OCA witness Fought recommended that the Company's consulting engineer provide a flushing plan and that the Company follow that plan. OCA St. 1 at 7.

21. It may be necessary to flush the system more than once to remove the sediment. If the sediment cannot be adequately removed in all the lines by flushing, it may be necessary to insert a "pig" in some of the lines to remove the sediment. OCA St. 1S at 2-3.

HVUS's Delay in Remediating Water Service

22. In 2005, DEP afforded the Company 90 days to submit an engineer's proposal for treatment plant to remove iron and manganese *and* apply for a PWS Construction Permit. OCA Exh. TLF-11.

23. In the DEP's November 2005 letter, the DEP recommended iron and manganese removal rather than sequestration but allowed the Company to submit its engineer's proposed approach. OCA Exh. TLF-11.

24. Sequestration "does not remove iron and manganese but treats the water with chemicals such as phosphate compounds that sequester the iron and manganese particles to prevent oxidation, precipitation and subsequent water quality problems (turbidity, color, staining, etc.)." 2016 I.D. at 17 (quoting 2015 OCA St. 2 at 4).

25. HVUS has known since at least 2010 that its sequestration approach was not solving the iron and manganese problem. OCA St. 1 at 10-11.

26. In 2018, the Commission gave the Company 90 days to submit its engineer's recommendations and an additional one year to carry out the recommendations before triggering additional proceedings. May 2018 Order at 27, 31-32 (Ordering Paragraphs 8 and 20).

27. OCA witness Fought testified that a viable company that wanted to quickly solve the iron and manganese problem could do so within one year. After the engineer's report was completed, Mr. Fought estimated three months for engineering design, three months to receive the DEP construction permit, and six months for construction. Tr. 552, 556 (Fought).

28. HVUS had the CME Engineer's Report in 2016, which identified four project options, but did not report that it was actively pursuing one option until July 2019. HVUS St. 1 at 5; HVUS St. 3 at 4-5; Status Report on Compliance with Order Entered January 18, 2018 and Reconsidered May 3, 2018 (Status Report) at 3 (July 16, 2019) (July 2019 Status Report).

29. The years that it took HVUS took to get to the point of seeking DEP approval for treatment plant to remove iron and manganese does not evidence any urgency on the Company's part to solve the problem. OCA St. 1 at 10 (citing HVUS St. 2 at 27); July 2019 Status Report at 3; HVUS St. 3 at 25.

30. Had the Company selected its course of action more quickly, construction would likely be completed by now. Tr. 570-71; OCA St. 1 at 11; OCA St. 1S at 1-2.

Going-Forward Water Treatment Plant Project Schedule

31. The Company’s engineer estimates the water treatment plant can be installed by November 2020 and that a DEP operating permit can be obtained within two months, likely less. OCA Exh. TLF-5; see also OCA St. 1 at 12; Exh. TLF-4; Tr. 599-600 (Stinebiser)

32. The other necessary steps – obtaining DEP approvals to operate the new plant and removing the existing iron and manganese sediment from the storage tank and distribution system can be accomplished by summer 2021. OCA St. 1 at 17; OCA St. 1S at 3-4, 8; Tr. 556 (Fought); HVUS St. 2R at 4, 8; OCA Exh. TLF-5.

33. The OCA revised recommended schedule reflects the most recently updated EADS schedule, and affords additional time. Specifically, Mr. Fought allowed one additional month for completing final design, beginning construction, and completing construction/start-up of the water treatment plant. OCA St. 1 at 17; OCA St. 1S at 3-4. The OCA’s recommended schedule also provides for removal of the existing iron and manganese sediment from the system. *Id.*

Project Schedule Submitted to DEP		OCA Revised Recommended Schedule	
Complete Final Design	April 2020	Complete Final Design	May 2020
Select Contractor	May 2020	Select Contractor	May 2020
Begin Construction	May 2020	Begin Construction	June 2020
Complete Construction/Start-up	Nov. 2020	Complete Construction/Start-up	Dec. 2020
		Complete Removal of Existing Sediment from the Storage Tank and Distribution System	July 2021

34. Removal of the iron/manganese sediment from the Storage Tank and Distribution System should be performed during non-freezing weather for proper diving and/or painting conditions and also to prevent freezing of roadways during main flushing. OCA St. 1 at 17; OCA St. 1S at 8; Tr. 556 (Fought).

35. If the water treatment plant construction was completed at a different time of year, in April, for example, less time would be warranted for completing removal of existing sediment. Tr. 556, 570-71 (Fought).

Financing Plan

36. The most recent cost estimate provided by HVUS's engineer (January 2019) indicated that the conventional iron filtration WTP project would cost \$1.9 million to construct, with ongoing O&M costs of roughly \$200,000 per year. HVUS Exh. BRS-2, Att. 4 (EADS cost estimate Jan. 24, 2019).

37. The estimate was divided into construction costs of \$1.6 million and "associated costs," comprised primarily of engineering and legal costs, of \$300,000. HVUS Exh. BRS-2, Att. 4 (\$1,479,170 + 10% contingency = \$1,627,087).

38. In May 2020, HVUS witness Kettler testified that he expects the construction costs for the water treatment plant project will be lower, closer to \$600,000. Tr. 510. If so, that will reduce the total project cost to roughly \$900,000. (\$600,000 construction costs + \$297,000 associated costs = \$897,000.) Mr. Kettler provided no update to the projected annual O&M of \$200,000.

39. According to Mr. Kettler, the WTP project costs will be financed through a \$400,000 loan obtained in December 2019 and "cash flow from the last rate increase and from just operations." Tr. 519-20 (Kettler); HVUS St. 3R at 3.

40. If the costs are recovered from customers in a future rate case, that will mean a significant rate increase. In April 2018, CME estimated that a \$1 million conventional iron filtration WTP project would increase customers' rates by roughly \$9.50 per month, or a 15% increase to current rates. HVUS Exh. JFL-2 at 6 and Table 1.

41. Rates have increased, since the 2018 CME estimate, such that a residential customer using 4,500 gallons per quarter pays \$61.21 per quarter or \$20.40 per month. OCA St. 2S at 4. If the actual cost of the water treatment plant project is closer to the \$1.9 million that EADS estimated in January 2019, the impact will be higher. OCA Exh. NDE-2.

42. The Company's cost estimates do not include the cost for repainting/repairing the storage tank. The 2018 estimate for repainting the interior of the storage tank was \$74,340. OCA St. 1 at 7; OCA Exh. TLF-8 (Company response to OCA XI-1).

43. The most recent Annual Report filed on May 8, 2020, as subsequently corrected by HVUS on May 27, 2020, indicates that HVUS has \$1.5 million in loans payable to Donald McCree at a 7% interest rate per year. HVUS Post-Hearing Exh. 1 (PUC Annual Report (Water) for Calendar Year 2019); HVUS Post-Hearing Exh. 2 (PUC Annual Report (Wastewater) for Calendar Year 2019); OCA Late-Filed Exh. 1 (Revised Schedule 225 (Water) and Revised Schedule 225 (Wastewater)) (\$619,029 (water) + \$880,971 (wastewater) = \$1,500,000).

44. The first \$880,000 loan, dated 10/24/2014, has accrued \$300,000 in interest through 2019. OCA Late-Filed Exh. 1 (Revised Schedule 225 (Water) and Revised Schedule 225 (Wastewater)). (\$280,500 (water) + \$569,500 (wastewater) = \$880,000 x 7% interest per year = \$59,500 x 5 years = \$297,500.)

45. No accrued interest is reported in the 2019 Annual Report for Wastewater. In the 2019 Annual Report for Water filed on May 8, 2020, HVUS reported \$210,000 as “accrued interest on water treatment plant.” Sched. 204, line 1 (Construction Work in Progress); *see also* Sched. 200-3, line 8 (Accrued Interest) and Sched. 225, line 4 (Accrued Interest).

46. HVUS stated that \$210,000 in accrued interest was incorrectly included in the original 2019 Annual Report for Water and removed it from Revised Schedule 225 (Water). OCA Late-Filed Ex. 1, HVUS Response to OCA on the Record Data Request 1.b.

47. The Company had an outside consultant review the 2019 Annual Report before it was filed. Tr. 530-31; HVUS Post-Hearing Exh. 1.

48. The Company has not obtained an independent financial audit of its financial records, as directed by the Commission. *March 2019 Rate Order* at 89; *Pa. P.U.C. v. Hidden Valley Utility Services, L.P.*, Docket Nos. R-2018-3001306, R-2018-3001307, Order at 9-10 (Aug. 29, 2019) (*August 2019 Rate Order*).

#### Usage Allowance

49. Customers must flush water when it becomes discolored due to the high levels of iron and manganese in the system. OCA St. 2 at 6 (footnote omitted) (citing OCA Statement 1 (Water) at 5, 10, 17-18 (July 8, 2015)); *see* OCA St. 2S at 4-5.

50. Because sewer bills are based on water usage, the need to flush water also increases customers’ sewer bills. *Id.*

#### Civil Penalties

51. Ten years after it was apparent that sequestration was not working, and more than two years after the January 2018 Order, the Company has not made the necessary improvements to its water system and is providing its customers with water that is not suitable for all household purposes. OCA St. 1S at 9-10; OCA St. 1 at 10-11; OCA Exh. TLF-1.

52. HVUS recorded 43 complaints about dirty water in 2018-2019. OCA Exh. TLF-1.

53. Iron and manganese in the water causes damages to property, as demonstrated by unrefuted testimony in this docket regarding damages to appliances, laundry, and the time and expense required to flush lines. Tr. 54, 58, 70, 78, 83, 91, 100, 149, 198, 211, 212, 222, 234, 270-72 (stained laundry); Tr. 46, 50, 54, 59, 69, 115, 130, 149, 161, 179, 183, 185, 190, 213, 215, 230, 234, 290 (damage to water heaters); Tr. 50, 149, 199 (damage to washing machines); Tr. 59, 70, 129 (damage to dishwashers); Tr. 59, 149 (damage to garbage disposals); Tr. 50, 149, 190, 291 (damage to faucets); Tr. 50, 70, 149, 183, 215, 234, 291 (damage to toilets); Tr. 45, 58, 70, 79, 207-208, 212 (stained fixtures); OCA St. 1 at 10-16 (addressing costs incurred by customers due to flushing brown water, lost rental income, installing home filtration systems, and replacing stained laundry, appliances and fixtures).

54. Similar testimony regarding damage to property was presented in the Company's recent base rate proceeding. *Pa. P.U.C. v. Hidden Valley Utility Services, L.P.*, Docket Nos. R-2018-3001306, R-2018-3001307, R.D. at 6-17 (Jan. 25, 2019).

55. As of the filing date for Reply Briefs in this proceeding (July 14, 2020), 452 days will have passed since the April 19, 2019 deadline for remedying water service.

**OCA Proposed Conclusions of Law**

1. This Commission has jurisdiction over the subject matter and parties to this proceeding. 66 Pa C.S. § 701.
2. Under Section 332 of the Public Utility Code, the proponent of an order has the burden of proof. As Hidden Valley Utility Services, L.P. filed the Petition at issue, it has the burden of proof in this matter. 66 Pa C.S. § 332(a).
3. Section 703(g) of the Code provides the Commission with the discretionary authority to rescind or amend our orders. 66 Pa. C.S. § 703(g). However, a petition to modify or rescind 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).
4. Parties “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) (*Duick*) (quoting *Pennsylvania Railroad Co. v. Pennsylvania Public Service Commission*, 179 A. 850, 854 (Pa. Super. Ct. 1935)).
5. The Petitioner has not met the legal standard for modifying the Commission’s May 3, 2018 Order because it did not raise “new and novel arguments” not previously heard or considerations which appear to have been overlooked or not addressed by the Commission. *Duick* 56 Pa. P.U.C. at 559
6. Hidden Valley Utility Services Co., L.P. is obligated to remedy any deficiencies in its system to ensure that its customers receive “adequate, efficient, safe, and reasonable service.” 66 Pa. C.S. § 501, 1501.
7. The Commission has the authority to require Hidden Valley Utility Services Co., L.P. to take steps necessary to provide adequate water and wastewater service. 66 Pa. C.S. § 501, 1501.
8. The Commission has the authority to require Hidden Valley Utility Services Co., L.P. to reduce rates to reflect ongoing inadequate water service. 66 Pa. C.S. §§ 1301 (rates must be just and reasonable), 523(a)-(b) (in determining just and reasonable rates, the Commission shall consider any relevant and material evidence of adequacy of service).
9. A public utility may be liable for civil penalties under Sections 3301(a) and 3301(b) of the Public Utility Code. 66 Pa. C.S. §§ 3301(a)-(b).

**OCA Proposed Ordering Paragraphs**

1. The Petition for Amendment of Hidden Valley Utility Services Co., L.P. filed on October 18, 2018, is denied, consistent with this Opinion and Order.
2. No later than July 31, 2020, Hidden Valley Utility Services Co., L.P., shall permanently resolve problems caused by iron and manganese and provide adequate water service to customers. By this deadline and as part of this remedy, the Company must also (1) remove existing iron and manganese sediment from the interior of the standpipe storage tank and (2) follow a flushing plan obtained from its engineer to remove the sediment from the distribution system. If the sediment cannot be adequately removed in all the lines by flushing, it may be necessary to insert a “pig” in some of the lines to remove the sediment.

If the Commission does not require the Section 529 proceeding directed in Ordering Paragraphs 21 and 27 of the May 3, 2018 Order to be initiated now, the OCA recommends including the following Ordering Paragraph:

Hidden Valley Utility Services Co., L.P.’s charges for water service shall be modified to include a 1,000 gallon allowance. Within seven (7) calendar days of entry of the Order on Hidden Valley Utility Services Co., L.P.’s October 2018 Petition for Amendment, Hidden Valley Utility Services Co., L.P. will file a tariff effective on one (1) day’s notice to reflect this change.

**Redline Showing Substantive Changes Made in the May 2018 Order**

Redline Showing Substantive Changes Made in the May 2018 Order

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

20. That on or before March 31, 2019, or within sixty (60) days after receipt of a written report of all completed rehabilitative measures from Hidden Valley Utility Services, L.P. and its engineer, the ~~Office of Consumer Advocate~~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 ~~or request that this matter be referred to the Bureau of Technical Utility Services.~~ If the recommended repairs, modifications, rehabilitative and maintenance procedures have not been accomplished within the time frame structured herein, or if the water quality or water and wastewater service as reported by ~~the Office of Consumer Advocate or~~ the Bureau of Technical Utility Services is not adequate and reasonable, an evidentiary hearing shall forthwith be scheduled by the Office of Administrative Law Judge for purposes of addressing one or more of the following issues: the adequacy of the water system, the adequacy of the wastewater system, the quality of the water, the appropriateness of penalties to be imposed against Hidden Valley Utility Services, L.P., the appropriateness of ratepayer refunds, and any other issue relative to these ordering paragraphs. The burden of proof in the evidentiary hearing as to these issues shall be upon Hidden Valley Utility Services, L.P. The Commission shall retain jurisdiction for that purpose.

**OCA Notice of HVUS Failure to Meet May 2018 Order Deadlines**

COMMONWEALTH OF PENNSYLVANIA



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November 20, 2019

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

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

Dear Secretary Chiavetta:

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

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

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

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

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

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

Respectfully Submitted,



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Enclosures:

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

\*280774

CERTIFICATE OF SERVICE

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

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

Dated this 20<sup>th</sup> day of November 2019.

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