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VIA E-FILE

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

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

Dear Secretary Chiavetta:

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

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

Sincerely,

COZEN O'CONNOR

By: Jonathan P. Nase
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JPN:kmg
Enclosure

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

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

CERTIFICATE OF SERVICE

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

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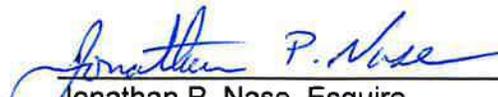
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I. INTRODUCTION

In the 2018 Orders,¹ the Commission charted the course for this case. The Commission found that HVUS violated Section 1501 and ordered the Company to complete certain tasks to improve service. January 2018 Order pp. 60-68. The Commission gave HVUS what it believed was the time reasonably necessary to comply with that order, but, consistent with 66 Pa. C.S. §§ 703(e) and (g), noted that the Company could request an extension of any deadline in the order, if deemed critical. January 2018 Order, p. 31 (cited with approval in the May 2018 Order pp. 8-9).

On October 18, 2018, HVUS filed a Petition to Amend, primarily seeking an extension of the one-year deadline in Ordering Paragraph 8(1) of the May 2018 Order. Petition to Amend, p. 2 and ¶¶ 16-18. In this proceeding, HVUS has proved, by a preponderance of the evidence, that the one-year compliance deadline was not sufficient to accomplish the designated task.

HVUS has also provided the Commission with reasonable assurances that a new deadline will be met. It has obtained a Public Water Supply Permit from DEP to construct a water treatment plant, which could be completed this year. HVUS will also complete the following projects after the water treatment plant is constructed: obtain an operating permit from DEP for the water treatment plant, vacuum the iron and manganese sediment from HVUS's storage tank, flush HVUS's distribution system, and request that customers flush the water in their homes (these projects, together with the construction of the water treatment plant, are referred to herein as the "Projects").

Consistent with the 2018 Orders and 66 Pa. C.S. § 703(e), HVUS recommends that the Commission (1) order the Company to complete the Projects, and (2) provide the Company with the time reasonably necessary to comply with that directive. Specifically, HVUS recommends that the Commission replace the one-year deadline in Ordering Paragraph 8(1) for eliminating the rust or brown-colored water provided to customers with a series of deadlines for specific milestones in the process of

¹ Unless otherwise indicated, capitalized terms in this Reply Brief have the same definitions as in HVUS's Main Brief. To avoid unnecessary repetition, this Reply Brief incorporates by reference HVUS's Main Brief, filed on June 30, 2020.

designing/constructing/permitting the Projects. HVUS also recommends that the Commission retain existing provisions in the 2018 Orders to allow the Commission to monitor the Company's progress and make sure the Projects stay "on track."

The OCA, like HVUS, recommends that the Commission order HVUS to construct the Projects. The OCA, however, argues that the Commission should deny HVUS's Petition to Amend. Instead, it recommends that the Commission add a new provision to the May 2018 Order establishing a new deadline for the Projects. The OCA also asks the Commission to order HVUS to pay penalties pursuant to 66 Pa. C.S. § 3301. It also asks the Commission to order the immediate commencement of a Section 529 Investigation of HVUS or, in the alternative, to order HVUS to give customers a usage allowance until the Projects are completed or the water system is transferred to another utility. In addition, since HVUS would be in violation of Ordering Paragraph 8(1), HVUS would be forced to litigate a penalty proceeding pursuant to Ordering Paragraph 20 of the May 2018 Order.

The OCA's proposal is a plan to fail. The OCA purports to be concerned about the Company's financial ability to complete the Projects, but its proposal would deprive HVUS of financial resources, decreasing the likelihood that the Company will complete the Projects in a timely manner. The Commission rejected similar OCA proposals in the January 2018 Order, finding that those proposals would hamper the Company's ability to comply with the Commission's order. January 2018 Order p. 24. The Commission should stay the course it charted in 2018.

In this case, HVUS carried its burden of proving, by a preponderance of the evidence, that it timely requested an extension and further demonstrated that it had good cause for the extension (one year was not a sufficient time period for completing the task described in Ordering Paragraph 8(1)). 66 Pa. C.S. § 703(e) and 52 Pa. Code § 1.15(a)(1). Since HVUS carried its burden of proof in this case, the Commission must modify the deadline in Ordering Paragraph 8(1). To the extent that the Commission has discretion over whether to modify the deadline, the Commission should do so, *inter alia*, because the existing deadline in Ordering Paragraph 8(1) is not supported by substantial evidence. Consequently, it is invalid and unenforceable. *Norfolk & Western Ry. Co. v. Pa. Pub. Util. Comm'n*, 413 A.2d 1037 (Pa. 1980) ("*Norfolk*").

The Commission's Mission Statement calls on the Commission to balance the interests of customers and utilities. In this case, their interests are aligned; customers need better water soon and HVUS needs a little more time to provide it to them. Contrary to the OCA's assertions, OCA Main Brief p. 31, further litigation will not solve the problem of iron and manganese in HVUS's water. Construction will. HVUS should be permitted to finish the Projects it has started, according to the schedule it has recommended in this proceeding, with appropriate oversight by the Commission.

II. STATEMENT OF THE CASE

In its Statement of the Case, and elsewhere in its Main Brief, the OCA cites documents that have been filed at this docket number, but have never been introduced into the record in this case (or in any other Commission proceeding). Notes 8, 9, 43, 116, 117, 140 and 157 reference status reports filed by HVUS, as do Proposed Findings of Fact 28 and 29. Appendix C is a November 20, 2019 letter filed by the OCA. In addition, Appendix B is a document apparently created for this case, which purports to show the difference between Ordering Paragraphs 8 and 20 of the January 2018 Order and Ordering Paragraphs 8 and 20 of the May 2018 Order.

HVUS respectfully requests that the ALJ disregard this extra-record evidence. HVUS did not have an opportunity to respond to these documents by way of testimony or responsive exhibits. The OCA introduced a status report into the record as OCA Exhibit TLF-2; there is no reason it could not have introduced the other cited documents into the record as well. Additionally, Appendix B is completely unnecessary because the Commission's May 2018 Order contained black-lines of the modified paragraphs.

Arguments based on evidence not admitted into the record must be excluded from the consideration and disposition of this proceeding. *Breezewood Telephone Company*, 82 Pa. P.U.C. 178 (1994). Consequently, HVUS requests that the ALJ disregard all references to the extra-record evidence in the OCA's Main Brief and Proposed Findings of Fact.

III. PROCEDURAL HISTORY

HVUS incorporates by reference its Main Brief, pp. 5-8.

On June 30, 2020, HVUS and the OCA filed Main Briefs. On that same date, Mr. Kollar and counsel for I&E both notified the ALJ and all Parties by e-mail that they would not file a Main Brief. On July 1, 2020, Ms. Sharon Howard-Frieri notified the ALJ by e-mail that she would not file a Main Brief. Although this notice was submitted late, it did not affect HVUS's substantive rights. 52 Pa. Code § 1.2(a). Consequently, HVUS has no objection to this late filing.

IV. LEGAL STANDARDS

In its Main Brief, the OCA asks the Commission to Order HVUS to complete the Projects by specific deadlines. OCA Main Brief p. 20; Proposed Ordering Paragraph 2. The OCA states that this is not a modification of Ordering Paragraph 8(1). OCA Main Brief pp. 10, 40. Instead, it is a new provision in the May 2018 Order establishing a new deadline.

The OCA also asks that the Commission institute a Section 529 Investigation immediately, regardless of whether the Commission grants HVUS's Petition to Amend. OCA Main Brief pp. 36-38. In the alternative, the OCA asks that the Commission order HVUS to give customers a usage allowance. OCA Main Brief pp. 39-40. These are also new requests for relief.

As the party requesting this relief, the OCA bears the burden of proof on these recommendations. 66 Pa. C.S. § 332(a). HVUS's Main Brief, pp. 8-10, explains this burden. Additionally, as discussed in Section VI.E. below, the OCA must demonstrate that it preserved these issues for consideration in this proceeding.

V. SUMMARY OF ARGUMENT

The OCA's Main Brief repeatedly criticizes HVUS for not doing more to remove the iron and manganese from its water prior to 2018. This argument is irrelevant and unpersuasive. This is not a proceeding to enforce the 2005 Settlement; it is a hearing to consider the evidentiary support for HVUS's

Petition to Amend the May 2018 Order. Obviously, HVUS cannot be faulted for failing to comply with the 2018 Orders *before they were even issued*.

The OCA's Main Brief is also unpersuasive because it is internally inconsistent. It claims that the one-year compliance deadline in Ordering Paragraph 8(1) was sufficient because OCA Witness Fought testified that HVUS could have constructed a water treatment plant within one year of receiving the April 2018 Engineer's Report. At the same time, the OCA's Main Brief claims the April 2018 Engineer's Report was insufficient because it failed to recommend that HVUS take additional steps that Mr. Fought recommended be taken *after* the water treatment plant is constructed.

The OCA's recommendation for resolving this case is similarly internally inconsistent. The OCA recommends that the Commission order HVUS to complete the Projects. It also recommends, however, that the Commission deny the Petition to Amend, resulting in HVUS being in violation of Ordering Paragraph 8(1). This result would mean that HVUS is subject to a penalty proceeding pursuant to Ordering Paragraph 20 (yet the OCA recommends that HVUS be penalized in this proceeding as well). Denying the Petition to Amend would also mean that HVUS is subject to a Section 529 Investigation.

Nowhere does the OCA's Main Brief acknowledge the impact of its recommendations on HVUS's ability to complete the Projects. That impact is obvious: HVUS would be deprived of financial resources, decreasing the likelihood that HVUS would be able to complete the Projects in a timely manner. This result would not be in the public interest.

The ALJ should recommend, and the Commission should find, that the April 2018 Engineer's Report was sufficient. It included all of the items required by Ordering Paragraph 6 of the January 2018 Order. The OCA asserts, without analysis, that the report was required to include "a remedy." The April 2018 Engineer's Report appropriately recommended that the Company implement any one of four projects – just as an attorney, who is asked to recommend another attorney to a friend or client, frequently recommends more than one counsel who can capably handle the matter.

The OCA also criticizes the engineer's report for not recommending that HVUS vacuum its storage tank and flush its water distribution system after the water treatment plant is completed. This criticism is

unjustified; the OCA's own witness testified that HVUS is already performing those activities on a regular basis. Consequently, the tank will be vacuumed, and the lines will be flushed, after the water treatment plant is constructed. The January 2018 Order did not require the engineer to recommend that the Company continue beneficial practices that it is already performing on a regular basis. Similarly, the OCA's criticisms of the implementation schedules in the April 2018 Engineer's Report should be rejected; they are criticisms of the actions/inactions of HVUS management during the period 2016-2018, not criticisms of the implementation schedules.

The ALJ should also recommend, and the Commission should find, that the recommendations, implementation schedules, and cost estimates in the April 2018 Engineer's Report were proper. The implementation schedules were properly prepared by an experienced professional based on the information available to him in 2018. They properly reflected the engineer's opinion that neither a water treatment plant, nor an interconnection to an alternative water source, could have been constructed within twelve months of receiving the engineer's report. The fact that they were later updated, based on more specific information about this particular project, does not mean that the April 2018 Engineer's Report was improper. Mr. Fought's allegation that the schedules did not reflect that the project needed to be done quickly is a personal opinion or perception, not evidence on which the Commission may rely.

Further, the ALJ should recommend, and the Commission should find, that the one-year compliance deadline in Ordering Paragraph 8(1) was insufficient; it did not give the Company the time reasonably necessary to comply with the May 2018 Order. HVUS demonstrated that one year is not an adequate period to construct a water treatment plant. The OCA argues that merely constructing a water treatment plant will not eliminate the rust or brown-colored water provided to customers; additional steps are necessary after the water treatment plant is constructed. There is no evidence whatsoever that one year is a reasonable time frame for completing all of the projects recommended by the OCA to eliminate the rust or brown-colored water provided to customers. The one-year deadline in Ordering Paragraph 8(1) therefore is not just insufficient, it is not supported by substantial evidence. Consequently, it is invalid and unenforceable.

The ALJ should recommend, and the Commission should modify the one-year compliance deadline in Ordering Paragraph 8(1). Pursuant to *Duick v. Pennsylvania Gas and Water Company*, 56 Pa. P.U.C. 553 (1982) (“*Duick*”), the Commission uses a two-step procedure to analyze a petition to amend. First, it determines whether it will even consider the petition. HVUS’s Main Brief demonstrated that the Commission should consider HVUS’s Petition to Amend for several reasons: HVUS has raised a new and novel issue, HVUS has raised an issue that was overlooked by the Commission previously, and HVUS has introduced evidence that did not exist and so was not available to it in 2016.

The OCA’s Main Brief stresses that in the second step of the *Duick* analysis, the Commission has discretion. Its discretion is not unlimited, however. HVUS has carried its burden of proving, by a preponderance of the evidence, that it meets the legal standard for an extension pursuant to 66 Pa. C.S. § 703(e) and 1.15(a)(1); the Company demonstrated that it petitioned to modify a deadline in a Commission order prior to the applicable deadline, and demonstrated good cause for the extension (the one-year deadline was insufficient). That burden does not change over time just because the litigation process has been protracted. Consequently, in this case, the Commission must grant an extension.

Additionally, as discussed above, the deadline in Ordering Paragraph 8(1) is invalid and unenforceable. If the Commission does not amend Ordering Paragraph 8(1), HVUS will not have a deadline for eliminating the rust or brown-colored water provided to customers. That result would not be in the public interest.

HVUS acted in good faith by timely complying with the one-year deadline in Ordering Paragraph 8(2) for reassessing the need, size and cost of a water treatment plant and deciding to build such a plant to permanently solve the problems caused by iron and manganese in its water. In this fact situation, the one-year deadline for deciding to construct a water treatment plant is the same as the one-year deadline for completing the projects (including construction of the water treatment plant) for eliminating the rust or brown-colored water provided to customers. Obviously, on these facts, the one-year compliance deadline in Ordering Paragraph 8(1) is insufficient and should be extended.

The OCA contends that the Commission should not extend the deadline, primarily because HVUS has “unclean hands,” having missed other deadlines. The Commission, however, does not have equitable powers. As discussed above, HVUS has carried its burden of proving that it meets the applicable legal standard in this case. HVUS has also provided the Commission with reasonable assurances that it will comply with a new deadline. The OCA claims these assurances are inadequate, but its argument is completely undermined by the fact that the OCA also recommends that the Commission order the Company to complete these same Projects.

The ALJ should recommend, and the Commission should approve HVUS’s recommendation that the Company be ordered to complete the Projects by a date that is after the Commission enters its final order in this proceeding. This result would be consistent with 66 Pa. C.S. § 703(e) and the 2018 Orders in that it would give the Company the time reasonably necessary to comply with the Commission’s order in this proceeding. This result is in the public interest because it offers a practical solution for improving the water provided to HVUS’s customers.

The OCA’s recommendations should be rejected. They are not in the public interest because they would increase the likelihood that HVUS will be unable to complete the Projects in a timely manner. Additionally, they are unsupported by the law. The OCA did not request alternative relief in its Answer to the Petition to Amend. It has therefore waived its right to request alternative relief in this proceeding. Moreover, if the Commission replaces the one-year deadline in Ordering Paragraph 8(1) with a deadline that is after the Commission enters its final order in this proceeding, HVUS would not be in violation of Ordering Paragraph 8(1) and there would be no basis for starting a Section 529 Investigation of HVUS or requiring HVUS to give customers a usage allowance. Finally, the OCA fails to carry its burden of proof on its recommendations because it fails to address key legal issues. For example, the OCA fails to even allege that the Commission has statutory authority to commence a Section 529 Investigation, despite evidence that the Company is not a “small water utility” as defined in Section 529(m).

Consequently, HVUS respectfully requests that the ALJ recommend, and the Commission grant, HVUS’s Petition to Amend, and deny the OCA’s requested relief.

VI. ISSUES

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

No Party addressed this issue in their Main Brief. HVUS will not address this issue here.

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

As stated in HVUS's Main Brief, the question presented is whether the April 2018 Engineer's Report complied with Ordering Paragraph 6 of the January 2018 Order. HVUS established a *prima facie* case that the April 2018 Engineers Report was sufficient because it included all of the items required by the January 2018 Order. The OCA failed to rebut HVUS's *prima facie* case. Consequently, the ALJ should recommend, and the Commission should find that the April 2018 Engineer's Report was sufficient.

1. **The report properly recommended that the Company complete any one of four projects for eliminating the rust or brown-colored water provided to customers**

The OCA asserts that the April 2018 Engineer's Report did not comply with Ordering Paragraph 6 of the January 2018 Order because it did not recommend "a remedy" to eliminate the rust or brown-colored water provided to customers. OCA Main Brief p. 14. The OCA, however, does not provide any analysis supporting its assertion that the April 2018 Engineer's Report was required to recommend "a remedy," as opposed to recommending that utility management implement any one of several projects. Interestingly, the OCA's Main Brief "does not challenge the correctness of the engineer's report for the four options identified to remove iron and manganese problems from the source water." OCA Main Brief p. 17.

In Section VI.B.3. of its Main Brief, HVUS explained that the April 2018 Engineer's Report recommended that the Company implement any one of four projects to remove the iron and manganese from its water. This is consistent with the common usage of the term "recommend." For example, an attorney who is asked to recommend another attorney to a friend or client frequently recommends more than one counsel who can capably handle the matter. HVUS' Main Brief, pp. 15-16, reviewed the specific terms of Ordering Paragraph 6 and found no explicit requirement that the April 2018 Engineer's Report

recommend “a remedy” to utility management. Additionally, HVUS’s Main Brief argued that such a requirement would have been inconsistent with the management discretion doctrine, which gives utility management (not an independent contractor) the responsibility of making decisions for the utility. The ALJ should recommend, and the Commission should reject the OCA’s assertion that Ordering Paragraph 6 required the April 2018 Engineer’s Report to recommend “a remedy” to utility management.

2. The April 2018 Engineer’s Report was not required to recommend that the Company continue beneficial practices that it is already performing on a regular basis

The OCA asserts that the April 2018 Engineer’s Report was insufficient because it did not tell HVUS management to vacuum the iron and manganese sediment from its storage tank, nor did it tell HVUS management to flush the water from its distribution system, after the water treatment plant is completed OCA Main Brief pp. 14-15. According to the OCA, “OCA witness Fought explained in this proceeding that the start-up and proper operation of the [water treatment plant], without more, will not eliminate the iron and manganese problems experienced by customers.” OCA Main Brief p. 14. The ALJ should recommend, and the Commission should reject this argument.

To determine whether the April 2018 Engineer’s Report was sufficient, of course, the analysis must begin with a review of the January 2018 Order. In pertinent part, Ordering Paragraph 6 required the engineer to make recommendations to correct any found deficiencies.

OCA Witness Fought noted that the Company has been vacuuming the iron and manganese from its storage tank approximately every three years. OCA St. 1 p. 6. The tank was, in fact, vacuumed in 2017. OCA Exhibit TLF-7. Consequently, the tank was due to be cleaned again in 2020. OCA Witness Fought also noted that the Company has been flushing its lines more frequently than normal for years. OCA St. 1, p. 7. In short, the testimony of *OCA’s own witness* demonstrates that HVUS is already regularly flushing

its lines and vacuuming the iron and manganese sediment from its storage tank.² Consequently, the tank will be vacuumed, and the lines will be flushed, after the water treatment plant is constructed.

Nothing in Ordering Paragraph 6 requires the engineer's report to include recommendations that HVUS continue existing practices that the Company is already performing on a regular basis that help to remove iron and manganese from its water. If an existing practice needed to be changed to correct a deficiency, the engineer's report arguably should have included that recommendation, but that is not the situation here. Commission orders, like statutes, should not be read to produce an absurd and unreasonable result. It would be absurd and unreasonable to construe Ordering Paragraph 6 as requiring the engineer's report to list every beneficial existing practice that the Company should continue. The ALJ should recommend, and the Commission should find, that the April 2018 Engineer's Report was sufficient.

3. The implementation schedules in the April 2018 Engineer's Report were sufficient

The OCA contends that the implementation schedules included in the April 2018 Engineer's Report were insufficient "because the Company had not taken action to narrow the options and develop the design details between 2016 and 2018." OCA Main Brief p. 16. The ALJ should recommend and the Commission should reject this argument.

On July 8, 2015, OCA Witness Fought introduced his Direct Testimony supporting the OCA's Complaint. He recommended that the Company be required to direct its consulting engineer to complete a study of installing a water treatment plant that removes iron or manganese, or finding a more suitable source of supply. He recommended that this report be due within 90 days of the date of the Commission's final order. HVUS Exhibit JMK-2 (OCA St. 2 p. 20).

Out of an abundance of caution, on August 18, 2015, HVUS authorized CME to evaluate alternatives for removing iron and manganese from its water system. CME studied the installation of a water treatment plant and finding a more suitable source of supply, and presented its report to HVUS

² Consequently, HVUS properly excluded the cost of these regularly-performed activities from its financing plan for the Projects.

management on April 27, 2016 (more than eight months later). HVUS St. 1 p. 4. At that time, the OCA Complaint remained in litigation before Administrative Law Judge Watson. Therefore, it was unclear whether the Commission would find that the Company's water service was reasonable and adequate and, if not, what the Commission might order as a remedy. Significantly, the Intervenors sought to have the Company placed in receivership in that proceeding. January 2018 Order pp. 56-59. Under these circumstances, it was reasonable for Company management to wait for a decision from the Commission before proceeding further with the CME report.

When the Commission issued its January 2018 Order, HVUS management reviewed CME's report and determined that it satisfied some but not all of the requirements of the Commission's Order. Mr. Kettler did not believe it was reasonable and prudent to have an engineer repeat the work that CME had already performed only two years before. Therefore, HVUS management hired EADS to complete the remaining items required by the Commission's order. HVUS St. 3 p. 5.

The OCA contends that the implementation schedules in the April 2018 Engineer's Report were insufficient because they relied on CME's report, in which projects were at the conceptual stage with very few design details developed. OCA Main Brief pp. 16-17. The OCA's argument is flawed because the OCA is not even criticizing the implementation schedules in the April 2018 Engineer's Report; it is criticizing HVUS management for actions/inactions taken before the Commission issued the January 2018 Order. Those actions/inactions did not violate the January 2018 Order, nor did they violate any other Commission order. HVUS was under no obligation to get an engineer's report in 2015, but it did. The Company acted reasonably in not pursuing the CME report further while the OCA Complaint was pending during the period 2016-2018. Doing so could have been an unnecessary expense, depending on the Commission's decision on the OCA Complaint.

Finally, it should be noted that CME spent eight months developing its report. If HVUS had waited until the Commission's January 2018 Order was entered, CME would have had only ninety days to develop its report. Consequently, CME's report was more developed and more detailed than would have been the case if HVUS had waited until the Commission issued its January 2018 Order.

HVUS did something it was not required to do by hiring CME to perform a study in 2015. The Company and its customers benefitted from that decision by receiving a report that was more detailed and more developed than would have been the case if the Company had waited until the January 2018 Order was entered. HVUS should not be punished under the guise of finding that the *implementation schedules* in the April 2018 Engineer's Report were "insufficient."

C. The propriety of the recommendations, proposed time schedules and financing plans for the recommendations contained in the April 2018 Engineer's Report

As stated in HVUS's Main Brief, this issue requires the Commission to evaluate the substance of the April 2018 Engineer's Report. HVUS established a *prima facie* case that the substance of its report was proper. The OCA failed to rebut HVUS's *prima facie* case. Therefore, the ALJ should recommend, and the Commission should find, that the substance of the April 2018 Engineer's Report was proper.

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

The OCA contends that the recommendations in the April 2018 Engineer's Report were improper because they did not include the vacuuming of iron and manganese sediment from HVUS's storage tank and the flushing of water from HVUS's distribution system. OCA Main Brief p. 17. As discussed in Section VI.B.2. above, HVUS was already performing those beneficial activities on a regular basis. Consequently, the 2018 Engineer's Report was not required to recommend that HVUS continue performing those activities.

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

The OCA alleges that the implementation schedules in the April 2018 Engineer's Report were not proper, in part, because they did not address the removal of iron and manganese from the storage tank or the flushing of water from the treatment system. OCA Main Brief p. 19. As discussed in Section VI.B.2. above, Ordering Paragraph 6 did not require the report to recommend that Company management continue beneficial activities that it was already performing on a regular basis. Consequently, the implementation schedules properly excluded these steps.

The OCA also argues that the implementation schedules were not proper because they were “unreasonably long.” OCA Main Brief p. 17. The implementation schedules were not improper just because the OCA did not like the results.

The unreasonableness of the OCA’s position becomes apparent when one considers that the OCA criticizes the implementation schedules for *excluding* the vacuuming of iron and manganese sediment from the storage tank and the flushing of water from HVUS’s system – which the OCA contends should be performed *after* the water treatment plant is completed. OCA St. 1 p. 17; OCA St. 1S p. 11. Obviously, if those steps had been included, the schedules would have been even longer.

The OCA notes that the estimated schedule that Mr. Stinebiser developed in 2020 differed from the schedule he developed in 2018. As explained in Section VI.C.2. of HVUS’s Main Brief, this fact does not demonstrate that the 2018 implementation schedules were incorrect or prepared improperly; it means the 2020 estimates were based on updated information. They were also prepared for different purposes. As a result, they included different steps.

For example, the schedule in the April 2018 Engineer’s Report included 120 days for completing final designs of the project after receiving the DEP permit. Based on the information available in 2020, Mr. Stinebiser believed only one month would be necessary for this step. In 2018, Mr. Stinebiser included the steps of obtaining bids and awarding contracts (a total of 150 days), because those steps were required by Ordering Paragraph 6. In 2020, Mr. Stinebiser noted that HVUS is not required to use a formal bidding process. Consequently, he estimated that a contractor could be selected within one month of completing final designs. Mr. Stinebiser’s 2018 implementation schedule included 60 days for obtaining the DEP operating permit after the water treatment plant is constructed. Mr. Stinebiser did not include this step in his 2020 estimate because this schedule was part of the application to DEP for a permit to construct the water treatment plant. This step was therefore irrelevant for the purposes of that schedule. *Compare* HVUS Exhibit JLF-2 and HVUS Exhibit BRS-2. These differences account for a 270 day difference in the two schedules. These differences are reasonable under the circumstances and do not prove that the 2018

implementation schedules were improper or incorrect based on the information available to Mr. Stinebiser in 2018.

The OCA alleges that Mr. Stinebiser's 2018 schedule "did not reflect that the project needed to be done quickly." OCA Main Brief pp. 18-19. This allegation is not supported by the evidence. Much of the evidence cited by the OCA again criticizes HVUS management's actions/inactions prior to January 2018. This evidence has nothing to do with Mr. Stinebiser's implementation schedules. Similarly, Mr. Fought testified that the Company's alleged "lack of response" to the CME report and the April 2018 Engineer's Report "seems to indicate that the Company thought it had more time to study which of four different options to implement." OCA St. 1 at 9-10, cited in note 62 of the OCA's Main Brief. Again, this is not a criticism of Mr. Stinebiser's implementation schedules. Even if it is, it is merely a personal opinion or perception, not evidence on which the Commission may rely. *MidAtlantic Power Supply Association of Pennsylvania v. Pa. Pub. Util. Comm'n*, 746 A.2d 1196, 1200 (Pa. Cmwlth. 2000) (citing *Pa. Bureau of Corrections v. City of Pittsburgh*, 532 A.2d 12, 14 (Pa. 1987) ("Mere bald assertions, personal opinions or perceptions do not constitute evidence.")).

Mr. Fought's opinion is contradicted by the testimony of Mr. Stinebiser, whose Direct Testimony stated that he knew the 2018 Orders required the Company to implement the recommendations from the engineer's report within one year, yet his implementation schedules estimated that the Company would need more than one year to implement each recommendation. He was asked:

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

EADS was not involved in this case prior to January 2018, so I do not know the factual basis for the one-year deadline. Based on our work for HVUS since January 2018, however, I do not believe that one year is an adequate time period to achieve the desired result – particularly if the Commission believes (as I think it does) that the appropriate means for achieving this end would be the construction

of a new water treatment plant or the construction of a connection to an alternative source of water such as the Quemahoning River. As explained above, I believe more than one year is necessary to complete all the steps described in Ordering Paragraph 6 (“completion of the design, repairs or improvements, obtaining permits, obtaining bids, awarding contracts, and completion of construction/start of operation.”).

HVUS St. 2 p. 19. The implementation schedules therefore reflect the professional opinion of the engineer who prepared them that one year was not a sufficient time period to complete the project.

For all of the above reasons, the OCA’s criticisms of the implementation schedules in the April 2018 Engineer’s Report should be rejected.³ The ALJ should recommend, and the Commission should find, that these implementation schedules were proper.

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

As explained in Section VI.C.3. of HVUS’s Main Brief, Ordering Paragraph 6 required the April 2018 Engineer’s Report to include cost estimates for the recommendations contained in that report, but did not require the engineer to prepare financing plans in the sense of recommendations for how HVUS should pay those costs (e.g., through a rate increase, loan, or sale of an ownership interest). The OCA’s Main Brief does not argue otherwise.

Nor does the OCA’s Main Brief criticize the cost estimates in the April 2018 Engineer’s Report. The ALJ should therefore recommend, and the Commission should find, that the April 2018 Engineer’s Report contained proper cost estimates.

Most of the OCA Main Brief’s discussion of this issue actually addresses HVUS’s plans for financing the Projects. These arguments will be addressed in Section VI.E.1.b.(6) below, but at this point, it is important to note the fundamental inconsistency in the OCA’s position.

The OCA claims to be concerned about the Company’s ability to finance and carry out the Projects, yet the OCA recommends that the Company be required to complete those Projects and pay penalties and

³ In discussing the implementation schedules in the April 2018 Engineer’s Report, the OCA’s Main Brief also discusses the OCA’s proposed schedule for the Projects. The OCA’s proposal will be discussed in Section VI.E.2.a. below.

immediately litigate a Section 529 Investigation or give customers a usage allowance. OCA Main Brief pp. 10, 20, 36-39, and 46. The OCA has been taking similarly inconsistent positions throughout this litigation and has been consistently rejected. *See, e.g.*, January 2018 Order pp. 17-18 (discussing the Initial Decision) and 24-26 (rejecting the OCA's continued request for rate reductions or customer usage allowances). The Commission should stay the course set in January 2018 and focus on getting better water to customers as quickly as possible rather than punishing the Company. The OCA's recommendations would hamper the Company's ability to complete the Projects in a timely manner. Therefore, they should be rejected.

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

As stated in HVUS's Main Brief, the question presented is whether the May 2018 Order gave HVUS the time "reasonably necessary to comply with the order." 66 Pa. C.S. § 703(e). Ordering Paragraph 8 contained two one-year compliance deadlines. HVUS has established a *prima facie* case that the one-year deadline in Ordering Paragraph 8(2) was sufficient and that HVUS complied with that deadline. HVUS has also established a *prima facie* case that the one-year deadline in Ordering Paragraph 8(1) was not sufficient. The OCA failed to rebut HVUS's *prima facie* case on either issue. Therefore, the ALJ should recommend, and the Commission should find (1) that the one-year deadline in Ordering Paragraph 8(2) was sufficient and that HVUS complied with that deadline, and (2) that the one-year deadline in Ordering Paragraph 8(1) was insufficient.

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

The OCA's Main Brief does not discuss Ordering Paragraph 8(2) at all. It has therefore failed to rebut HVUS's *prima facie* case on this issue. The ALJ should recommend, and the Commission should find, that the one-year deadline in Ordering Paragraph 8(2) was sufficient and that the Company timely complied with that deadline.

This finding is significant, considering the interplay between Ordering Paragraphs 8(1) and 8(2). The Company reassessed the need, size and cost of a water treatment plant and, within one year of receiving

the April 2018 Engineer's Report, decided to build such a plant to permanently solve the problems caused by iron and manganese. In this fact situation, the deadline for deciding whether to build a water treatment plant *is the same as* the deadline for completing the projects (including the construction of a water treatment plant) to eliminate the rust or brown-colored water provided to customers. By definition, in this situation, the deadline established in Ordering Paragraph 8(1) was insufficient.

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

In its Main Brief, the OCA seems to try to downplay the significance of the one-year compliance deadline. It suggests that the one-year compliance deadline was sufficient because the Company could have made "substantive progress" toward resolving the problems caused by iron and manganese in its water during that time. OCA Main Brief p. 27. Ordering Paragraph 8(1) was intended as an "objective guideline for compliance." January 2018 Order p. 31. HVUS doubts that either the OCA or the Commission would find "substantive progress" by HVUS adequate to comply with that ordering paragraph.

The OCA also portrays the deadline as merely a "starting point for hearings," and alleges that the hearings were intended as a consumer protection. The OCA emphasizes that the Company can continue to make improvements and repairs while the hearings are on-going. OCA Main Brief p. 26.

Contrary to the OCA's position, the Commission intended to protect consumers by ordering HVUS to complete certain work by a specific date:

Our concerns about the delays in resolving the outstanding service problems apply equally to HVUS Exception No. 2. 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. If additional time is deemed critical, the Company may petition the Commission for relief to modify the deadline pursuant to Section 5.572(d) of the Code.

January 2018 Order p. 31. The hearings were not intended as a customer protection; they are required by due process before the Commission can impose a penalty on HUVS for violating a Commission order.

Consumers have no right to a hearing unless and until the Company improperly misses⁴ a deadline in the 2018 Orders.

Improperly missing a deadline has serious consequences for the Company. Two sets of hearings will commence, meaning that the Company will incur considerable expenses for attorneys' fees, witnesses' fees, and other litigation costs – regardless of the outcome of the litigation. May 2018 Order, Ordering Paragraphs 20 and 21. Additionally, the Company could be ordered to pay untold amounts in civil penalties and customer refunds, and could be ordered to sell the water system to a capable public utility. *Id.*

The serious consequences of missing the April 2019 deadline caused the Company to file its Petition to Amend in October 2018, consistent with 66 Pa. C.S. § 703(e) and 52 Pa. Code § 1.15(a)(1). Based on the implementation schedules in the April 2018 Engineer's Report, the Company believed that it would have difficulty meeting the one-year compliance deadline in Ordering Paragraph 8(1), and exercised its right, under the Code and the 2018 Orders, to file a Petition to Amend the May 2018 Order. Nevertheless, the Company continued its efforts to comply with the Commission's 2018 Order. As discussed above, HVUS timely complied with Ordering Paragraph 8(2), which required HVUS to reassess the need, size and cost of treatment plant by April 2019 to permanently solve the problems caused by iron and manganese.

The evidence introduced in this case demonstrates that the one-year compliance deadline in Ordering Paragraph 8(1) was not sufficient and therefore HVUS has good cause for an extension of the deadline. 66 Pa. C.S. § 703(e). The terms of the Code are particularly significant. 66 Pa. C.S. § 703(e) provides that "The commission may grant and prescribe such additional time as, in its judgment, is reasonably necessary to comply with the order, and may, on application and for good cause shown, extend the time for compliance fixed in its order." While the Commission may exercise its judgment as to the time reasonably necessary to comply with the order, a Commission decision must be supported by substantial

⁴ At this time, it is impossible to determine whether HVUS has "improperly missed" the April 18, 2019 deadline. It properly applied for an extension prior to that deadline, and that request remains pending. If the Commission finds that HVUS was unable to meet the deadline because the deadline was insufficient, the Company would not have "improperly missed" the deadline.

evidence. *Norfolk*. The Commission cannot exercise its judgment arbitrarily. Additionally, the HVUS respectfully submits that the time “reasonably necessary to comply with the order” is not the absolute minimum time in which the designated task could conceivably be accomplished.

The evidence introduced in this case addressing the sufficiency of the one-year deadline includes the implementation schedules in the April 2018 Engineer’s Report (which estimated that construction of a water treatment plant would take more than four years), Mr. Stinebiser’s 2019 Report (which estimated that construction of a water treatment plant would take more than three years) and the history of HVUS’s on-going project to build a water treatment plant. Among other things, this evidence demonstrates that HVUS applied for a DEP permit to build a water treatment plant on November 27, 2019, and, in February 2020, estimated that the plant could be completed during November 2020. Even Mr. Fought must believe this estimate was reasonable, since he proposes a schedule very similar to it. OCA St. 1-S p. 11. Mr. Stinebiser’s estimate indicates that construction of the water treatment plant could be completed approximately one year after submitting the application to DEP, but this schedule obviously does not include the time necessary to design the project, prepare the application to DEP, or obtain the operating permit from DEP after the completion of construction.

The OCA’s Main Brief asserts that the evidence concerning HVUS’s on-going project to construct a water treatment plant “does not show the one-year deadline was insufficient.” OCA Main Brief p. 28. The ALJ and the Commission cannot ignore this evidence. The evidence concerning HVUS’s on-going project, together with all of the other evidence introduced by HVUS, establishes a *prima facie* case that the one-year deadline did not give HVUS the time reasonably necessary to comply with the Commission’s May 2018 Order.

The OCA’s Main Brief tries to rebut HVUS’s *prima facie* case based on the May 20, 2020 testimony of Mr. Fought, alleging that one year was a sufficient time period for constructing the water treatment plant. OCA Main Brief p. 27. The OCA’s argument is disingenuous because it conveniently ignores the argument on page 14 of its own Main Brief, that “the start-up and proper operation of the [water treatment plant], without more, will not eliminate the iron and manganese problems experienced by

customers.” To do that, the OCA alleges that HVUS also needs to vacuum the iron and manganese sediment from its storage tank and flush the water from its system. OCA Main Brief p. 14-15. The OCA cannot have it both ways. There is no record evidence whatsoever demonstrating that one year provides a reasonable time period for completing the design, permitting and construction of the water treatment plant, plus all of the other projects advocated by Mr. Fought.

In the testimony cited in the OCA’s Main Brief, Mr. Fought claims that three months was a reasonable period for completing engineering designs, three months was a reasonable time period for receiving the DEP construction permit and six months was a reasonable time period for constructing the water treatment plant. Tr. 556. Mr. Fought’s timeline, however, does not include any time for submitting local and other permit applications, authorizing and completing final design changes, and selecting a contractor – steps that were included in Mr. Fought’s own Direct Testimony recommending a schedule to address Hidden Valley’s iron and manganese problems. OCA St. 1 p. 17. Nor does Mr. Fought’s timeline include any time for obtaining the DEP operating permit for the water treatment plant, which must be obtained before the water treatment plant can be used to supply water to customers. Tr. 564, 597-598, 600. Nor does Mr. Fought’s testimony include any time for authorizing the engineer to begin preparing designs – a step included in Mr. Fought’s 2015 Surrebuttal Testimony. HVUS Exhibit JMK-3, p. 12. HVUS’s Main Brief, pp. 30-31, gives other examples of Mr. Fought’s inconsistent testimony over the course of this proceeding. Mr. Fought’s testimony on the time reasonably necessary to construct the Projects is not credible.

Clearly the OCA has not rebutted HVUS’s *prima facie* case. Therefore, the preponderance of the evidence introduced over the entire course of this proceeding demonstrates that the one-year compliance deadline was not sufficient. Moreover, the one-year deadline is not supported by substantial evidence. It is therefore invalid and unenforceable. *Norfolk*.

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

As stated in HVUS's Main Brief, the initial question presented is whether the Commission should grant HVUS's request to extend the compliance deadline in Ordering Paragraph 8(1) of the May 2018 Order. HVUS's Main Brief argued that this question must be answered in the affirmative. HVUS's Main Brief therefore went on to discuss the question of how the Commission should modify the deadline in Ordering Paragraph 8(1).

In its Main Brief, the OCA asks the Commission to deny HVUS's Petition to Amend and maintain the existing deadline in Ordering Paragraph 8(1). The OCA's Main Brief, however, goes on to request additional relief. It asks the Commission to create a new requirement, in addition to Ordering Paragraph 8(1), that HVUS complete the Projects in accordance with a schedule proposed by the OCA. OCA Main Brief 10, 19-20. It also asks the Commission to commence a Section 529 Investigation of HVUS immediately, OCA Main Brief 36-39, or, in the alternative, to order HVUS to give customers a usage allowance until the Company completes the Projects or sells its water assets. OCA Main Brief 39.

The ALJ should recommend, and the Commission should find that the OCA's proposals are beyond the scope of this proceeding. The Commission cannot grant relief based on an issue that was not raised in pleadings. *Pelusa v. Pennsylvania Power and Light Co.*, Docket No. Z-00312303 (October 16, 1996). In its Answer to the Petition to Amend, the OCA did not request alternate forms of relief.

The procedural posture of this case is critical. This is an evidentiary hearing pursuant to 66 Pa. C.S. § 703(g) on HVUS's Petition to Amend. The only matters that can be considered are matters that were raised in the pleadings and described in the January 2019 Order and in *Hidden Valley Utility Services, L.P. v. Pa. Pub. Util. Comm'n*, 187 C.D. 2019 (Pa. Cmwlth. May 15, 2019). In their answers, neither the OCA nor the Intervenors requested alternative relief; the OCA simply asked that the Commission deny the Petition to Amend and proceed with hearings pursuant to Ordering Paragraphs 20 and 21. OCA Answer p. 10. Neither the Commission nor the Commonwealth Court opened the door for the consideration of

alternative remedies. The OCA's recommendations are therefore beyond the scope of this proceeding. Nevertheless, for the sake of completeness, HVUS will discuss those proposals in Section VI.E.2. below.

1. HVUS's proposed amendments to the May 2018 order

a. Whether HVUS has satisfied the legal standards for modifying the Commission order

In its Main Brief, the OCA argues that HVUS failed to satisfy the standards in *Duick* for amending a Commission order. OCA Main Brief p. 28. According to the OCA, HVUS has only raised issues that have been previously considered and rejected by the Commission. *Id.* The OCA's Main Brief ignores much of the evidence in this case as well as several of the *Duick* standards.

HVUS's Main Brief included a lengthy quotation from *Duick*, establishing that there are multiple reasons for the Commission to amend a Commission Order. HVUS Main Brief pp. 32-33. HVUS's Main Brief went on to demonstrate that HVUS has satisfied the *Duick* standards for amending a Commission Order in several respects. First, HVUS has raised a new and novel issue: The Company's request for an extension meets the requirements of 66 Pa. C.S. § 703(e) and 52 Pa. Code § 1.15(a)(1) because the Company filed a motion requesting an extension well before the deadline in a Commission order and the Company demonstrated good cause for the requested extension (the one-year compliance deadline in Ordering Paragraph 8(1) did not give HVUS the time reasonably necessary to comply with the Commission's order). Second, HVUS raised issues that were overlooked or not addressed by the Commission previously: the April 2018 Engineer's Report included estimated implementation schedules that indicated the one-year compliance deadline in Ordering Paragraph 8(1) was insufficient, but the Commission overlooked or failed to address this evidence when it issued the May 2018 Order. Third, HVUS introduced extensive evidence in the instant proceedings that did not exist and therefore was not available to it when the record closed in this proceeding in June, 2016. This evidence establishes that:

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

Based on the law and the facts, the ALJ should recommend, and the Commission should find that HVUS has satisfied the *Duick* standards.

b. Should the Commission Modify the Deadline of April 18, 2019?

The OCA correctly notes that a petition to amend, like a petition for reconsideration, requires a two-step analysis. As the Commission stated in *Pennsylvania Public Utility Commission, Bureau of Investigation and Enforcement v. Columbia Gas of Pennsylvania, Inc.*, Docket No. M-2014-2306076 (Opinion and Order entered December 18, 2014) p. 12:

As stated above, Petitions for Reconsideration are governed by *Duick*, which essentially requires a two-step analysis. First, we determine whether a party has offered new and novel arguments, or identified considerations that appear to have been overlooked or not addressed by the Commission in its previous order. We will not reconsider our previous decision based on arguments that have already been considered. However, we will not necessarily modify our prior decision just because a party offers a new and novel argument, or identifies a consideration that was overlooked or not addressed by the Commission in its previous order. The second step of the *Duick* analysis is therefore to evaluate the new or novel argument, or overlooked consideration, in order to determine whether to modify our previous decision.

The OCA emphasizes that, in the second step of the *Duick* analysis, the Commission has discretion as to whether to grant the requested relief. OCA Main Brief p. 30. In the second step of the *Duick* analysis, however, the Commission does not have unlimited discretion. The OCA's Main Brief is notable for what it does not say; there is almost no discussion of any legal standards for the Commission's exercise of its discretion. The OCA makes this case sound like an equitable proceeding, arguing that HVUS has "unclean hands" and does not deserve a modification of the one-year compliance deadline in Ordering Paragraph 8(1). Of course, the Commission is not a court of equity and the Code does not give it equitable powers. *Louis Pettinato, Sr. and Louis Pettinato, Jr. v. UGI Penn Natural Gas, Inc.*, Docket No. C-2009-2102117 (Initial Decision issued Mar. 10, 2010, Final Order entered Apr. 13, 2010).

As argued in HVUS's Main Brief, this case is governed, in part, by 66 Pa. C.S. § 703(e) and 1.15(a)(1). HVUS filed its Petition for Reconsideration approximately six months before the applicable deadline established in a Commission order and carried its burden of proving, by a preponderance of the evidence, that it has good cause for an extension – the one-year deadline was insufficient to accomplish the

designated task. Under these circumstances, HVUS submits that the Commission is legally required to grant an extension.

To the extent that the Commission does have discretion, it should exercise its discretion to modify the deadline in Ordering Paragraph 8(1). HVUS's Main Brief, pp. 34-35, demonstrates that the current deadline in Ordering Paragraph 8(1) is not supported by substantial evidence. It is therefore invalid and unenforceable. *Norfolk*. Consequently, if the Commission would refuse to modify that deadline, HVUS would not have any deadline for eliminating the rust or brown-colored water provided to customers. This result would not be in the public interest.

Finally, to the extent that the Commission has discretion over whether to modify the deadline in Ordering Paragraph 8(1), the Commission should seek to provide customers with better water quickly as opposed to imposing a punishment that will deprive HVUS of the financial resources necessary to complete the Projects timely. Both HVUS and the OCA ask the Commission to require HVUS to complete the Projects, but the OCA asks the Commission to require the Company to complete those Projects *while paying penalties and litigating a Section 529 Investigation or paying a customer usage allowance*. The OCA's Main Brief never addresses the impact that its proposal would have on the Company's ability to complete the Projects. That impact is obvious – adoption of the OCA's proposals would hamper HVUS's ability to complete the Projects. Consequently, to the extent that the Commission has discretion, it should exercise its discretion to adopt HVUS's recommendation rather than the OCA's.

(1) Events prior to 2018 do not warrant denying HVUS's Petition to Amend

The OCA's Main Brief contends that HVUS's Petition to Amend should be denied based on events during the period 2005-2018. OCA Main Brief pp. 30-31, 33. If HVUS was ineligible for a modification of the one-year compliance deadline, based on events that occurred before 2018, what was the point of these hearings? By ordering hearings on the sufficiency of the April 2018 Engineer's Report and the sufficiency of the one-year compliance deadline, the Commission has already rejected this argument.

66 Pa. C.S. § 703(g) gives all parties a statutory right to file a petition to amend a Commission order. Similarly, 66 Pa. C.S. § 703(e) gives all parties subject to a deadline in a Commission order a statutory right to request an extension for good cause. The OCA's position would effectively take these rights away from HVUS based on events that occurred even before the Commission entered its January 2018 Order. For all of these reasons, the ALJ should recommend, and the Commission should reject the OCA's position.

(2) The OCA's argument based on "lack of good faith" is not supported by the evidence or the law

The OCA claims that HVUS did not demonstrate "good faith" in trying to solve the iron and manganese problem during the period 2016-2019. OCA Main Brief p. 31. As discussed above, there is no basis for the Commission to deny HVUS's Petition to Amend based on events that occurred before the Commission even entered the 2018 Orders. HVUS acted reasonably in waiting until the Commission issued its decision on the OCA's Complaint.

The OCA claims "[i]t was not until July 2019 that HVUS reported that it was actively pursuing one option – a conventional filtration treatment plant – and was in the process of applying to DEP for necessary permits." OCA Main Brief p. 32. This argument is disingenuous at best. The undisputed evidence introduced in this proceeding demonstrates that HVUS and its engineers had been exploring the possibility of purchasing a used water treatment plant since the fall of 2018. They met with DEP officials about that project in November 2018, Company officials offered to purchase the used water treatment plant in January 2019 and they entered into a contract to purchase that plant in May 2019. *Id.* In short, HVUS complied with Ordering Paragraph 8(2) by deciding to build a water treatment plant to permanently solve the problems caused by iron and manganese. HVUS Main Brief pp. 3-4, 25.

Additionally, the Company has continued its efforts to eliminate the rust or brown-colored water provided to customers even after the expiration of the one-year deadline in Ordering Paragraph 8(1). The Company has obtained a permit to build the water treatment plant, has taken out loans to finance that project,

and has completed many other steps in the design/construction/permitting process. HVUS Main Brief pp. 4-5. This evidence demonstrates HVUS's continuing good faith in trying to comply with the 2018 Orders.

In any event, the OCA cites no legal authority as to why the Company's alleged lack of good faith is even relevant to the question before the Commission. It is not. The Company has satisfied the legal standards for obtaining an extension in 66 Pa. C.S. § 703(e) and 52 Pa. Code § 1.15(a)(1) and the Commission is therefore required to extend the deadline. Of course, the Commission is not a court of equity and the Code does not give it equitable powers. *Louis Pettinato, Sr. and Louis Pettinato, Jr. v. UGI Penn Natural Gas, Inc.*, Docket No. C-2009-2102117 (Initial Decision issued Mar. 10, 2010, Final Order entered Apr. 13, 2010). Consequently, the ALJ should recommend, and the Commission should reject the OCA's "good faith" argument.

(3) The OCA's argument that construction could have been completed by now is unsupported by the evidence or the law

The OCA contends that, "[h]ad the Company selected its course of action more quickly, construction would likely be completed by now." OCA Main Brief p. 32. As support for this proposition, the OCA again cites, in part, the Company's actions during the period 2016-2018. OCA St. 1 at 11; OCA St. 1S at 1-2. As discussed above, HVUS cannot be held liable for failing to comply with a Commission Order before that order is entered. HVUS acted reasonably in waiting until the Commission entered the January 2018 Order.

The only remaining evidence to support the OCA's contention is opinion testimony from Mr. Fought at the May 20, 2020 hearing. Considering that Mr. Fought repeatedly changed his opinion on the time frame reasonably necessary to complete the water treatment plant, this testimony is not credible. *See* HVUS's Main Brief pp. 30-31. Moreover, the OCA fails to discuss any of the other relevant evidence in the record on this issue. As stated in note 12 of HVUS's Main Brief,

The preponderance of the evidence demonstrates that a reasonable period for eliminating the rust or brown-colored water has not expired. The April 2018 Engineer's Report estimated that more than four years would be needed to construct a water treatment plant, EADS's January 2019 report estimated that more than three years would be necessary to construct a water treatment plant, and the period from HVUS's pre-application meeting

with DEP to Mr. Fought's proposed deadline of July 31, [2021] for HVUS's on-going water treatment plant project and related projects is more than twenty-six months.

At most, Mr. Fought's testimony is a scintilla of evidence supporting the OCA's theory. Of course, a scintilla of evidence is not enough to support a Commission order, *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 578 A.2d 600, 602 (Pa. Cmwlth. 1990), *alloc. denied*, 602 A.2d 863 (Pa. 1992), nor is it enough to rebut HVUS's *prima facie* case.

Again, the OCA does not cite any legal authority demonstrating that this evidence is even relevant. It is not. Ordering Paragraph 8(1) required HVUS to eliminate the rust or brown-colored water provided to customers by April 18, 2019. In October 2018, HVUS filed a Petition to Amend contending that the one-year deadline was insufficient. It was therefore HVUS's burden, pursuant to 66 Pa. C.S. § 703(e) and 52 Pa. Code § 1.15(a)(1), to demonstrate that the Company had good cause for an extension (i.e., the one-year deadline did not provide HVUS with the time reasonably necessary to comply with the Commission's order).⁵ That burden does not change over time. HVUS satisfied that burden by demonstrating that the one-year deadline was insufficient.

It is unclear what burden of proof the OCA seeks to place on HVUS. Must HVUS demonstrate that it could not have completed the Projects by the date of the hearing? By the date of the Commission's final order in this proceeding (whenever that may be)? Either theory should be rejected because it would allow a petition to amend to be denied just because the litigation process is lengthy. That would be a classic example of "justice delayed is justice denied."

Additionally, HVUS's Petition for Review was quashed by order of the Commonwealth Court dated May 15, 2019. The instant evidentiary hearings were not commenced until February, 2020. This delay was not the fault of HVUS and should not prejudice its rights.

⁵ HVUS also had the burden of proof on its proposed remedy. It has carried this burden by demonstrating that the Commission should order HVUS to complete the Projects by a deadline that is after the Commission enters its final order in this proceeding. Only such an order would give HVUS the time reasonably necessary to comply with the Commission's order in the instant proceeding.

Finally, as stated above, HVUS has carried its burden of demonstrating that the one-year compliance deadline in Ordering Paragraph 8(1) was insufficient. If the Commission nonetheless refuses to amend Ordering Paragraph 8(1), HVUS could be subject to penalties of up to \$1,000 per day since April 19, 2019 for failing to meet a deadline that did not give the Company the time reasonably necessary to comply with the Commission's order. HVUS respectfully submits that this would be a violation of due process. Consequently, the ALJ should recommend, and the Commission should find, that HVUS had the burden to prove that it could not complete the Projects by April 18, 2019, and that it carried that burden.

(4) The OCA has waived its own waiver argument

The OCA contends that HVUS somehow waived the issue of the sufficiency of the one-year deadline by not raising that issue in HVUS's Petition for Reconsideration filed in February 2018. The ALJ should recommend, and the Commission should find that the OCA waived this argument.

HVUS's October 2018 Petition to Amend clearly stated that the implementation schedules in the April 2018 Engineer's Report indicated that one year was not a sufficient time period for HVUS to comply with the one-year deadline in Ordering Paragraph 8(1). Petition to Amend p. 2 and ¶¶ 16-18. The OCA did not raise its waiver argument in its Answer to the Petition to Amend. The Commission and the Commonwealth Court subsequently ordered hearings, *inter alia*, on the sufficiency of the one-year deadline. January 2019 Order p. 31; *HVUS v. PUC* p. 10. The OCA was a party to these proceedings and did not seek reconsideration of these orders.

The OCA presents its waiver argument for the first time in its Main Brief. HVUS respectfully submits that the OCA waived its right to raise this issue by not raising the issue in its Answer.

Even if the ALJ and the Commission address the merits of this argument, they should reject it. The OCA cites no legal support for its position. By not raising the issue of the sufficiency of the one-year deadline in its Petition for Reconsideration, and by not appealing the Commission's 2018 Orders to Commonwealth Court, HVUS can no longer appeal the 2018 Orders. There is no bar, however, to HVUS filing a petition to amend the May 2018 Order. 66 Pa. C.S. §§ 703(e) and 703(g).

As explained in HVUS's Main Brief, p. 26, at the time the Petition for Reconsideration was filed in February 2018, HVUS had not received Mr. Stinebiser's estimated implementation schedules. Consequently, HVUS had no new evidence to support a claim that the one-year compliance deadline was insufficient. It does now. In this proceeding, the Parties have submitted considerable additional evidence on the sufficiency of the one-year deadline. The Commission therefore must re-consider the question of the sufficiency of the one-year deadline, based on the evidence introduced over the course of this entire proceeding.

(5) HVUS timely filed its Petition to Amend

The OCA contends that Ordering Paragraph 8(1) should not be amended because HVUS did not timely file its Petition to Amend. The OCA does not indicate when HVUS should have filed its Petition to Amend and cites no legal authority to support its position.

HVUS, in contrast, cited 52 Pa. Code § 1.15(a)(1) to demonstrate that it timely filed its Petition to Amend. That regulation provides that a party may request an extension of a deadline in a Commission order *even after that deadline has passed*. HVUS, however, filed its request well before the one-year compliance deadline in Ordering Paragraph 8(1). Based on that filing date, the regulation provides that HVUS must establish good cause for the extension. HVUS clearly established good cause for the extension – the one-year compliance deadline was insufficient. The ALJ should recommend, and the Commission should reject the OCA's argument that HVUS failed to file its Petition to Amend in a timely manner.

(6) HVUS has provided adequate assurances that it will meet a new deadline

The OCA argues that the Commission should not modify the one-year compliance deadline because HVUS has missed deadlines in the past. OCA Main Brief pp. 33-34. Additionally, the OCA claims that there are no assurances that the Projects will be adequately funded.⁶ OCA Main Brief pp. 21-25 and 35.

⁶ The OCA's concerns about the Company's financing plans are not really concerns about the Company's plans for paying the estimated costs of the Projects; they are really concerns about the amount of the Company's debt and the Company's financial reporting practices. OCA Main Brief 35, 21-25.

Nevertheless, the OCA – like HVUS – recommends that the Commission order HVUS to complete the Projects.

The OCA’s recommendation completely undermines its alleged concerns about the Company’s financial wherewithal to complete the Projects. Why would the OCA argue that the Commission should order the Company to complete the Projects if the OCA does not believe the Company can do so? Moreover, why would the OCA argue that the Commission should order the Company to complete the Projects while paying penalties and possibly a customer usage allowance, if the OCA does not believe the Company can do so?

The ALJ should recommend, and the Commission should find that HVUS has provided adequate assurances that future deadlines will be met. HVUS’s Main Brief, pp. 37-39, describes the assurances that the Company has provided to the Commission. There are no guarantees, of course, but 66 Pa. C.S. § 703(e) and 52 Pa. Code § 1.15(a)(1) do not require a party to give the Commission absolute guarantees that subsequent deadlines will be met. In fact, Section 1.15(a)(1) explicitly permits a party to ask for additional extensions later. 52 Pa. Code § 1.15(a)(1) (“whenever under this title or by order of the Commission, ..., an act is required or allowed to be done at or within a specified time, the time fixed or the period of time prescribed may, by the Commission, the presiding officer or other authorized person, for good cause be extended upon motion made before expiration of the period originally prescribed *or as previously extended*”) (emphasis added).

By contrast, the OCA has provided absolutely no assurances that HVUS will be able to comply with the OCA’s proposed deadlines if the Commission adopts the OCA’s recommendations. If the Commission would adopt the OCA’s proposals, HVUS would immediately be required to pay a penalty, OCA Main Brief p. 46. Further, the OCA’s recommendation would require the Company to immediately defend itself in a Section 529 Investigation or pay customers a usage allowance. Still further, since the OCA recommends denying HVUS’s Petition to Amend, HVUS would need to defend itself in a penalty proceeding pursuant to Ordering Paragraph 20 of the May 2018 Order. Comparing this proposal to HVUS’s

proposal, it is indisputable that the OCA's proposal gives the Commission fewer assurances that a subsequent deadline will be met.

2. The OCA's requests for relief

a. The Commission should reject the OCA's proposed schedule

The OCA recommends that the Commission adopt a schedule for HVUS to complete the Projects by July 2021. This schedule is not a proposed amendment to Ordering Paragraph 8(1), however. OCA Main Brief pp. 19-20. According to the OCA, Ordering Paragraph 8(1) should not be modified and HVUS should be penalized for failing to meet the April 2019 deadline. OCA Main Brief p. 46. Nevertheless, the OCA recommends that the Commission require the Company to complete the Projects according to a timeline proposed by the OCA, which would be enforced in the proceedings pursuant to Ordering Paragraphs 20 and 21 of the May 2018 Order.⁷ OCA Main Brief p. 10.

This request for relief proposes a new amendment to the May 2018 Order which was not proffered to the Commission in 2018. As discussed above, it is therefore beyond the scope of the present proceedings and should be summarily rejected.

Even if the ALJ and the Commission consider the merits of the proposal, it should be rejected. The OCA never discusses the Commission's authority to adopt this proposal. Under the OCA's recommendation, HVUS would be in violation of Ordering Paragraph 8(1) immediately and so would be subject to a civil penalty of up to \$1,000 per day beginning April 19, 2019. 66 Pa. C.S. § 3301(b). If the Company would fail to comply with the OCA's proposed schedule, HVUS would be subject to another penalty of up to \$1,000 per day. Consequently, HVUS could be subject to penalties of up to \$2,000 per day for what is essentially the same offense. HVUS respectfully submits that the OCA's proposal is not permitted by the Code.

⁷ It is unclear how this proposal would work. If the Commission would deny HVUS's Petition to Amend, HVUS would be in violation of Ordering Paragraph 8(1) and enforcement proceedings would presumably commence immediately pursuant to Ordering Paragraphs 20 and 21. The OCA's proposed deadline for completing the Projects, however, is not until July 2021.

Additionally, the OCA's proposed schedule includes several deadlines for milestones in the process of designing/constructing/permitting the Projects. Some of these deadlines have already passed, and more could pass before a final order is rendered in this proceeding. ALJ Watson issued his Initial Decision in this case on September 9, 2016, the Commission entered its order on Exceptions sixteen months after the Initial Decision was issued, and the Commission entered its order on Reconsideration approximately twenty months after the Initial Decision was issued. If a similar amount of time is necessary to resolve the instant proceeding, all of the deadlines in the OCA's proposed schedule would pass before the Commission enters its final order in this proceeding. An order that requires a utility to perform a task by a date that has already passed would not give the utility the time reasonably necessary to comply with the Commission's order in this proceeding, and so would not be consistent with 66 Pa. C.S. § 703(e). HVUS also submits that such an order would violate the utility's due process rights.

At the hearing, OCA Witness Fought testified that the only deadline that should be enforced is the July 2021 deadline. Tr. 574-575. The OCA's Main Brief, however, does not explain whether any of the other deadlines in its proposal should be enforced. Similarly, in his testimony, Mr. Fought stated that the deadlines for specified tasks should be the last day of the month indicated in the proposed schedule. OCA St. 1S p. 3. The OCA's Main Brief does not clarify whether the proposed "July 2021" deadline, for example, would be July 1, July 31 or some date in between. Given these uncertainties in the OCA's proposal, the OCA has failed to carry its burden of proof pursuant to 66 Pa. C.S. § 332(a).

The purpose of the deadline in Ordering Paragraph 8(1) was to give an "objective guideline for compliance." The OCA's proposal is not sufficiently specific and would only give rise to more litigation. For all of the above reasons, the ALJ should not recommend, and the Commission should not adopt the OCA's proposed schedule.

b. The Commission should reject the OCA's proposal to start a Section 529 Investigation immediately

Pursuant to Ordering Paragraph 21 of the May 2018 Order, a Section 529 Investigation is to commence if HVUS improperly misses any deadline in the May 2018 Order. Pursuant to Ordering

Paragraphs 26 and 27, the OCA may notify the Secretary's Bureau that HVUS has improperly missed a deadline, and a Section 529 Investigation is to commence at that time. The OCA (relying on Appendix C, which was not introduced into the record in this proceeding), argues that it notified the Secretary's Bureau that HVUS improperly missed a deadline, and therefore a Section 529 Investigation should be commenced immediately.⁸ As discussed in note 4, *supra*, HVUS contends that it is impossible to know at this time whether the Company has improperly missed the compliance deadline in Ordering Paragraph 8(1).

HVUS filed its Petition to Amend prior to the April 2019 deadline in Ordering Paragraph 8(1). The Commission should not commence a Section 529 Investigation while that petition remains pending; if a Section 529 Investigation would start, and the Commission would subsequently grant the Petition to Amend and extend the deadline to a future date, the Section 529 Investigation would need to close because HVUS would no longer be in violation of Ordering Paragraph 8(1). This result would mean the Commission and the Parties would have wasted time and money on an unnecessary proceeding. The Commission should not adopt such a wasteful approach, particularly considering that it could adversely impact the Company's ability to complete the Projects that even the OCA believes should be completed.

Similarly, if the Commission's final order in this proceeding grants HVUS's Petition to Amend, and replaces the deadline in Ordering Paragraph 8(1) with a deadline that is in the future, that order should not commence a Section 529 Investigation because HVUS would not be in violation of Ordering Paragraph 8(1). If, in contrast, the Commission's final order in this proceeding denies HVUS's Petition to Amend, HVUS would be in violation of Ordering Paragraph 8(1) and a Section 529 Investigation would commence pursuant to Ordering Paragraph 21. Therefore, there is no need for the Commission to order the commencement of a Section 529 Investigation at this time.

⁸ The OCA's letter contains allegations concerning HVUS's wastewater system. This proceeding only concerns HVUS's water system. The Commission should not commence a Section 529 Investigation against HVUS in this proceeding due to alleged violations of the 2018 Orders concerning HVUS's wastewater system.

Since the OCA has requested that the Commission commence a Section 529 Investigation immediately, the OCA bears the burden of proof on this issue. 66 Pa. C.S. § 332(a). The OCA has failed to carry this burden because its Main Brief fails to discuss several critical legal issues regarding its proposal.

First and foremost, the OCA failed to even allege that the Commission has the statutory authority to commence a Section 529 Investigation against HVUS. HVUS introduced evidence in this proceeding that its water system regularly serves more than 1,200 customers, all of whom are connected to its system. HVUS St. 3-R pp. 9-10. As a result, HVUS is not a “small water utility” as that term is defined in Section 529(m) and the Commission lacks statutory authority to commence a Section 529 Investigation of HVUS. 66 Pa. C.S. § 529(m) (defining a small water utility as “[a] public utility which regularly provides water service to 1,200 or fewer customer connections”). The Commission should not order a proceeding to commence without requiring this minimal pleading.

Second, the OCA does not discuss the scope of the proceeding. The OCA proposes a Section 529 Investigation against HVUS, a company which operates both a water utility and a wastewater utility. HVUS’s Petition to Amend, and the instant evidentiary hearing thereon, only pertain to HVUS’s water system. Consequently, the ALJ denied the OCA’s attempt to conduct discovery in this proceeding pertaining to HVUS’s wastewater system. HVUS respectfully submits that the Commission cannot institute a Section 529 Investigation of HVUS’s wastewater system in a proceeding that only concerns HVUS’s water system.

Finally, the OCA’s Main Brief notes that, in her Prehearing Order, the ALJ ordered I&E to contact the Secretary’s Bureau to institute a Section 529 Investigation. OCA Main Brief p. 38. I&E has not yet complied with this order. HVUS respectfully submits that I&E has properly waited until the instant proceeding is resolved before complying with the Prehearing Order. By ordering the Commission’s prosecutor to take actions to commence a proceeding against HVUS, the ALJ improperly commingled adjudicatory and prosecutory functions in violation of HVUS’s due process rights. *Lyness v. State Board of Medicine*, 605 A.2d 1204 (Pa. 1992).

Considering that the OCA has not carried its burden of proof on this recommendation, the ALJ should not recommend, and the Commission should not adopt the OCA's proposal to institute a Section 529 Investigation against HVUS at this time.

c. The Commission should reject the OCA's proposal for a customer usage allowance

If the Commission rejects the OCA's proposal to immediately commence a Section 529 Investigation, the OCA recommends that the Commission order HVUS to give its customers a usage allowance until such time as the Company resolves the problems caused by iron and manganese in its water or the Company transfers ownership of the water system to a capable public utility. OCA Main Brief 39-40. This is a new request for relief, which was not proffered to the Commission in OCA's Answer to the Petition to Amend. Like the OCA's proposal for a new ordering paragraph requiring HVUS to construct the Projects according to the OCA's schedule, discussed in Section VI.E.2.a. above, this proposal exceeds the scope of the instant proceeding. The ALJ should recommend, and the Commission should reject this proposal as beyond the scope of this proceeding.

Even if the ALJ and the Commission address the merits of this proposal, they should reject it. If the Commission's final order in this proceeding grants HVUS's Petition to Amend, and replaces the deadline in Ordering Paragraph 8(1) with a deadline that is in the future, HVUS would not be in violation of Ordering Paragraph 8(1) and there would be no basis for imposing this penalty. If, in contrast, the Commission's final order in this proceeding denies HVUS's Petition to Amend, HVUS would be in violation of Ordering Paragraph 8(1) and a penalty proceeding would commence pursuant to Ordering Paragraph 20. By its own terms, that proceeding would consider the appropriateness of ratepayer refunds.

Since OCA has requested this relief, it bears the burden of proof. 66 Pa. C.S. § 332(a). The OCA has failed to carry that burden. It has given no reason why the Commission should circumvent the process previously established in Ordering Paragraph 20. Ordering Paragraph 20 must be the exclusive procedure for imposing a customer usage allowance as a penalty for an alleged violation of Ordering Paragraph 8(1).

Otherwise, HVUS could be penalized twice for the same offense – once now and again later in the Ordering Paragraph 20 proceeding. This would violate the Code and HVUS’s due process rights.

Finally, the OCA does not indicate how much this usage allowance would save customers or cost the Company. In fact, the OCA’s Main Brief nowhere acknowledges the adverse impact that any of its recommendations will have on the Company’s ability to complete the Projects. The OCA’s proposal for a customer usage allowance is not in the public interest because it would hamper the Company’s ability to complete the Projects that even the OCA recommends be completed. In its January 2018 Order, the Commission refused to impose a customer usage allowance, or to order customer refunds, because such remedies could hamper the Company’s ability to make the improvements required by the Commission. January 2018 Order pp. 24 and 25. There is no reason for the Commission to change course now. Consequently, the ALJ should recommend, and the Commission should reject the OCA’s recommendation.

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

The OCA does not address this question; it simply contends that the Commission should not extend the deadline in Ordering Paragraph 8(1). OCA Main Brief p. 40. The OCA has therefore failed to rebut HVUS’s *prima facie* case regarding how Ordering Paragraph 8(1) should be revised. The ALJ should recommend, and the Commission should adopt, HVUS’s primary recommendation for modifying Ordering Paragraph 8(1).

In 2018, the Commission charted the course for this proceeding by giving the Company the time the Commission thought was reasonably necessary to comply with its order. In this proceeding, HVUS has demonstrated that the time period stated in Ordering Paragraph 8(1) was insufficient. Therefore, the Commission should extend the deadline in Ordering Paragraph 8(1) to give the Company the time period reasonably necessary for the Company to comply with the Commission’s order *in this proceeding*.

In this proceeding, HVUS recommends that the Commission order it to complete specific Projects, rather than simply extending the deadline for implementing a recommendation to eliminate the rust or brown-colored water provided to customers. To ensure that HVUS has the time reasonably necessary to

comply with the Commission's order in this proceeding, the new deadline should be after the Commission enters its final order in this proceeding. HVUS Main Brief pp. 12, 37, 43, 46. Of course, it is impossible to know, at this time, when the Commission will enter its final order in this proceeding. ALJ Watson issued his Initial Decision in this case on September 9, 2016, the Commission entered its order on Exceptions sixteen months later, on January 18, 2018, and the Commission entered its order on Reconsideration on May 3, 2018, approximately twenty months after the Initial Decision was issued.

Consequently, HVUS proposes amending Ordering Paragraph 8(1) to set deadlines for significant milestones remaining in the process of designing/constructing/permitting the Projects. HVUS's recommendation appropriately recognizes the uncertainties of the construction process and avoids punishing HVUS if delays are caused by factors outside its control. HVUS, for example, should not be penalized if DEP is unable to timely issue an operating permit. Additionally, HVUS's recommendation incorporates existing provisions in the 2018 Orders allowing the Commission to monitor the Company's progress on the Projects to ensure they stay "on track," and to impose penalties if the Company misses the new objective guideline for compliance in Ordering Paragraph 8(1).

HVUS's recommendation is reasonable and in the public interest. It is a practical solution to the problems of iron and manganese in HVUS's water – much more practical than the OCA's recommendation to deprive the Company of financial resources yet expect it to complete the same Projects. Consequently, HVUS's recommendation should be adopted rather than the OCA's.

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

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

The OCA does not recommend that the Commission impose a penalty on HVUS for violating Ordering Paragraph 6. HVUS agrees for the reasons set forth in its Main Brief pp. 47-50. Therefore, the ALJ should not recommend, and the Commission should not impose penalties on HVUS for failing to comply with Ordering Paragraph 6.

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

a. The Commission should not impose penalties on HVUS for failing to comply with Ordering Paragraph 8(2)

The OCA's Main Brief does not recommend that penalties be imposed on HVUS for failing to comply with Ordering Paragraph 8(2). HVUS agrees, for the reasons set forth in its Main Brief, p. 51. Therefore, the ALJ should not recommend, and the Commission should not impose penalties on HVUS for failing to comply with Ordering Paragraph 8(2).

b. The Commission should not impose penalties on HVUS for failing to comply with Ordering Paragraph 8(1)

To answer the question of whether a penalty is warranted for a violation of Ordering Paragraph 8(1), the OCA's Main Brief analyzes the Commission's Statement of Policy at 52 Pa. Code § 69.1201 ("[f]actors and standards for evaluating litigated and settled proceedings involving violations of the Public Utility Code and Commission regulations"). OCA Main Brief pp. 44-46. The OCA's Main Brief, however, never explains why such an analysis is appropriate in this case. It is not.

If the Commission grants HVUS's Petition to Amend, and extends the deadline in Ordering Paragraph 8(1) to a future date, HVUS would not be in violation of Ordering Paragraph 8(1). If the Commission denies HVUS's Petition to Amend, in contrast, Ordering Paragraph 20 of the May 2018 Order would require that a hearing be held on the adequacy of the water system, the quality of the water, the appropriateness of penalties and ratepayer refunds, and related matters.⁹

Ordering Paragraph 20 must be the exclusive procedure for imposing a penalty for an alleged violation of Ordering Paragraph 8(1). Otherwise, HVUS could be penalized up to \$1,000 per day per violation in this proceeding and be penalized up to \$1,000 per day per violation again for the same offense in the Ordering Paragraph 20 proceedings. This would violate the Code and HVUS's due process rights. Under the terms of the May 2018 Order, imposing a civil penalty on HVUS for failing to comply with

⁹ In addition, a Section 529 Investigation would begin pursuant to Ordering Paragraph 21.

Ordering Paragraph 8(1) would be premature at this time. Therefore, the ALJ should not recommend, and the Commission should not impose a penalty for violating Ordering Paragraph 8(1) in this proceeding.

VII. CONCLUSION AND REQUEST FOR RELIEF

WHEREFORE, for all of the reasons set forth above, and in HVUS's Main Brief, HVUS respectfully requests that the Honorable Administrative Law Judge Katrina L. Dunderdale recommend, and the Commission order:

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

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

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

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

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

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

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

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

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

f. HVUS shall not be liable for any failure to comply with any provision of this Ordering Paragraph 8(1), where such failure is wholly or partially due to circumstances occasioned by or in consequence of the COVID-19

pandemic, which are not reasonably within HVUS's control and which HVUS by the exercise of due diligence is unable to prevent or overcome.

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

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

...

19. That, within thirty days after the deadline set forth in Ordering Paragraph 8(1)(e), on or before January 31, 2019 or as soon as all repairs, modifications and improvements have been made, as ordered herein, Hidden Valley Utility Services, L.P., shall file a detailed status report with the Secretary of the Commission, along with a verification from its engineer outlining the details of what has and has not been completed, and provide copies to the Office of Consumer Advocate and to the Commission's Bureau of Technical Utility Services, in writing, at the time of filing, identifying in detail the extent of compliance and any incomplete matters as ordered herein. If any matters ordered herein have not been completed, Hidden Valley Utility Services, L.P. and its engineer shall state in said report, in detail, the reasons for the same.

20. That, within two months after the deadline set forth in Ordering Paragraph 19 or after receiving the notice described in Ordering Paragraph 8(1)(g) on or before March 31, 2019, or within sixty (60) days after receipt of a written report of all completed rehabilitative measures from Hidden Valley Utility Services, L.P. and its engineer, the Bureau of Technical Utility Services shall investigate the quality of the water as well as of the water and wastewater services being received by Hidden Valley Utility Services, L.P.'s customers. If the recommended repairs, modifications, rehabilitative and maintenance procedures have not been accomplished within the time frame structured herein, or if the water quality or water and wastewater service as reported by the Bureau of Technical Utility Services is not adequate and reasonable, an evidentiary hearing shall forthwith be scheduled by the Office of Administrative Law Judge for purposes of addressing one or more of the following issues: the adequacy of the water system, the adequacy of the wastewater system, the quality of the water, the appropriateness of penalties to be imposed against Hidden Valley Utility Services, L.P., the appropriateness of ratepayer refunds, and any other issue relative to these ordering paragraphs. The burden of proof in the evidentiary hearing as to these issues shall be upon Hidden Valley Utility Services, L.P. The Commission shall retain jurisdiction for that purpose.

Respectfully submitted,



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