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August 10, 2020

**Via Electronic Filing**

Rosemary Chiavetta, Secretary  
PA Public Utility Commission  
PO Box 3265  
Harrisburg, PA 17105-3265

Re: John Kerr Musgrave, IV v. The Pittsburgh Water and Sewer Authority  
Docket No. C-2020-3020714

Dear Secretary Chiavetta:

Enclosed for electronic filing please find The Pittsburgh Water and Sewer Authority's Preliminary Objections to the Complaint filed in the above-referenced matter. Copies to be served in accordance with the attached Certificate of Service.

Very truly yours,

/s/ *Shannon F. Barkley*

Shannon F. Barkley  
Corporate Counsel for The Pittsburgh Water and Sewer Authority ("PWSA")

**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that this day I served a copy of the foregoing Preliminary Objections upon the persons listed below in the manner indicated in accordance with the requirements of 52 Pa. Code Section 1.54.

**Via Email Only (due to the current pandemic emergency)**

John Kerr Musgrave, IV  
jmusky@earthlink.net

Date: August 10, 2020

/s/ Shannon F. Barkley

Shannon F. Barkley, Esquire  
Attorney for  
The Pittsburgh Water and Sewer Authority

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

John Kerr Musgrave, IV,	:	
Complainant	:	
	:	
v.	:	Docket No. C-2020-3020714
	:	
The Pittsburgh Water and Sewer Authority,	:	
Respondent	:	
	:	

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**NOTICE TO PLEAD**

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**To: John Kerr Musgrave, IV**  
6059 Bunkerhill Street  
Pittsburgh, PA 15206-1155

You are hereby notified that a reply to the enclosed **Preliminary Objections** of The Pittsburgh Water and Sewer Authority (“Authority”) must be filed within 10 days of the date of service.

All pleadings, such as a Reply to Preliminary Objections, must be filed with the Secretary of the Pennsylvania Public Utility Commission with a copy served to counsel for the Authority and where applicable, the Administrative Law Judge presiding over the issue.

File with:

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
PO Box 3265  
Harrisburg, PA 17105-3265

With a copy to:

Shannon F. Barkley, Esquire  
Pittsburgh Water and Sewer Authority  
Penn Liberty Plaza I  
1200 Penn Avenue  
Pittsburgh, PA 15222

Lauren M. Burge, Esquire  
Eckert Seamans Cherin & Mellott, LLC  
600 Grant Street, 44<sup>th</sup> Floor  
Pittsburgh, PA 15219

*/s/ Shannon F. Barkley*

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Shannon F. Barkley, Esquire

Date: August 10, 2020

Attorneys for  
The Pittsburgh Water and Sewer Authority

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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**THE PITTSBURGH WATER AND SEWER AUTHORITY  
PRELIMINARY OBJECTIONS**

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Pursuant to 52 Pa. Code § 5.101, The Pittsburgh Water and Sewer Authority (“PWSA” or “Authority”) submits the following Preliminary Objections to the Complaint of John Kerr Musgrave, IV (“Complainant”) seeking dismissal of the Complaint. Contemporaneously with the filing of these Preliminary Objections, PWSA has filed an Answer with New Matter to the Formal Complaint, which is incorporated herein by reference. In support of these Preliminary Objections, PWSA states as follows:

**INTRODUCTION**

In his Formal Complaint, the Complainant is claiming that the water at the subject property does not contain adequate chlorine levels. The Complainant claims that there is not enough chlorine in the water, and it is affecting the safety of his water. Additionally, the Complainant requests that the PUC order PWSA to build a new water service line to the subject property because the current line breaks frequently. The Complainant does not believe that he or his neighbors should be required to pay for their own private water line repairs. He also states that there is no proof that the water line to the subject property is a private service line.

Contemporaneously with the filing of these Preliminary Objections, PWSA has filed an Answer denying the allegations and requesting that the Complaint be dismissed in its entirety.

For the reasons stated herein and in PWSA's Answer, the Commission should dismiss the Complaint because: (a) the Commission lacks jurisdiction to decide the issues raised by the Complaint; (b) the Commission lacks jurisdiction to grant the requested relief; and (c) the Complaint is insufficient to show that the Complainants are entitled to requested relief.

### **PRELIMINARY OBJECTIONS**

#### **A. Applicable Legal Standards**

1. The Commission's Rules of Administrative Practice and Procedure permit the filing of preliminary objections.<sup>1</sup> The Commission's procedure regarding the disposition of preliminary objections is similar to that utilized in Pennsylvania civil practice. *Id.*

2. Under Section 5.101(a) of the Commission's regulations, preliminary objections must specifically state the legal and factual grounds relied upon and be limited to the following:

- (1) Lack of Commission jurisdiction or improper service of the pleading initiating the proceeding;
- (2) Failure of a pleading to conform to this chapter or the inclusion of scandalous or impertinent matter;
- (3) Insufficient specificity of a pleading;
- (4) Legal insufficiency of a pleading;
- (5) Lack of capacity to sue, nonjoinder of a necessary party or misjoinder of a cause of action;

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<sup>1</sup> 52 Pa. Code § 5.101(a)(1)-(7). *Equitable Small Transportation Interveners v. Equitable Gas Company*, 1994 Pa. P.U.C. LEXIS 69, Docket No. C-00935435 (July 18, 1994).

(6) Pendency of a prior proceeding or agreement for alternative dispute resolution; and

(7) Standing of a party to participate in the proceeding.

3. The moving party may not rely on its own factual assertions, but must accept for the purposes of disposition of the preliminary objection, all well-pleaded, material facts of the other party, as well as every inference fairly deducible from those facts.<sup>2</sup> However, the Commission need not accept as true conclusions of law, unwarranted inferences from facts, argumentative allegations or expressions of opinion.<sup>3</sup>

4. In deciding the preliminary objections, the Commission must determine whether, based on the well-pleaded factual averments of the party, recovery or relief is possible.<sup>4</sup>

5. PWSA submits these preliminary objections pursuant to 52 Pa. Code § 5.101(a), based on the lack of the Commission's jurisdiction over the specific issues presented, the legal insufficiency of the Complaint, and the Complainant's lack of standing. The Commission does not have jurisdiction to enforce water quality regulations, and also lacks jurisdiction to decide the public versus private nature of water service lines. The Complaint is legally insufficient to show that the Complainant is entitled to the relief requested. Further, the Complainant is not the customer of record and lacks standing to bring the Complaint. Therefore, the Complaint must be dismissed.

**B. Lack of Jurisdiction Over Water Quality Issues**

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<sup>2</sup> *County of Allegheny v. Cmwlth. of Pa.*, 490 A.2d 402 (Pa. 1985).

<sup>3</sup> *Stanton-Negley Drug Co. v. Dep't of Pub. Welfare*, 927 A.2d 671, 673 (Pa. Cmwlth. 2007).

<sup>4</sup> *Department of Auditor General, et al. v. SERS, et al.*, 836 A.2d 1053, 1064 (Pa. Cmwlth. 2003); *P.J.S. v. Pa. State Ethics Commission*, 669 A.2d 1105 (Pa. Cmwlth. 1996).

6. To act on the Complaint, the Commission must have jurisdiction.<sup>5</sup> The Commission, as a creation of the General Assembly, has only the powers and authority granted to it by the General Assembly contained in the Public Utility Code.<sup>6</sup> The Commission must act within, and cannot exceed, its jurisdiction.<sup>7</sup> Jurisdiction may not be conferred by the parties where none exists.<sup>8</sup> Subject matter jurisdiction is a prerequisite to the exercise of power to decide a controversy.<sup>9</sup>

7. The Commission has jurisdiction to decide matters relating to a utility's facilities and service. However, there is a distinction between water service, which the Commission may regulate pursuant to Sections 1501 and 1505 of the Public Utility Code,<sup>10</sup> and water quality, which is outside the Commission's jurisdiction.<sup>11</sup> Water quality is statutorily regulated by the provisions of the Pennsylvania Safe Drinking Water Act and the Federal Safe Drinking Water Act; enforcements of these statutes is specifically vested in the Pennsylvania Department of Environmental Protection and the federal Environmental Protection Agency.<sup>12</sup> The Commonwealth Court has said that "[p]recedent makes clear the distinction between water service,

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<sup>5</sup> See 52 Pa. Code § 5.101(a)(1), 5.102.

<sup>6</sup> *Tod and Lisa Shedlosky v. Pennsylvania Electric Co.*, Docket No. C-20066937, Opinion and Order entered May 28, 2008; *Feingold v. Bell Tel. Co. of Pa.*, 383 A.2d 791 (Pa. 1977).

<sup>7</sup> *City of Pittsburgh v. PUC*, 43 A.2d 348 (Pa.Super. 1945).

<sup>8</sup> *Roberts v. Martorano*, 235 A.2d 602 (Pa. 1967).

<sup>9</sup> *Hughes v. Pennsylvania State Police*, 619 A.2d 390 (Pa.Cmwlth. 1992), appeal denied, 637 A.2d 293 (Pa. 1993).

<sup>10</sup> 66 Pa. C.S. §§ 1501, 1505.

<sup>11</sup> *Rovin, D.D.S. v. PUC*, 502 A.2d 785; *Pickford v. PUC*, 4 A.3d 707 (Pa.Cmwlth. Ct. 2010).

<sup>12</sup> *Rovin*, 502 A.2d at 787.

which the Commission may regulate, and water quality, which may only be regulated by the PADEP.”<sup>13</sup>

8. The Complaint’s claims that the water service to the subject property does not have adequate chlorine levels is outside the Commission’s jurisdiction. Specific concentrations of chlorine and related treatment processes are regulated by PA DEP, not the Commission.

9. The Complaint must be dismissed because the chlorination issue raised by the Complaint is clearly a water quality issue and thus is outside the Commission’s jurisdiction.

**C. Lack of Jurisdiction to Decide Water Line Ownership Issues**

10. The courts, not the Commission, have jurisdiction to decide the public versus private nature of the water lines at issue. The courts have primary jurisdiction to adjudicate issues related to ownership and the dedication of property to the public use.<sup>14</sup> No power is conferred upon the Commission under the Public Utility Code to adjudicate property disputes.<sup>15</sup>

11. To the extent the Complainant argues that the water line serving the subject property is a public water line, the Complaint may require the Commission to interpret ordinances, easements, records and/or agreements of the City of Pittsburgh. The Commission, however, lacks jurisdiction to interpret such documents.<sup>16</sup>

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<sup>13</sup> *Pickford*, 4 A.3d at 713.

<sup>14</sup> Property disputes belong in a court of general jurisdiction. *See, e.g., Anne E. Perrige v. Metropolitan Edison Co.*, PUC Docket No. C-00004110, Order entered July 11, 2003 (Commission had no jurisdiction to interpret the meaning of a written right-of-way agreement); *Lou Amati/Amati Service Station v. West Penn Power Co. and Bell Atlantic-Pennsylvania, Inc.*, PUC Docket No. C-00945842, Order entered October 25, 1995 (real property issues such as trespass and whether utility facilities are located pursuant to valid easements are within the exclusive jurisdiction of the Courts of Common Pleas); , PUC Docket No. C-20066937, Order entered May 28, 2008.

<sup>15</sup> *Id.* The private character of mains does not change in the absence of evidence that they were dedicated to the public use. *See Overlook Development Co. v. Public Service Commission*, 158 A. 869 (Pa. 1932) (main continued to be private property, and did not become devoted to a public use); *In re Water Distribution Mains*, 466 A.2d 239 (Pa.Cmwlth. 1983) (regarding taking of private mains by the Borough of Boyertown for public use) (“Boyertown”).

<sup>16</sup> Regarding easements and property issues, *see* footnote 8. Regarding contracts and agreements, *see, e.g., Allport Water Auth. v. Winburne Water Co.*, 393 A.2d 673 (Pa. Super. Ct. 1978); *Behrend v. Bell Tel. Co.*, 363 A.2d

12. Under circumstances presented, and for the reasons stated herein and in PWSA's Answer, the Commission lacks jurisdiction to act on the ownership issues raised by the Complaint and the Complaint must be dismissed.

**D. The Complaint is Insufficient to Show that the Complainant is Entitled to the Requested Relief**

13. To act on the Complaint, the Complainant must show that he is entitled to the requested relief. As the party seeking relief, the Complainant bear the burden proving: (a) that PWSA is in violation of the Public Utility Code, the Commission's Regulations or the Commission's Order; and (b) their right to the requested relief.

14. The Commission is empowered to resolve all disputes or conflicts arising under PWSA's approved tariff, which allocates responsibility for repair and maintenance of a water line based on the ownership of that water line.<sup>17</sup> The water lines at issue here are private water lines located on a private street. As noted in the Answer, PWSA's Tariff provides that "[t]he customer service line shall be furnished, installed, maintained and/or replaced, when necessary, by and at the sole expense of the customer."<sup>18</sup> Additionally, the Tariff specifically requires that "Non-Municipal Residential Property Owners whose properties are served by a Party Water Service Line must install separate service lines to each individual property...The cost of installation of the Water Service Line from the residence to the Curb Stop is the responsibility of the property Owner."<sup>19</sup> Thus, Responsibility for the repair, maintenance, or replacement of private water lines

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1162 (Pa. Super. Ct. 1976), subsequent history omitted; *Adams, et al. v. Pa. PUC*, 819 A.2d 631 (Pa. Cmwlth. 2003); *Leveto v. Nat'l Fuel Gas Dist. Co.*, 366 A.2d 270 (Pa. Super. Ct. 1976); and *Litman v. Peoples Natural Gas Co.*, 449 A.2d 720 (Pa. Super. Ct. 1982).

<sup>17</sup> PWSA Tariff Water – Pa. P.U.C. No 1 at Part II.3 (definition of "Authority Water Main") (effective March 1, 2019).

<sup>18</sup> PWSA Tariff Water – Pa. P.U.C. No. 1, Part III, Section B.1.

<sup>19</sup> PWSA Tariff Water Pa. P.U.C. No. 1, Part III, Section B.13.a.<sup>20</sup> See 66 Pa. C.S. §§ 102, 3201, 3202(a).

lies with the property owner. Moreover, any issue related to the public versus private nature of the water lines must be resolved, as discussed herein, by the Courts, not the Commission.

15. The Complainant has not stated a basis upon which relief may be granted by the Commission under the Public Utility Code or Commission regulations. PWSA is regulated as a public utility by the Commission.<sup>20</sup> Section 1501 of the Public Utility Code<sup>21</sup> requires PWSA to furnish and maintain adequate, efficient, safe, and reasonable service and facilities. That provision, however, does not require PWSA to bear all repair and maintenance responsibility for any and all water lines in the City, regardless of ownership. Nor does that or any other provision in the Public Utility Code empower the Commission to direct PWSA to use public utility funds to benefit private individuals by repairing and maintaining a privately-owned water line.<sup>22</sup>

16. Under circumstances presented, and for the reasons stated herein and in PWSA's Answer, the Complaint must be dismissed as being legally insufficient pursuant to 52 Pa. Code § 5.101(a)(4).

**E. The Complainant Lacks Standing**

17. *Per* Allegheny County Real Estate records, the subject property has been owned by John K. Musgrave, III and Judith Langhart since April 11, 1995.

18. John K. Musgrave, IV is not the customer of record for 6059 Bunkerhill Street As far back as PWSA has billing records, the bills appear in the name of "John Musgrave" (without designation of III or IV); however the owner of record of a property is the customer absent the

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<sup>20</sup> See 66 Pa. C.S. §§ 102, 3201, 3202(a).

<sup>21</sup> 66 Pa. C.S. § 1501.

<sup>22</sup> 53 Pa. C.S. § 5612; *Price v. Philadelphia Parking Authority*, 221 A.2d 138 (Pa. 1966) (A public corporation, exercises public powers and its engagements are public in nature, and its facilities are public property. Empowered to act only for the public benefit, a public corporation may not employ its resources for the primary and paramount benefit of a private endeavor. An engagement essentially private in nature may not be justified on the theory that the public will be incidentally benefited.).

filing of a “Change of Address – Owner/Tenant Form” or an “Assumption Form”. Since, PWSA has neither a Change of Address Owner/Tenant Form nor an Assumption Form on file for this address, the customer is the owner of record, which according to Allegheny Property Tax Records is John K. Musgrave, III, who is believe to be deceased.<sup>23</sup>

19. The Complainant is not the customer of record for the PWSA account associated with the subject property.

20. The Complainant cannot bring a Complaint on behalf of John. K. Musgrave, III, the customer of record for the subject property.

21. Upon information and belief, the Complainant is not a licensed attorney and may not represent the interests of others before the Commission.

22. The Complainant lacks standing in his own right to bring this Formal Complaint as he is not the owner nor the customer of record for the subject property.

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<sup>23</sup> See on-line obituary at: <https://www.legacy.com/obituaries/triblive-pittsburgh-tribune-review/obituary.aspx?n=john-k-musgrave&pid=182186119&fhid=9799>

**CONCLUSION**

WHEREFORE, PWSA respectfully requests that this Commission (a) grant PWSA's preliminary objections; (b) dismiss the Complaint in its entirety; and (c) grant any other relief to PWSA that is deemed to be reasonable and appropriate.

Respectfully submitted,

/s/ Shannon F. Barkley

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Date: August 10, 2020

Attorneys for the Pittsburgh Water and Sewer Authority

Verification

I, Julie A. Quigley, am the Director of Administration for The Pittsburgh Water and Sewer Authority (“PWSA” or “Authority”), and I hereby state that the facts set forth in the foregoing **Preliminary Objections** are true and correct to the best of my knowledge, information and belief and that I expect the Authority to be able to prove the same at a hearing held in this matter. I understand that the statements herein are made subject to the penalties of 18 Pa. C.S. § 4904 (relating to sworn falsification to authorities).

/s/ Julie A. Quigley  
Julie A. Quigley  
Director of Administration  
The Pittsburgh Water and Sewer Authority