

August 19, 2020

VIA EFILING

Rosemary Chiavetta, Secretary
PA Public Utility Commission
Commonwealth Keystone Bldg.
400 North Street
Harrisburg, PA 17101

Re: Tim McKercher v. Hanover Municipal Waterworks
Docket No. C-2020-3021080
Preliminary Objections to Formal Complaint of the Borough of Hanover, Hanover
Municipal Water Works

Dear Secretary Chiavetta:

Please find enclosed for filing the Preliminary Objections of the Borough of Hanover, Hanover Municipal Water Works to the Formal Complaint of Tim McKercher in the above-referenced matter. If you have any questions or concerns, please feel free to contact me at the address listed above.

Very Truly Yours,

Salzmann Hughes, PC



Isaac P. Wakefield

IPW/nas
Enclosure

Cc: Certificate of Service

**BEFORE THE PENNSYLVANIA
PUBLIC UTILITY COMMISSION**

TIM MCKERCHER
Complainant

v.

HANOVER MUNICIPAL WATERWORKS
Respondent

Docket No. C-2020-3021080

NOTICE TO PLEAD

Pursuant to 52 Pa. Code § 5.101(a), you are hereby notified to file a written response to the enclosed Preliminary Objections within ten (10) days from service hereof or the Preliminary Objections may be granted. All pleadings, such as an answer to Preliminary Objections, must be filed with the Secretary of the Pennsylvania Public Utility Commission, with a copy served on counsel, and where applicable, the Administrative Law Judge presiding over the issue.

File with:

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
400 North Street, Second Floor
Harrisburg, PA 17120

Dated: August 19, 2020



Isaac P. Wakefield
*Counsel for Respondent, the
Borough of Hanover, Hanover
Municipal Water Works*

**BEFORE THE PENNSYLVANIA
PUBLIC UTILITY COMMISSION**

TIM MCKERCHER	:	
Complainant	:	
	:	
v.	:	Docket No. C-2020-3021080
	:	
	:	
HANOVER MUNICIPAL WATERWORKS	:	
Respondent	:	
	:	
	:	

**PRELIMINARY OBJECTIONS OF THE BOROUGH OF HANOVER, HANOVER
MUNICIPAL WATER WORKS TO THE FORMAL COMPLAINT OF TIM
MCKERCHER**

Pursuant to 52 Pa. Code § 5.101, the Borough of Hanover, Hanover Municipal Water Works (“Hanover”), files the Preliminary Objections to the Formal Complaint of Tim McKercher and support thereof states as follows:

I. INTROUDCTION

1. On July 30, 2020, Hanover was served with a notice of Formal Complaint filed by Complainant, Tim McKercher.
2. Concurrently with these Preliminary Objections, Hanover has filed an Answer and New Matter in response to the Complaint, which is incorporated herein by reference.
3. Hanover is a municipal corporation, organized and existing under the laws of the Commonwealth of Pennsylvania.
4. Hanover furnishes water service to, *inter alia*, portions of Penn Township, York County, Pennsylvania.
5. In providing water service outside of its municipal boundaries to portions of Penn Township, Hanover acts in the capacity of a jurisdictional water utility and is certificated by the Public Utility Commission (the “Commission”) to provide such service.

6. Hanover intends to replace an aging water transmission main presently located on private properties with a new water main located within the public right-of-way, as part of the project known as the 2020 Water System Improvements Project (the “Project”).

7. Relevant to this Complaint, Hanover provides water service to 11 properties located in Penn Township, York County in the vicinity of Beck Mill Road and Park Heights Boulevard (the “Properties”).

8. The Properties are served by an existing 12” diameter, cast iron water main (“Existing Main”).

9. Upon review of the Existing Main, Hanover’s staff and engineering consultants determined that it is necessary for a new transmission main to be installed to replace the aging Existing Main (the “New Main”).

10. The location of the New Main will require that the water service to the Properties be relocated.

11. Hanover provides service to the Properties pursuant to its Commission approved tariff, the “Rates, Rules and Regulations Governing the Distribution of Water” (Supplement No. 31 to Water-PA P.U.C. No. 3) (the “Tariff”).

12. Section 4.1 of the Tariff provides that Hanover will “make all connections to its mains, furnish, install and maintain all service lines from the main to the curb, including the service pipe, corporation stop, curb stop, curb box, or other appurtenances, all of which will be the property of the Water Works and shall be accessible to and under the exclusive control of the Water Works.”

13. Section 4.3 of the Tariff provides that “[t]he service line from the main to the curb line shall be installed and maintained at the expense of the Water Works as an integral part of its distribution system.”

14. Section 4.3 further provides, however, that “[t]he service line and all appurtenances installed from the curb line to the customer’s premises shall be installed and maintained at the expense of the customer.”

15. Consistent with the terms of its Commission-approved Tariff, Hanover determined that Hanover is responsible for the costs of installing the New Main and the service line up to the curb box on an owner’s Property.

16. The Property owner, however, is responsible for the cost of installing the service line and plumbing from the curb box to the customer’s premises.

II. PRELIMINARY OBJECTIONS

17. The Commission's Rules of Administrative Practice and Procedure permit the filing of Preliminary Objections under certain circumstances, including legal insufficiency of the pleading and nonjoinder of a necessary party. 52 Pa. Code §§ 5.101(a)(4) & 5.101(a)(5).

18. In addition, Section 703 of the Public Utility Code ("Code") allows the Commission to dismiss a complaint without a hearing, if the Commission determines such a hearing “is not necessary in the public interest.” 66 Pa.C.S. § 703(b).

19. Preliminary Objections allowed by 52 Pa. Code § 5.101 are comparable to a demurrer in a civil case, which is authorized by Rule 107(b) of the Pennsylvania Rules of Civil Procedure.

20. The Commission has adopted this standard. *Application of Main Line Transit Service, Inc.*, Docket No. A-001 16172, Initial Decision issued January 4, 2000, Final Order entered October 3, 2002.

21. In ruling on preliminary objections, the Commission must accept as true all well-pleaded facts of the non-moving party, and the undisputed relevant facts averred in the moving

party's new matter will be deemed admitted. *See Ciabattoni v. Rounsvilte*, Docket No. C-2009-2097477, 2009 WL 2986733 (Sept. 11, 2009); *Horton v. Nat'l Fuel Gas Distrib. Corp.*, Docket No. C-2009-2097173, 2009 WL 3332182 (Oct. 13, 2009); 52 Pa. Code. § 5.63.

A. The Complaint should be dismissed because Hanover has not violated any section of the Code, any Commission Regulation or Order, or its Commission-approved tariff.

22. The Complaint must be dismissed because Hanover has not violated any section of the Code, any Commission Regulation or Order, or its Commission-approved Tariff. 66 Pa. C.S. § 701.

23. 66 Pa. C.S.A. 1501 provides that “[s]ubject to the provisions of this part and the regulations or orders of the commission, every public utility may have reasonable rules and regulations governing the conditions under which it shall be required to render service.”

24. Commission-approved tariffs have the force and effect of law, and Hanover must comply with its own tariff. 66 Pa.C.S.A. § 1303; *DiSanto v. Dauphin County Water Supply Company*, 436 A.2d 197 (Pa. Super. 1981); *Brockway Glass Co. v. Pa. Pub. Util. Comm'n.*, 437 A.2d 1067 (Pa. Cmwlth. 1981); *PPL Electric Utilities Corp. v. Pa. Pub. Util. Comm'n.*, 912 A.2d 386 (Pa. Cmwlth. 2006).

25. Pennsylvania’s Commonwealth Court has held that “[a] tariff is a set of operating rules imposed by the State that a public utility must follow if it wishes to provide services to customers. It is a public document which sets forth the schedule of rates and services and rules, regulations and practices regarding those services. It is well settled that public utility tariffs must be applied consistently with their language. 66 Pa.C.S. § 1303. Public utility tariffs have the force and effect of law, and are binding on the customer as well as the utility.” *PPL Elec. Utilities Corp.* 912 A.2d at 402.

26. Hanover has the obligation to “furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and shall make all such repairs, changes, alterations, substitutions, extensions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public.” 66 Pa.C.S. § 1501.

27. Hanover, following considered engineering and operational analysis, has determined that the facilities proposed in the Project are needed to provide adequate, reasonable, safe, and reliable facilities and service to the properties served in Penn Township.

28. Sections 4.1 and 4.3 of Hanover’s Tariff expressly delineate responsibility for costs between Hanover and a customer under the circumstances.

29. Pursuant to Section 4.1, Hanover is responsible for the costs of installing the New Main and the service line up to the curb box on an owner’s property.

30. Pursuant to Section 4.3, a property owner is responsible for the cost of installing the service line and plumbing from the curb box to the customer’s premises.

31. To the extent the New Main will require certain property owners to relocate portions of their service lines, the Commission-approved Tariff requires that the property owners bear that cost. The Tariff is clear and unambiguous in this regard.

32. Moreover, the Properties at issue in Hanover’s Penn Township service territory will benefit directly from these improvements to the water system.

33. To require these customers to bear the cost of relocating the portions of their privately owned service line is consistent with industry practice and good policy.

34. If the affected customers do not pay, Hanover's only other sources of revenue are other water customers or Borough taxpayers, neither of which should be required to subsidize private plumbing costs of the affected customers.

35. Furthermore, Hanover's decision is consistent with mandatory connection requirements that can be put in place upon the demand of the municipality including in Pennsylvania Boroughs and Second Class Townships and require that the cost of construction of the connection is to be at the property owner's expense. *See* 8 Pa.C.S.A. §§ 2461-2462; 53 P.S. § 67603.

36. Indeed, even in cases where a public utility was required to bear the cost of repairs and construction of a water main consistent with the general rule applicable to such costs, the Commission has ordered that customers pay the costs for the portion of their water service lines beyond the curb box. *See McCormick v. Pa PUC*, 409 A.2d 962, 964 n. 3 (Pa. Cmwlth. 1980).¹

37. The Project in this instance is necessary or proper for the accommodation, convenience, and safety of Hanover's customers and the public.

38. Hanover's Tariff places the responsibility on the customer to install and maintain the service line from the curb to the customer's premises, a reasonable and Commission-approved requirement.

39. Hanover is acting within the bounds of the Public Utility Code, Commission regulations and orders, and Hanover's Commission-approved Tariff in requiring that property owners in Penn Township affected by the Project pay the cost of relocating their privately owned

¹ The Commission's own regulations applicable to fixed service utilities also draw a distinction between the portion of a water system for which the utility is responsible and the portion for which the customer is responsible. *See* 52 Pa. Code § 65.1 (separately defining "company's service line" and "customer's service line").

service lines in order to connect to the newly constructed water main and the Complaint must, therefore, be dismissed. 66 Pa. C.S. § 701.

B. The Complaint should be dismissed because Complainant has failed to join all necessary parties.

40. Pursuant to 52 Pa. Code § 5.101(a)(5), the Complaint should be dismissed because it fails to join necessary parties.

41. “A necessary party is one whose rights are so connected with the claims of the litigants that no relief can be granted without infringing upon those rights.” *Pennsylvania Fish Commission Pleasant Tp.*, 388 A.2d 756, 759 (Pa. Cmwlth. 1978).

42. Complainant, Mr. McKercher, purports to file the Complaint on behalf of six other residents of Penn Township affected by the Project.

43. None of these other residents are listed as parties to the Complaint nor have they provided a verification and signature to the Complaint.

44. Mr. McKercher lacks standing to file the Complaint on behalf of these six other residents.

45. Additionally, Mr. McKercher is the only named party in the Complaint and has failed to join all of the residents affected by this Project.

46. Specifically, the following 11 Properties and property owners will be affected by this Project:

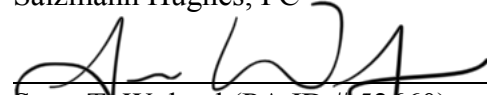
- a. 355 Park Heights Blvd., Hanover, PA 17331 – John R. McGrew & Wendy J. Bish-McGrew
- b. 375 Park Heights Blvd., Hanover, PA 17331 - Tim S. & Susan L. McKercher
- c. 390 Park Heights Blvd., Hanover, PA 17331 – Tracey L. Albrecht
- d. 391 Park Heights Blvd., Hanover, PA 17331 – Gary E. & Patricia K. Waltman
- e. 410 Park Heights Blvd., Hanover, PA 17331 – Keith Keller & Susan Belt

- f. 430 Park Heights Blvd., Hanover, PA 17331 – Thornton P. & Mary B. Shriner
 - g. 415 Beck Mill Rd., Hanover, PA 17331 – Dwight D. & Judith S. Dubs
 - h. 419 Beck Mill Rd., Hanover, PA 17331 – Leonard E. & Sabrina E. Bosse
 - i. 421 Beck Mill Rd., Hanover, PA 17331 – Leonard E. & Sabrina E. Bosse
 - j. 435 Beck Mill Rd., Hanover, PA 17331 – Bernard E. & Judy A. Spangler
 - k. 445 Beck Mill Rd., Hanover, PA 17331 – Shilo W. & Michelle R. Mitchell
47. All of the aforementioned property owners are necessary parties.
48. The Complaint failed to join these necessary parties.
49. Accordingly, the Complaint should be dismissed for failure to join necessary parties.

WHEREFORE, Hanover respectfully requests that the Complaint be dismissed.

Respectfully submitted,

Salzmann Hughes, PC



Scott T. Wyland (PA ID #52660)

Isaac P. Wakefield (PA ID # 311909)

Salzmann Hughes, PC

112 Market Street, 8th Floor

Harrisburg, PA 17101

Phone: (717) 234-6700

Email: swyland@salzmannhughes.com

iwakefield@salzmannhughes.com

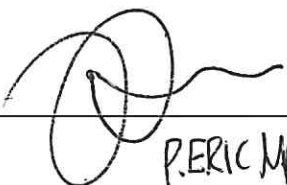
*Counsel for Respondent, the
Borough of Hanover, Hanover
Municipal Water Works*

Dated: August 19, 2020

VERIFICATION

I, P. Eric Mains, PE, Director of Planning & Engineering for the Borough of Hanover, hereby state that the facts set forth above are true and correct to the best of my knowledge, information, and belief, and that I expect to be able to prove the same at a hearing held in this matter. I understand that the statements herein are made subject to the penalties of 18 Pa.C.S. § 4904 (relating to unsworn falsification to authorities).

Date: 08/18/2020


P. ERIC MAINS

CERTIFICATE OF SERVICE

I, Isaac P. Wakefield, certify that on this 19th day of August, 2020, I have served the foregoing Preliminary Objections by depositing the same in the United States Mail, by First Class Mail, postage prepaid, addressed as follows:

Tim McKercher
375 Park Heights Blvd
Hanover, PA 17331

Tracey Albrecht
390 Park Heights Blvd
Hanover, Pa 17331

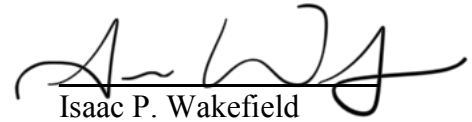
Keith Keller
410 Park Heights Blvd
Hanover, Pa 17331

Pat Waltman
391 Park Heights Blvd
Hanover, PA 17331

Leonard Bosse
419 & 421 Beck Mill Road
Hanover, PA 17331

Dwight Dubs
415 Beck Mill Road
Hanover, PA 17331

Bernie Spangler
435 Beck Mill Road
Hanover, PA 17331


Isaac P. Wakefield