**PENNSYLVANIA**

**PUBLIC UTILITY COMMISSION**

**Harrisburg, PA 17120**

|  |  |
| --- | --- |
|  | Public Meeting held August 6, 2020 |
| Commissioners Present:  Gladys Brown Dutrieuille, Chairman  David W. Sweet, Vice Chairman  John F. Coleman, Jr.  Ralph V. Yanora |  |
| Pennsylvania Public Utility Commission  v.  Pennsylvania-American Water Company | R-2020-3019369  R-2020-3019371 |
|  |  |

**OPINION AND ORDER**

**BY THE COMMISSION:**

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition is a Petition for Reconsideration of Staff Action filed on June 24, 2020, by Pennsylvania-American Water Company (PAWC or Company) in the above-captioned proceedings, seeking reversal of the June 4, 2020 Order (*Extension Order*) of Chief Administrative Law Judge Charles E. Rainey, Jr. (CALJ), in which he granted the Expedited Motion of the Office of Consumer Advocate (OCA) filed on May 28, 2020 (Expedited Motion), and the Answers filed by OCA, the Bureau of Investigation & Enforcement (I&E), the Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania (CAUSE-PA), and the Office of Small Business Advocate (OSBA).

By granting the Expedited Motion, the CALJ extended the established rate suspension period by forty-five (45) days, or from January 28, 2021, to March 15, 2021,**[[1]](#footnote-2)** for the purpose of establishing a reasonable procedural schedule in this proceeding.

After full consideration of the Petition, the Answers, the *Extension Order*, and the procedural schedule in this matter, for the reasons discussed more fully below, we shall grant, in part and deny, in part, the Petition, affirm the CALJ’s *Extension Order*, and direct the Office of Administrative Law Judge (OALJ) to modify, if necessary, the litigation schedule appearing in the Prehearing Order issued by Administrative Law Judge (ALJ) Conrad A. Johnson on June 15, 2020, in this proceeding(*Prehearing Order*) consistent with this Opinion and Order.

**Background**

On March 6, 2020, the Governor of the Commonwealth of Pennsylvania, Tom Wolf, issued the Proclamation of Disaster Emergency pursuant to Section 7301(c) of the Emergency Management Services Code, 35 Pa. C.S. §§ 7101, *et seq*. (*Executive Order*) to address the exigencies created by the COVID-19 global pandemic.

On March 15, 2020, the Commonwealth of Pennsylvania’s Deputy Secretary for Human Resources and Management issued an Executive Order implementing protocols for remote telework for state offices in Dauphin County and the Capital Complex, including the Commission’s offices, as amended, beginning March 16, 2020, and extending at least through a period effective as of the entry date of this Opinion and Order.

On March 19, 2020, the Governor’s Office issued an order closing all businesses that were not life sustaining.[[2]](#footnote-3)

On March 20, 2020, the Commission issued the *Emergency Order Re Suspension of Regulatory and Statutory Deadlines; Modification to Filing and Service Requirements*, Docket No. M-2020-3019262 (*Emergency Order*), to furnish guidance on the conduct of Commission proceedings during the pendency of the COVID-19 disaster emergency. Specifically, the *Emergency Order* directs, in part, that:

Parties to proceedings before the Commission are encouraged to cooperate regarding the suspension, extension, waiver or change of any regulatory, statutory or procedural deadlines in connection with the performance of any obligation prescribed by the Public Utility Code or other applicable law.

*Emergency Order* at 4. The *Emergency Order* further provides that:

[I]n pending rate case litigation, the Chief ALJ is authorized to establish reasonable deadlines under the circumstances after consideration of the positions of the parties and the presiding Administrative Law Judge. The Chief ALJ’s decision would then be subject to review by the Commission.

*Emergency Order* at 2. Additionally, in response to the *Executive Order*, the Commission adopted broader electronic filing practices, ceased paper service on and by the Commission for the duration of the emergency, and has encouraged other flexible procedures to allow the Commission to continue to operate through the emergency.

On April 13, 2020, the Pennsylvania Supreme Court ruled that the Governor’s *Executive Order* is a legal exercise of authority granted to the Governor under the Emergency Management Services Code. *See* *Friends of Danny DeVito et al. v. Tom Wolf, Governor, et al*., 227 A.3d 872 (Pa. 2020), 2020 Pa. LEXIS 1987 (*DeVito)*, \*25 (citing 35 Pa. C.S. § 7301(f)).

Beginning in late May 2020, the reopening phase began under Governor Wolf’s program that has allowed Counties to move towards reopening businesses and government locations through a series of progressively less-restrictive reopening protocols under the Governor’s Red-Yellow-Green designations.

On June 3, 2020, Governor Wolf renewed the *Executive Order* for an additional ninety days.[[3]](#footnote-4)

On July 1, 2020, the Commonwealth of Pennsylvania’s Secretary of the Department of Health issued an Order[[4]](#footnote-5) and on July 15, 2020, the Governor[[5]](#footnote-6) and the Secretary of Health[[6]](#footnote-7) each signed new orders, effective July 16, 2020, for statewide targeted mitigation efforts in response to the recent rise in COVID-19 cases. These Orders included, *inter alia*, mandating the use of universal face coverings in public, beginning immediately, and further directing the continuation of telework within the Commonwealth.

As of the entry date of this Opinion and Order, the Commission’s office buildings remain closed due to the COVID-19 disaster emergency, however, the Commission remains fully operational with its staff teleworking.

**History of the Proceeding**

On March 30, 2020, PAWC filed with the Commission its Notice of Intent to file data and testimony in support of its proposed general base rate increase on or before April 29, 2020.

On April 29, 2020, the Company filed Supplement No. 19 to Original Tariff Water – Pa. P.U.C. No. 5 and Supplement No. 19 to Original Tariff Wastewater – Pa. P.U.C. No. 16, issued to be effective for service rendered on and after June 28, 2020. The filing proposed changes to PAWC’s base rates designed to produce an increase in annual water and wastewater revenues totaling $138.6 million over two years: $92.4 million, annualized over the entire year 2021, and $46.2 million in 2022.

Beginning on April 29, 2020, Complaints and Petitions to Intervene were filed by various parties including the OCA and the OSBA, and I&E filed a Notice of Appearance. A list of the parties that filed pleadings in this case is set forth in the Prehearing Order issued by the ALJ on June 15, 2020.

By Order entered May 21, 2020 pursuant to 66 Pa. C.S. § 1308(d), the Commission suspended PAWC’s general base rate increase filing by operation of law until January 28, 2021 (Suspension Order) and instituted an investigation to determine the lawfulness, justness and reasonableness of the Company’s existing and proposed rates, rules and regulations. In compliance with the Commission’s Suspension Order, on May 27, 2020, PAWC filed Tariff Supplement No. 20 to Original Tariff Water – Pa. P.U.C. No. 5 and Supplement No. 20 to Original Tariff Wastewater – Pa. P.U.C. No. 16, reflecting the suspension until January 28, 2021.

On May 28, 2020, the OCA filed its Expedited Motion, requesting that the Commission extend the statutory suspension period by forty-five-days. The OCA invoked the *Executive Order* and the *Emergency Order* as the basis for seeking a forty-five-day extension of the suspension period. In support of its Expedited Motion, the OCA stated that additional time is needed to review the rate filing and present the OCA’s case given that the OCA’s staff members are currently working remotely due to the COVID-19 pandemic, and, thus, lack access to full office resources. Additionally, the OCA submitted that additional review time is needed because this rate case is particularly complex. Expedited Motion at 6-7.

ALJ Johnson advised the Parties that the Expedited Motion would be addressed at the Prehearing Conference. PAWC filed an Answer in Opposition to the OCA’s Motion and I&E and CAUSE-PA filed Answers supporting the OCA’s Motion.

On June 4, 2020, the Prehearing Conference was held with ALJ Johnson presiding and the CALJ participating. Following presentations by the OCA, PAWC and other Parties, the CALJ, after deliberation with ALJ Johnson, delivered his ruling granting the OCA’s Expedited Motion and indicated a written order would follow.

On June 4, 2020, the CALJ issued the *Extension Order* granting the OCA’s Expedited Motion and extending the Section 1308(d) suspension period by forty-five days, until March 15, 2021. The *Extension Order* made no reference to PAWC’s alternative proposals presented at the prehearing stages. In the *Extension Order*, the CALJ directed any party seeking to challenge the ruling to file a Petition for Reconsideration from Staff Action pursuant to Section 5.44 of the Commission’s Regulations within twenty days.

On June 15, 2020, ALJ Johnson issued the *Prehearing Order* establishing the litigation schedule as agreed to by the Parties at the Prehearing Conference and consistent with the CALJ’s decision to grant additional procedural time in this proceeding.

As noted above, on June 24, 2020, PAWC filed the Petition currently before us. On July 6, 2020, the OCA and I&E each filed an Answer to the Petition. On July 8, 2020, CAUSE-PA filed an Answer to the Petition. On July 14, 2020, the OSBA filed an Answer to the Petition.

The Petition and Answers are now ripe for decision.

**Discussion**

**A. Legal Standards**

In the *Emergency Order*, in pertinent part, we declared that while the *Emergency Order* is in effect, any decision by a Commission Bureau Director, including the CALJ, to suspend, extend, waive or change “any regulatory, statutory or procedural deadline,” is reviewable by the Commission pursuant to Section 5.44 of the Commission’s Regulations upon the filing of a petition for reconsideration of staff action by an affected party.[[7]](#footnote-8) *Emergency Order* at 2, 4, OP No. 6.

When evaluating appeals from a Commission staff action under 52 Pa. Code § 5.44, the applicable legal standard is that the moving party has the burden of proof.[[8]](#footnote-9) *See, e.g., Application of Airquest*, Docket No. A-2015-2493073 (Order entered December 8, 2016) (request for reconsideration of secretarial letter denying application for failure to comply with conditions); *Application of Dep’t of Transportation (Norfolk),* Docket No. A-2018-3003795 (November 19, 2019) (request for reconsideration of secretarial letter approving application with conditions).

In the *Emergency Order*, the Commission delegated authority to Bureau Directors, including the CALJ, to suspend, extend, waive, or change any statutory or regulatory deadline which may hinder, rather than further, the mission of the Commission. Specifically, we stated as follows:

Similar to other actions where we have delegated various duties to Commission bureaus, we now delegate the authority to determine the suspension, extension, waiver or change of any regulatory, statutory or procedural deadlines to individual Commission Bureau Directors whose bureaus are tasked with matters before the Commission. Each Bureau Director will make decisions regarding the necessity of modifying such deadlines. Modifications may result from a request by a party or the tribunal/bureau staff itself.

All Bureau Directors are hereby delegated the authority to suspend, extend, waive or change a statutory or regulatory deadline *which may hinder, rather than further, the mission of the Commission*, after consultation with all interested parties, as deemed necessary and appropriate.

*Emergency Order* at 2, 4, Ordering Paragraph (OP) No. 4 (emphasis added).

In applying such delegated authority in general base rate cases, we stated as follows:

[I]n pending rate case litigation, the Chief Administrative Law Judge is authorized to establish reasonable deadlines under the circumstances after consideration of the positions of the parties and the presiding Administrative Law Judge. The Chief Administrative Law Judge’s decision would then be subject to review by the Commission.

*Emergency Order* at 2.

We encouraged parties appearing before us in proceedings to cooperate regarding procedural extensions, stating as follows:

Parties to proceedings before the Commission are encouraged to cooperate regarding the suspension, extension, waiver or change of any regulatory, statutory or procedural deadlines in connection with the performance of any obligation prescribed by the Public Utility Code or other applicable law.

*Emergency Order* at 4, OP No. 1 (emphasis added).

Finally, it is well settled that we are not required to consider expressly or at length each contention or argument raised by the parties. [*Consolidated Rail Corporation v. Pa. PUC*, 625 A.2d 741 (Pa. Cmwlth. 1993);](file:///C:\research\buttonTFLink?_m=69761b6202cb4178e2a6e6fe02f5751b&_xfercite=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b2000%20Pa.%20PUC%20LEXIS%2067%20%5d%5d%3e%3c\cite%3e&_butType=3&_butStat=242&_butNum=5&_butInline=1&_butinfo=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b625%20A.2d%20741%5d%5d%3e%3c\cite%3e&_fmtstr=FULL&docnum=5&_startdoc=1&_startchk=1&wchp=dGLSzS-lSlbz&_md5=ad2b02d95c2a9216e83b92a3570d4785) *also see, generally,* [*University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984).](file:///C:\research\buttonTFLink?_m=69761b6202cb4178e2a6e6fe02f5751b&_xfercite=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b2000%20Pa.%20PUC%20LEXIS%2067%20%5d%5d%3e%3c\cite%3e&_butType=3&_butStat=242&_butNum=6&_butInline=1&_butinfo=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b485%20A.2d%201217%5d%5d%3e%3c\cite%3e&_fmtstr=FULL&docnum=5&_startdoc=1&_startchk=1&wchp=dGLSzS-lSlbz&_md5=9b1cc8319afd12440738bb82d74455ef) Thus, any argument in the Petition that we do not specifically address shall be deemed to have been duly considered and denied without further discussion.

**B. Petition and Answers**

1. **PAWC**

In the Petition, PAWC contends that the *Extension Order* is contrary to the Code, appellate case law, and the Commission’s own precedent, and exceeds the scope of Governor’s *Executive Order* and the Commission’s *Emergency Order* by impermissibly waiving, or modifying the operation of, Section 1308(d) of the Code, for the purpose of appropriate rate recovery. Petition at 2-3, 6-14. PAWC argues that, by its operation, Section 1308(d) is a substantive statute addressing an affected utility’s substantial property right – in relevant part, the right to rate relief in the event a final order from the Commission in a general base rate increase proceeding takes effect after the end date of the statutorily-mandated, seven-month rate suspension period. Petition at 6-14.

PAWC submits that the appellate courts have affirmed that the Commission does not have the power to extend the effective date of rates beyond the suspension period provided in Section 1308(d). Petition at 6-11 (citing *Bell Telephone Co. of Pa. v. Pa. PUC*, 452 A.2d 86 (Pa. 1982), *aff’d per curiam*, 482 A.2d 1272 (Pa. 1984) (*Bell Tel. Co*.) (rejecting a Commission Order that prevented the application of newly authorized base rates until the approval of a compliance filing after the end of the statutory suspension period); *Joseph Horne Co. v. Pa. PUC,* 485 A.2d 1105, 1111 n. 9 (Pa. 1984) *(Joseph Horne Co.)* (affirming the Commonwealth Court’s holding in *Bell Tel. Co*. that under Section 1308(d) the PUC may not suspend the effective date of filing of the revised tariffs when the effective date would thereby be more than nine months after the initial general rate increase filing).

PAWC argues that: (1) by the terms of the Governor’s *Executive Order* and the Commission’s *Emergency Order*, neither document permits or authorizes an administrative agency’s waiver or modification of substantive statutes, like Section 1308(d) but rather both documents only address procedural statutes and regulations; (2) adhering to Section 1308(d)’s rate suspension period would not interfere with “necessary action in coping with this emergency,” as required by the *Executive Order*;and (3) the Commission’s *Emergency Order* cannot provide authority to suspend the operation of Section 1308(d), a substantive statute, because the authority to issue the *Emergency Order,* is derived from the authority conferred by the *Executive Order*, which, does not authorize the waiver or modification of substantive statutes, but only procedural ones. Petition at 11-14.

Additionally, PAWC contends that the *Extension Order* unreasonably fails to address PAWC’s alternative proposals presented in this proceeding. Petition at 2, 14‑20. PAWC notes that at the Prehearing Conference it: (1) offered an alternative that would add three weeks to the litigation schedule by voluntarily extending the suspension period from January 28 to February 4, 2021, provided that, if a settlement was achieved, the settlement rates could become effective before February 4, 2021;[[9]](#footnote-10) and (2) explained that, if an extension beyond February 4, 2021 were granted, the rates finally approved by the Commission must be effective as of the end of the suspension period and the portion of the revenue increase not billed from the effective date through the end of the extended suspension period should be recovered by a recoupment surcharge.

PAWC requests that we acknowledge its alternative procedural proposals and make a ruling upon them in this Opinion and Order. Petition at 2, 14-20.

1. **I&E**

In its Answer, I&E requests the Commission deny PAWC’s Petition and notes that while under normal circumstances, a utility’s proposed rates would take effect at the end of the seven-month suspension period under Section 1308(d), the Parties to this base rate proceeding are not working under normal circumstances due to the COVID-19 pandemic and the Commission’s *Emergency Order*. I&E argues that: (1) the Commission’s *Emergency Order* provides the Commission with the authority to suspend, extend, waive, or change any regulatory, statutory or procedural deadlines prescribed in the Code or the Commission’s Regulations, as a result of the Governor’s *Executive Order*; and (2) PAWC’s base rate case is complex and the forty-five day extension of the procedural schedule is required to give the Parties sufficient time to thoroughly investigate and analyze the various issues given the challenges faced by the Parties during this unique COVID-19 pandemic emergency. I&E Answer at 4-16.

1. **OCA**

In its Answer, the OCA requests that the Commission deny PAWC’s Petition and contends that the CALJ acted within his authority according to the Governor’s *Executive Order* and the Commission’s *Emergency Order* when he decided to extend the suspension period in Section 1308(d) of the Code. The OCA argues that: (1) PAWC’s reading of these documents is too narrow, as both documents clearly apply to regulatory statutes, not just procedural deadlines and submits that the Commission’s *Emergency Order* even references rate cases and the deadlines associated with rate cases; (2) the statutory suspension period is a deadline that drives the rate case schedules, OCA Answer at 6-8; and (3) the cases cited by PAWC in its Petition, including, among others, *Bell Tel. Co*., and *Joseph Horne Co*., are unpersuasive, as these cases were determined at times when the Commonwealth was not in the midst of a global pandemic or while the Commission’s *Emergency Order* was in place. OCA Answer at 9-10. Specifically, this proceeding is distinguishable from *Bell Tel. Co*. because “[n]ew rates will still go into effect at the end of the suspension period” established by the CALJ. OCA Answer at 9. Regarding *Joseph Horne Co*., the OCA argues the Commission’s *Emergency Order* fairly balances the need for protection of ratepayers through meaningful Commission review of their concerns against the needs of utilities, immediate or otherwise, by allowing specific, limited extensions of statutory deadlines due to the current extraordinary circumstances. OCA Answer at 10.

Furthermore, the OCA notes that the Parties in support of the extension are facing limitations brought on by office closings due to the COVID-19 pandemic and the Governor’s *Executive Order*, in addition to the analysis of a new set of novel issues in the case. OCA Answer at 11-12. The OCA argues that the *Emergency Order* permits the CALJ to allow an extension of statutory deadlines of up to ninety days, and in this case, he was well within his authority to grant the forty-five day extension requested by the OCA and supported by the other Parties to the proceeding. OCA Answer at 12-13 (citing *Emergency Order* at 4).

Regarding PAWC’s alternative proposals, the OCA: (1) rejects the Company’s offer to voluntarily extend the suspension period to February 4, 2021; (2) insists that a minimum forty-five-day schedule extension was needed; and (3) argues that the Commission was empowered to unilaterally waive the statutory mandate of Section 1308(d) and to refuse to permit finally-adjudicated rates to be effective as of the end of the suspension period. OCA Answer at 14-18.

1. **CAUSE-PA**

In its Answer, CAUSE-PA requests that the Commission deny PAWC’s Petition because the CALJ was within his authority to grant the OCA’s Expedited Motion for a forty-five day extension of the statutory suspension period in this matter pursuant to the Commission’s *Emergency Order*. CAUSE-PA contends: (1) that the language of Section 1308(d) cannot be taken in isolation, but instead must be considered in conjunction with the unprecedented circumstances and the Commission’s *Emergency Order* and the Governor’s *Executive Order,* CAUSE-PA Answer at 7-8; and (2) that the CALJ properly granted the OCA’s Expedited Motion after the Prehearing Conference where the OCA, CAUSE-PA, and the other Parties argued that extending the suspension period by forty-five days was necessary in light of the vast challenges consumers faced as a result of the COVID-19 pandemic, as well as the practical challenges associated with litigation of a complex rate case without full access to office resources. CAUSE-PA Answer at 8. In addition, CAUSE-PA, like the OCA, argues: (1) that *Bell Tel. Co*. is not controlling precedent here and is distinguishable from the present matter because *Bell Tel. Co*. does not analyze the effect of an emergency order on statutory suspension periods and was decided years before under circumstances not comparable to the current unprecedented emergency which continues to unfold. CAUSE-PA Answer at 8-9; and (2) that *Joseph Horne Co*. also was decided without taking into consideration the effect of any emergency or modifying Order on Section 1308(d), let alone the Commission’s *Emergency Order*, which CAUSE-PA argues delegates clear authority to the CALJ to establish reasonable deadlines in light of the COVID-19 pandemic. CAUSE-PA Answer at 9.

CAUSE-PA asserts that strict compliance with Section 1308(d) *will* prevent, hinder and delay necessary action in coping with the pandemic. CAUSE-PA Answer at 12. More specifically, CAUSE-PA contends that PAWC fails to adequately grasp the profound economic impact of the pandemic on consumers and that a critical component to determine whether proposed rates are just and reasonable is an examination of whether the rates charged to customers are affordable for the consumers in the Company’s service territories. Therefore, the extension of the statutory rate suspension period is necessary to properly evaluate the effects of the pandemic on the long-term economic health of PAWC’s service territory and without the forty-five day extension, the Parties will not be able to adequately investigate whether PAWC’s proposed rate increases are just and reasonable given the continued effects of the pandemic. CAUSE-PA Answer at 12-13.

Finally, as for PAWC’s alternative proposal to voluntarily extend the suspension period to February 4, 2021, CAUSE-PA argues that such an extension does not provide sufficient time to address the issues in this case and properly create a developed record for review. CAUSE-PA Answer at 15-17. If the Commission determines that the procedural schedule should be extended beyond February 4, 2021, CAUSE-PA argues that PAWC should not be entitled to charge rates established in the present tariff filings as of the Section 1308(d) suspension period. CAUSE-PA Answer at 17-21.

1. **OSBA**

In its Answer, the OSBA argues that the Pennsylvania Supreme Court has ruled that the Governor’s *Executive Order* is a legal, valid exercise of authority granted to the Governor and has also ruled that “any regulatory statute prescribing the procedures of the conduct of Commonwealth business,” as well as the Commission’s “orders, rules or regulations” may be suspended while the Governor’s *Executive Order* is in effect. OSBA Answer at 3 (citing *DeVito* at \*25). The OSBA further highlights that the *Executive Order* additionally states as follows:

Commonwealth agencies may implement emergency assignments without regard to procedures required by other laws, except mandatory constitutional requirements, pertaining to performance of public work, entering into contracts, incurring of obligations, employment of temporary workers, rental of equipment, purchase of supplies and materials, and expenditures of public funds.

OSBA Answer at 4 (citing *Executive Oder* at 2). The OSBA asserts that: (1) Title 66 undoubtedly is a “regulatory statute” that prescribes “the conduct of Commonwealth business” – specifically, “the regulation of public utilities…” OSBA Answer at 4; (2) both the *Executive Order* and the *Emergency Order* allow for the extension of the statutory suspension period of PAWC’s base rate proceedings by forty-five days. OSBA Answer at 5; and (3) PAWC’s citations to *Bell Tel. Co*. and other appellate cases do not, in any way, overturn *DeVito* nor do they support PAWC’s argument that the Commission lacks the authority to suspend Section 1308(d), a “regulatory statute,” because none of the cited cases were decided during an ongoing disaster emergency or global pandemic. OSBA Answer at 5-6.

As for PAWC’s alternative proposal for a recoupment surcharge, the OSBA submits that the issue of “making public utilities whole” in light of a disaster proclamation is not before the Commission at this time and it would be inappropriate for the Commission to decide the issue of a recoupment surcharge in the context of a scheduling dispute. OSBA Answer at 7-8. The OSBA submits that PAWC had full control over when to file its base rate case and it should have been aware of the risk that the rate relief it seeks could be delayed. *Id*. If and when the issue of retroactive billing adjustments is ripe for adjudication, the OSBA will fully respond at that time. *Id*. at 8.

**C. Disposition**

In the Commission’s *Emergency Order*, we stated that “in pending rate case litigation” the CALJ has delegated authority to “establish reasonable deadlines under the circumstances.” *Emergency Order* at 2. We delegated the authority to the CALJ to “suspend, waive or change a statutory or regulatory deadline which may hinder, rather than further, the mission of the Commission, after consultation with all interested parties, as deemed necessary and appropriate.” *Emergency Order* at 4.

Here, in its Expedited Motion as stated above, the OCA set forth its reasoning, *inter alia*, as to why its lack of access to full office resources due to the COVID-19 pandemic created the need for additional time in the procedural schedule for it to fully review, consider, and develop adequately supported positions in this proceeding. Furthermore, I&E, CAUSE-PA and the OSBA also offered supporting reasons as set forth above. Based on the Parties’ positions, the CALJ found it appropriate in his *Extension Order* to grant the OCA’s request to extend the statutory rate suspension period by forty-five days *for the purpose of establishing a reasonable procedural schedule in this proceeding*.

We view the CALJ’s decision in the *Extension Order* as an authorized departure from the Commission’s traditional procedural practice to use the Section 1308(d) seven-month rate suspension period for a final Commission action. Traditionally, this longstanding scheduling practice has been observed by the Commission and the Parties in general base rate increase cases in pursuit of serving the public interest by ensuring the timely implementation of new, just, and reasonable rates on customer bills and avoiding the burden of subsequent rate adjustments through refunds. Pursuant to this longstanding practice, the presiding officer and the parties typically will establish a procedural schedule for the litigation of a rate case by working backwards from the appropriate Public Meeting occurring before the end of the suspension period that ensures sufficient time for the litigation process and the Commission’s review to take final action at that Public Meeting.

In the Petition and Answers, the Parties have raised arguments to either support or reject the issue of whether or not the Commission has the authority to waive or amend the statutory suspension period for the purpose of delaying PAWC’s right to appropriate rate recovery as of the end of the suspension period in this case, or January 28, 2021 via the *Extension Order.* Specifically, PAWC argues the Commission does not have the authority to waive or modify its right to rate relief as of the end of the statutory suspension period. However, the other Parties argue that we do have such authority pursuant to the Governor’s *Executive Order* and the Commission’s *Emergency Order*, so long as PAWC is permitted to implement the finally approved rates as of the end of the modified suspension period, or March 15, 2021.

To decide the issue, we must first acknowledge that our authority under the *Emergency Order* is derived from the authority conferred by the Governor’s *Executive Order*. The Governor’s *Executive Order* was issued pursuant to the Emergency Management Services Code, 35 Pa. C.S. § 7101.

Governor Wolf’s *Executive Order* in part provides, in pertinent part:

FURTHER, I hereby suspend the provisions of any regulatory statute prescribing the procedures for conduct of Commonwealth business, or the orders, rules or regulations of any Commonwealth agency, if strict compliance with the provisions of any statute, order, rule or regulation would in any way prevent, hinder, or delay necessary action in coping with this emergency. Commonwealth agencies may implement emergency assignments without regard to procedures required by other laws, except mandatory constitutional requirements, pertaining to performance of public work, entering into contracts, incurring of obligations, employment of temporary workers, rental of equipment, purchase of supplies and materials, and expenditures of public funds.

*Executive Order* at 2.

As the Pennsylvania Supreme Court stated in *Devito*, *supra*, regulatory statutes “prescribing the procedures of the conduct of Commonwealth business,” as well as “orders, rules or regulation of any Commonwealth agency” may be suspended while the Governor’s *Executive Order* is in effect “if strict compliance with the provisions of any statute, order, rule or regulation would in any way prevent, hinder or delay necessary action in coping with the emergency.” *DeVito* at \*25 (citing 35 Pa. C.S. § 7301(f)).

We acknowledge that the *Executive Order* applies to regulatory statutes and that the suspension authority conferred by the *Executive Order* applies if: (1) the regulatory statute that is subject to suspension is one “prescribing the procedures for the conduct of Commonwealth business….” and (2) only if “strict compliance” with the statute would “in any way prevent, hinder, or delay necessary action in coping with this emergency.” *Executive Order* at 2. The Commission, in its *Emergency Order*, expounded on those criteria by noting that suspension of deadlines would be appropriate if adhering to the deadline would “hinder, rather than further, the mission of the Commission, after consultation with all interested parties, as deemed necessary and appropriate.” *Emergency Order* at 4.

Initially, we note that the provisions of the *Executive Order* are applicable to the Code since it is a regulatory statute. Therefore, the Commission, as the agency with the oversight and enforcement of the Code, may exercise the authority conferred by the *Executive Order*. Our *Emergency Order* stated,

All Bureau Directors are hereby delegated the authority to suspend,

extend, waive or change a statutory or regulatory deadline *which may hinder, rather than further, the mission of the Commission*, after consultation with all interested parties, as deemed necessary and appropriate

*Emergency Order* at 2, 4, Ordering Paragraph (OP) No. 4 (emphasis added).

With respect to the application of this delegated authority in general base rate cases, we stated as follows:

[I]n pending rate case litigation, the Chief Administrative Law Judge is authorized to establish reasonable deadlines under the circumstances after consideration of the positions of the parties and the presiding Administrative Law Judge. The Chief Administrative Law Judge’s decision would then be subject to review by the Commission.

*Emergency Order* at 2.

In particular, we note that the *Emergency Order* grants the CALJ the authority to suspend, extend, waive or change a statutory or regulatory deadline *which may hinder, rather than further, the mission of the Commission*, after consultation with all interested parties, as deemed necessary and appropriate. We conclude that the CALJ properly considered the basis presented by the moving party, the OCA, regarding the vast challenges facing the Parties, and the potential impact to the public, due to the COVID-19 emergency and the litigation in this matter. Governor Wolf and this Commission recognize that we have been and continue to be in unprecedented and challenging circumstances in the Commonwealth, the nation, and the globe. Consequently, litigating a base rate case without*, inter alia*, office resources, an in-person hearing, etc. may be challenging. As a result, the current circumstances may hinder the mission of the Commission concerning this matter and the public interest. Therefore, the CALJ’s decision to extend the procedural schedule reflects a proper exercise of his authority pursuant to both Section 1308(d) of the Code and the *Emergency Order* to provide more time for the Parties to review, analyze, and prepare adequately-supported positions in this proceeding.

Based on the foregoing analysis, we shall affirm the CALJ’s decision in the *Extension Order* to grant the OCA’s request for an additional forty-five days in the procedural schedule. Therefore, the presiding ALJ shall modify, if necessary, the procedural schedule consistent with this Opinion and Order.

Because we are only authorizing the extension or suspension of *deadlines* and not of substantive rights, failure to meet the seven-month deadline would result in the proposed rates going into effect by operation of law.  Therefore, we find that PAWC is entitled to the appropriate rate relief in accordance with Section 1308(d) of the Code immediately following the end of the original statutory rate suspension period, which, in this case, is January 28, 2021.

We note, however, that the Recommended Decision is due in a case with a statutory deadline 60 days before the last reasonable public meeting prior to the expiration of the suspension date.[[10]](#footnote-11) As the Commission may alter the staff recommendation at a public meeting by motion, there must be sufficient time for staff to prepare and enter a revised Commission Opinion and Order. In this situation, the date of the suspension expiration is March 15, 2021, and that means that the last reasonable public meeting at which the Commission may consider the staff recommendation is the public meeting of February 25, 2021. Accordingly, deadline for the issuance and filing of the Recommended Decision of the presiding ALJ is on or before Thursday, December 24, 2020.

Additionally, we shall reserve the following issues to be addressed at the appropriate stages in this proceeding for final adjudication: (1) the appropriate rate recovery immediately following the end of the Section 1308(d) suspension period until the date the final rates are approved in a final Commission order and take effect in the utility’s compliance tariff filing; and (2) the appropriate mechanism for implementing such rate recovery. We shall direct the Parties to address the foregoing rate recovery issues at the appropriate stages in this proceeding and direct the OALJ to fully address the issues and provide a recommended disposition thereof in the Recommended Decision.

**Conclusion**

Based upon our review of the Petition, the Answers, the *Extension Order*, the procedural schedule in this matter, and applicable law, we shall grant, in part, and deny, in part, the Petition and affirm the *Extension Order*, consistent with this Opinion and Order; **THEREFORE,**

**IT IS ORDERED:**

1. That the Petition for Reconsideration of Staff Action filed on June 24, 2020, by Pennsylvania-American Water Company in the above-captioned proceeding, at Docket Nos. R-2020-3019369, R-2020-3019371, is denied in part and granted in part, consistent with this Opinion and Order.

2. That the *Order Granting the Office of Consumer Advocate’s Expedited Motion For An Extension of the Statutory Suspension Period of Pennsylvania American Water Company’s Base Rate Proceedings*, issued on June 4, 2020, by Chief Administrative Law Judge Charles E. Rainey Jr., in the above-captioned proceeding, at Docket Nos. R-2020-3019369, R-2020-3019371, is affirmed insofar as it grants the Motion for Extension filed by the Office of Consumer Advocate, consistent with this Opinion and Order.

3. That, consistent with this Opinion and Order, the Petition for Reconsideration of Staff Action filed on June 24, 2020, by Pennsylvania-American Water Company in the above-captioned proceeding, at Docket Nos. R-2020-3019369, R‑2020‑3019371, is granted insofar that the general base rates that result from this proceeding shall be effective as of the end date of the statutory suspension period in this proceeding under Section 1308(d) of the Public Utility Code, unless another date is approved by the Commission.

4. That the effective date of the rates that result from this proceeding shall be January 28, 2021, unless another date is approved by the Commission.

5. That Administrative Law Judge Conrad A. Johnson shall modify the *Prehearing Order* issued on June 15, 2020, if necessary, consistent with this Opinion and Order.

6. That the Recommended Decision in this matter shall be issued and filed on or before December 24, 2020.

7. That, consistent with this Opinion and Order, we shall direct the Parties to address at the appropriate stages in this proceeding, and direct the Office of Administrative Law Judge to fully address in the Recommended Decision to be issued in this proceeding, the following issues related to rate recovery: (1) the appropriate amount of rate recovery starting from the end of the Section 1308(d) suspension period, January 28, 2021, until the date the final rates are approved in a final Commission order and take effect in the utility’s compliance tariff filing and (2) the appropriate mechanism for implementing such rate recovery.

**BY THE COMMISSION,**



Rosemary Chiavetta

Secretary

(SEAL)

ORDER ADOPTED: August 6, 2020

ORDER ENTERED: August 20, 2020

1. The Public Meeting dates scheduled for March 2021 are Thursday, March 11, 2021 and Thursday, March 25, 2021. [↑](#footnote-ref-2)
2. *See Order of the Governor of the Commonwealth of Pennsylvania Regarding the Closure of All Businesses That Are Not Life Sustaining*, as amended; *see also Order of the Secretary of the Pennsylvania Department of Health Regarding the Closure of All Businesses That Are Not Life Sustaining*, as amended. [↑](#footnote-ref-3)
3. *See* *Amendment to Proclamation of Disaster Emergency* renews the Proclamation for an additional ninety (90) days from June 3, 2020. [↑](#footnote-ref-4)
4. *See Order of the Secretary of the Pennsylvania Department of Health Requiring Universal Face Coverings*, effective July 1, 2020. [↑](#footnote-ref-5)
5. *See Order of the Governor of the Commonwealth of Pennsylvania Directing Targeted Mitigation Measures*, effective July 16, 2020. [↑](#footnote-ref-6)
6. *See Order of the Secretary of the Pennsylvania Department of Health Directing Mitigation Measures*, effective July 16, 2020. [↑](#footnote-ref-7)
7. Under the *Emergency Order*, review pursuant to Section 5.44 applies for any extension granted up to ninety days. Beyond ninety days, any request for a suspension, extension, waiver or change of any regulatory, statutory or procedural deadline may only be considered upon expedited certification of the question by the CALJ or Bureau Director directly to the Commission. *See Emergency Order* at 2, 4, OP No. 5. [↑](#footnote-ref-8)
8. The Commission’s *Emergency Order* providing authority to Bureau Directors and the CALJ provides that the decisions of Bureau Directors, which would be issued as Secretarial Letters or as an order, are subject to Commission review under 52 Pa. Code § 5.44. While we note that normally orders of the CALJ or any ALJ are subject to interlocutory review under 52 Pa. Code § 5.302, since both Sections 5.302 and 5.44 ultimately place the burden of proof on the petitioner, the outcome would be the same under either standard. 52 Pa. Code §§ 5.302, 5.44. [↑](#footnote-ref-9)
9. The Commission’s public meetings are scheduled for January 14 and February 4, 2021. Under 66 Pa. C.S. § 1308(d), the suspension period of the Company’s rate filing ends on January 28, 2021. The Company’s offer to voluntarily extend the suspension period to February 4, 2021 would extend the procedural schedule by 20 days (January 14 to February 4, 2021). [↑](#footnote-ref-10)
10. The 60 days is comprised of 30 days for Exceptions and Reply Exceptions, 20 days for the Office of Special Assistants to review the record and prepare a recommendation on those Exceptions, and nine days for the Commissioners’ and their staff to consider the record, Exceptions, and recommendation and, if necessary, prepare a motion on the OSA recommendation, all while considering the 30 to 50 other Public Meeting staff reports appearing on a typical Public Meeting agenda. A reasonable time for preparation of a rewrite following the public meeting is between 10 and 14 days. We assume that all of those involved in the Expedited Motion seeking extension of time are aware of this schedule and took the rewrite time into consideration when determining the appropriate number of days for the extension. [↑](#footnote-ref-11)