



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
COMMONWEALTH KEYSTONE BUILDING
400 NORTH STREET, HARRISBURG, PA 17120

BUREAU OF
INVESTIGATION
&
ENFORCEMENT

August 31, 2020

Via Electronic Filing

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

Re: Petition of Twin Lakes Utilities, Inc. for a Commission Order Authorizing the Acquisition of Twin Lakes Utilities, Inc. by a Capable Public Utility Pursuant to 66 Pa. C.S. §529
Docket No. P-2020-3020914
I&E Brief in Support of Petition for Interlocutory Review

Dear Secretary Chiavetta:

Enclosed for filing please find the **Brief of the Bureau of Investigation and Enforcement in Support of the Petition for Interlocutory Review of the Bureau of Investigation and Enforcement** for the above-captioned proceeding.

Copies are being served on parties of record per the attached Certificate of Service. *Due to the temporary closing of the PUC's offices, I&E is only providing electronic Service.* Should you have any questions, please do not hesitate to contact me.

Sincerely,

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SBG/ac
Enclosures

cc: Chairman Gladys Brown Dutrieuille (*via email only*)
Vice Chairman David W. Sweet (*via email only*)
Commissioner John F. Coleman, Jr. (*via email only*)
Commissioner Ralph V. Yanora (*via email only*)
Honorable Joel H. Cheskis (*via email only*)
Office of Special Assistants (*via email only* – RA-OSA@pa.gov)
Per Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Petition of Twin Lakes Utilities, Inc. for :
a Commission Order Authorizing the :
Acquisition of Twin Lakes Utilities, Inc. by a : Docket No.: P-2020-3020914
Capable Public Utility Pursuant to :
66 Pa. C.S. §529 :

**BRIEF
IN SUPPORT OF THE PETITION FOR INTERLOCUTORY REVIEW
OF THE BUREAU OF INVESTIGATION & ENFORCEMENT**

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Dated: August 31, 2020

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I. INTRODUCTION AND PROCEDURAL HISTORY.

A. Procedural History.

On July 16, 2020, Twin Lakes Utilities Inc., (“Twin Lakes” or “Company”) filed a Petition (“Twin Lakes Petition”) with the Pennsylvania Public Utility Commission (“Commission”) requesting that the Commission issue an order, on an expedited basis, that authorizes the acquisition of Twin Lakes pursuant to 66 Pa. C.S. § 529 (“Section 529”) by a “capable public utility” as defined by statute. In its Section 529 Petition, Twin Lakes set forth its history of ownership by the Middlesex Water Company (“Middlesex”) confirming its business address in Iselin, New Jersey. In support of the requested 529 acquisition, Twin Lakes discussed the termination of the existing Service Agreement between Twin Lakes and its parent, Middlesex. Twin Lakes has stated that it will cease providing water service to its customers effective at 12:01 a.m. on September 1, 2020, if it is unable to secure a new system operator. A new operator has not been secured and it is unlikely one will be secured by the Company’s September 1, 2020 deadline.

After a telephonic a prehearing conference on July, 27, 2020, Deputy Chief Administrative Law Judge Joel H. Cheskis (“ALJ Cheskis”) issued a Scheduling Order on July 28, 2020.

On August 5, 2020, the Bureau of Investigation and Enforcement (“I&E”) filed a timely Answer (“I&E Answer”) to the Twin Lakes Petition requesting that the Commission deny the relief requested in the Twin Lakes Petition because Section 529 is unambiguously intended for use exclusively by the Commission pursuant to its own motion. Further, Chapter 5 does not confer or bestow any powers upon the certificated

public utilities. Finally, in consideration of the totality of the circumstances regarding the relative capabilities of Twin Lakes and its parent company, Middlesex; I&E, as the party with the burden of establishing the prima facie case, cannot present to the ALJ and the Commission that I&E has determined that condition (a)(3)¹ in Section 529 can be met.

On August 19, 2020, I&E filed the instant Petition for Interlocutory Review and Declaratory Order, pursuant to Section 5.302 of Commission regulations,² following the July 28, 2020 Scheduling Order of Presiding Deputy Chief Administrative Law Judge Joel H. Cheskis (“I&E Petition”). And now, I&E submits this Brief (“I&E Brief”) in support of I&E’s Petition for interlocutory review.

Also note, the Office of Consumer Advocate (“OCA”) filed a Petition for Interim Emergency Relief (“OCA Petition”) on August 18, 2020, which requested the appointment of a receiver pursuant to Section 529(g)³ of the Public Utility Code. I&E filed its timely answer to the OCA Petition on August 20, 2020 recommending that OCA’s request be denied as Twin Lakes has the necessary technical, managerial and financial ability to continue providing service to its customers. Twin Lakes and Aqua Pennsylvania were also parties to the OCA Petition proceeding and filed responses. A Hearing was held on August 21, 2020 and the transcript for the hearing is on file at this Docket No. P-2020-3020914.⁴ Parties filed Main Briefs on August 24, 2020 and Reply Briefs on August 25, 2020. On August 28, 2020, ALJ Cheskis issued an Order denying the relief requested in the OCA Petition.

¹ 66 Pa. C.S. § 529(a)(3).

² 52 Pa. Code § 5.302.

³ 66 Pa. C.S. § 529(g).

⁴ See Hearing Transcript, pp. 38-155 (“Hr. Tr.”), dated August 21, 2020.

In support of this I&E Petition, I&E presents the following arguments for the Commission's consideration.

B. Interlocutory Review and Burden of Proof.

I&E files its petition pursuant to the Commission standards set forth in Sections 5.301-5.306 of Commission regulations.⁵ The interlocutory review standard has been interpreted in *In re: Application of Knights Limousine Service, Inc.*⁶ wherein the Commission explained that it does not routinely grant interlocutory review except upon a showing by the petitioner that the relief sought should be granted now rather than later, and that granting interlocutory review would prevent substantial prejudice or expedite the proceeding.

I&E, as the petitioner and the proponent of the requested interlocutory relief, carries the burden regarding the instant petition.⁷ This burden is comprised of two distinct burdens: the burden of production and the burden of persuasion. The burden of production tells the adjudicator which party must come forward with evidence to support a particular position.⁸ The burden of persuasion determines which party must produce sufficient evidence to convince a judge that a fact has been established, and it never leaves the party on whom it is originally cast.⁹

I&E must satisfy its burden by presenting a preponderance of evidence.¹⁰ A preponderance of the evidence is such evidence that is more convincing, by even the

⁵ 52 Pa. Code §§ 5.301-5.306.

⁶ *In re: Application of Knights Limousine Service, Inc.*, 59 Pa. P.U.C. 538 (1985).

⁷ 66 Pa. C.S. § 302.

⁸ *See, In re: Loudenslager's Estate*, 430 Pa. 33, 240 A.2d 477 (1968).

⁹ *Reidel v. County of Allegheny*, 633 A.2d 1325, 1329 n. 11 (Pa. Commw. 1993).

¹⁰ *Samuel J. Lansberry, Inc. v. Pennsylvania Public Utility Commission*, 578 A.2d 600 (Pa. Commw. 1990).

smallest amount, than that presented by another party.¹¹ If a preponderance of evidence is submitted, the burden of going forward with competing evidence shifts to opposing parties to produce credible evidence of at least co-equal weight.

While the burden of going forward and producing evidence may shift back and forth between the parties, the Commission must ensure that any adjudication is supported by substantial evidence. "Substantial evidence" is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion.¹²

C. Stay of Proceedings.

I&E is not requesting a stay of the Twin Lakes Petition proceedings. However, I&E would not oppose a stay if the Commission exercises its discretion and orders a stay on its own motion.

In consideration of whether a stay would be appropriate, ALJ Cheskis issued a scheduling order on July 28, 2020, setting the litigation schedule as:

I&E Direct Testimony November 1, 2020;
All Parties Rebuttal Testimony December 2, 2020;
All Parties Surrebuttal December 16, 2020; and
Hearings January 5-6, 2021.

I&E will continue to develop its direct testimony to the best of its ability while the Commission considers the instant I&E Petition. The 30 day time period set forth in Section 5.303(a)¹³ does not appear to infringe on the substantial rights of the parties when considering the procedural schedule established by ALJ Cheskis.

¹¹ *Se-Ling Hosiery v. Margulies*, 70 A.2d 854 (Pa. 1950).

¹² *Norfolk & Western Ry. Co. v. Pennsylvania Public Utility Commission*, 413 A.2d 1037 (Pa. 1980).

¹³ 52 Pa. Code § 5.303(a).

II. QUESTION PRESENTED.

Q. Should the Commission permit a certificated small water or wastewater public utility to proceed by its own petition pursuant to Section 529 of the Public Utility Code?

Suggested Answer: No.

III. SUMMARY OF ARGUMENT.

Whether the Commission should permit small certificated water or wastewater public utilities to proceed by their own motion pursuant to Section 529 of the Public Utility Code is a fundamental question of statutory construction. When interpreting a statute, Pennsylvania courts are guided by the Statutory Construction Act of 1972 which provides that the object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly. When the language of a statute is plain and unambiguous and conveys a clear and definite meaning, we must give the statute this plain and obvious meaning. Finally, if statutory language is clear and free from ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.

Subpart B, Chapter 5, Section 501 and Section 529 were all intended by the legislature to grant power to the Commission. The titles of both Subpart B and Chapter 5 clearly state it; and, the text of Section 501 cannot be clearer in its statement regarding the enumeration of powers to the Commission. The plain language states the legislature's intent, and the context of the statutory scheme of Subpart B confirms it.

The language of Subpart B, Chapter 5, Section 501 and Section 529 are clear. The only conclusion the Commission can reach is that the legislature intended to grant the

power to utilize Section 529 solely to the Commission. The legislature did not intend for Section 529 to be used by small certificated water and wastewater public utilities pursuant to their own motion.

I&E steadfastly argues that the legislature's intent is clear and the language of Sections 501 and 529 is plain and unambiguous. But even if the next step in the statutory interpretation scheme is undertaken, the same conclusion must be reached.

Applying Sections 1921 and 1922 of the SCA to this proceeding to determine legislative intent presents the Commission with a situation where it must consider both the consequences of a particular interpretation and an absurd result that is unreasonable and impossible in its execution. If Twin Lakes is allowed to continue with its Section 529 Petition, then I&E will have the burden of proof in this proceeding and I&E will be placed in the position of establishing a prima facie case. I&E cannot argue in good faith that the six factors required to be proven in a Section 529 proceeding are met. Specifically, I&E will be unable to present testimony that Twin Lakes cannot reasonably be expected to furnish and maintain adequate, efficient, safe and reasonable service and facilities in the future when I&E has argued the opposite position in its Answer. This is an unreasonable, impossible and absurd result.

Further, allowing the small certificated water and wastewater public utilities to utilize Section 529 will have the effect of incentivizing the small public utility to intentionally violate the Public Utility Code or Pennsylvania DEP regulations in order to meet the requirements of Section 529(a)(1) and (a)(2). This will also produce an unreasonable and absurd result.

The Commission must find that the intent of the legislature is clear. Section 529 was intended solely for use by the Commission on its own motion. Small certificated water and wastewater public utilities must not be permitted to act on their own motion pursuant to Section 529. The Twin Lakes Petition requesting that the Commission issue an order, on an expedited basis, that authorizes the acquisition of Twin Lakes pursuant to 66 Pa. C.S. § 529 by a “capable public utility” should be dismissed with prejudice.

Finally, the Commission may and should request that its Chief Counsel exercise the powers bestowed upon it in Sections 502 and 503. The Commission may institute injunction, mandamus, or other appropriate legal proceedings to restrain the threatened violations when the Commission is of the opinion that a corporation or person is about to violate the Public Utility Code.

IV. ARGUMENT.

A. The Commission should not permit a certificated small water or wastewater public utility to proceed by its own petition pursuant to Section 529 of the Public Utility Code.

When interpreting a statute, Pennsylvania courts are guided by the Statutory Construction Act of 1972 (“SCA”),¹⁴ which provides that “[t]he object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly.”¹⁵ It is well settled that the best indication of the General Assembly's intent may be found in a statute's plain language.¹⁶ Thus, “when the language of a statute is plain and unambiguous and conveys a clear and definite meaning,” we must

¹⁴ 1 Pa. C.S. §§ 1501-1991.

¹⁵ *Cagey v. Commonwealth*, 645 Pa. 268, ___, 179 A.3d 458, 462, (2018), *citing* 1 Pa. C.S. § 1921(a).

¹⁶ *Id.*, *citing* 1 Pa. C.S. § 1921(b).

give the statute this plain and obvious meaning.¹⁷ Pennsylvania courts have also stated, in determining whether language is clear and unambiguous, we must assess it in the context of the overall statutory scheme, construing all sections with reference to each other.¹⁸ Finally, if statutory language is “clear and free from ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.”¹⁹

1. The language of Section 501 and Section 529 is clear and unambiguous, and nothing in Section 529 permits a small water utility to proceed under Section 529 pursuant to its own petition.

The title of Subpart B is: “COMMISSION POWERS, DUTIES, PRACTICES AND PROCEDURES.”²⁰ The title of Chapter 5 is: “Powers and Duties.”²¹ And, Section 501 of Chapter 5 states in pertinent part, “[i]n addition to any powers expressly enumerated in this part, the commission shall have full power and authority, and it shall be its duty to enforce, execute and carry out, by its regulations, orders or otherwise, all and singular, the provisions of this part, and the full intent thereof”²² Further, Section 501 states in pertinent part, “the express enumeration of the powers of the commission in this part shall not exclude any power which the commission would otherwise have under any of the provision of this part.”²³ And finally, Section 529 states the Commission may order a “capable public utility” to acquire a small water utility if all six of the conjunctive requirements of Section 529 are met.²⁴ As one of the powers

¹⁷ *Id.*, (citation omitted).

¹⁸ *Commonwealth of Pa. v Darnell Foster*, 214 A3d 1240 (Pa. 2019) (citation omitted).

¹⁹ *Id.*, citing *Cagey v. Commonwealth*, 645 Pa. 268, ___, 179 A.3d 458, 462, (2018). *See also* 1 Pa. C.S. § 1921(b).

²⁰ *See* 66 Pa. C.S. Subpart B (emphasis added).

²¹ *See* 66 Pa. C.S. Chapter 5.

²² 66 Pa. C.S. § 501(a).

²³ 66 Pa. C.S. § 501(a) (emphasis added).

²⁴ 66 Pa. C.S. § 529(a)(1)-(6) (emphasis added).

bestowed upon the Commission in Chapter 5, Section 529 is unambiguously intended for use by the Commission pursuant to its own motion.²⁵

There can be no doubt that Subpart B, Chapter 5 and Section 501 were all intended by the legislature to grant power to the Commission. The titles of both Subpart B and Chapter 5 clearly state it; and, the text of Section 501 cannot be clearer in its statement regarding the enumeration of powers to the Commission. The plain language states the legislature's intent; and the context of the statutory scheme of Subpart B confirms it.

The language of Subpart B, Chapter 5, Section 501 and Section 529 are clear. The only conclusion the Commission can reach is that the legislature intended to grant the power to utilize Section 529 to the Commission. The legislature did not intend for Section 529 to be used by small certificated water and wastewater public utilities pursuant to their own motion. Even if the statutory interpretation process is carried to its next step of determining the legislative intent by considering the other factors and presumptions set forth in the SCA, the same conclusion must be reached.

2. The rules of statutory construction do not favor consequences of a particular statutory interpretation that are absurd, impossible of execution or unreasonable.

I&E steadfastly argues that the legislature's intent is clear and the language of Sections 501 and 529 is plain and unambiguous. But even if the next step in the statutory interpretation scheme is undertaken, the same conclusion must be reached.

Pennsylvania courts have held, in situations where the words of a statute "are not explicit," the legislature's intent may be determined by considering any of the factors

²⁵ 66 Pa. C.S. § 529(a).

enumerated in Section 1921(c).²⁶ These factors include in pertinent part:

...
(6) The consequences of a particular interpretation.²⁷

Further, Section 1922 of the SCA establishes specific presumptions applicable to the interpretation and construction of all statutes which are aids in determining legislative intent.²⁸ One of the presumptions is: (1) the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable.²⁹

Applying Sections 1921 and 1922 of the SCA to this proceeding to determine legislative intent presents the Commission with a situation where it must consider both the consequences of a particular interpretation and an absurd result that is unreasonable and impossible in its execution.

If Twin Lakes is allowed to continue with its Section 529 Petition, then I&E will have the burden of proof in this proceeding. Specifically, Section 529(i) mandates:

Burden of proof.--The Bureau of Investigation and Enforcement shall have the burden of establishing a prima facie case that the acquisition of the small water or sewer utility would be in the public interest and in compliance with the provisions of this section.³⁰

The practical result of this interpretation is that I&E will be placed in an unreasonable and near impossible position that is contrary to legal reasoning.³¹ Even though Twin Lakes filed the petition requesting the specific relief from the Commission, I&E will have the burden of proving the prima facie case despite the fact that I&E is an adversarial

²⁶ *Snyder Brothers v. Pa PUC*, 198 A3d 1056 (2018), citing 1 Pa. C.S. § 1921(c).

²⁷ 1 Pa. C.S. § 1921(c)(6). See also *Macher v. County of Allegheny*, 657 A2d 1056 (Pa. Cmmw 1996).

²⁸ 1 Pa. C.S. § 1922(1)-(5).

²⁹ 1 Pa. C.S. § 1922(1). See also *Snyder Brothers v. Pa PUC*, 198 A3d 1056 (2018).

³⁰ 66 Pa. C.S. § 529(i).

³¹ I&E Answer, ¶ 18.

party. More specifically, in this proceeding, I&E cannot argue in good faith that the six factors required to be proven in a Section 529³² proceeding are met.³³ Specifically, I&E will be unable to present testimony that Twin Lakes cannot reasonably be expected to furnish and maintain adequate, efficient, safe and reasonable service and facilities in the future when I&E has argued the opposite position in its Answer.³⁴ This is an unreasonable, impossible and absurd result.

Further, allowing the small certificated water and wastewater public utilities to utilize Section 529 will have the effect of incentivizing the small public utility to intentionally violate the Public Utility Code or Pennsylvania DEP regulations in order to meet the requirements of Section 529(a)(1) and (a)(2).³⁵ This is will also produce an unreasonable and absurd result.

Only one conclusion can be reached. The Commission must find that the intent of the legislature is clear. Section 529 was intended solely for use by the Commission on its own motion. Small certificated water and wastewater public utilities must not be permitted to act on their own motion pursuant to Section 529.

B. The Commission, by and through its Chief Counsel, has been granted the power of injunction in Sections 502 and 503 to restrain such violations whenever the Commission is of the opinion that any corporation or person is about to violate the Public Utility Code.

Twin Lakes, in its Petition for a Commission Order authorizing its acquisition pursuant to Section 529, threatened repeatedly that it would cease water service to its

³² 66 Pa. C.S. § 529(a)(1)-(6).

³³ I&E Answer, ¶ 18.

³⁴ I&E Answer, ¶¶ 3, 12. *See* 66 Pa. C.S. § 529(a)(3).

³⁵ I&E Petition, ¶ 8.

customers on September 1, 2010.³⁶ Twin Lakes also threatened it would cease water service during the hearing regarding the OCA Petition for interim emergency relief.³⁷

When questioned during the hearing on this specific issue, Twin Lakes President Robert Fullagar stated that it would be his decision to turn off the water,³⁸ and that it would require turning off the pump with full knowledge that water service to its customers would cease.³⁹ Further, when asked directly by ALJ Cheskis what Twin Lakes would do if ALJ Cheskis denied the OCA's request to appoint a receiver, Mr. Fullagar stated:

Twin Lakes would do our best to abide by that order. If we can't pay our bills, we can't pay our employees. At some point they'll stop working. They'll stop showing up. We can't pay for hypo. It won't be delivered. So we'd keep going just as long as we could until those services that we depend on stopped.⁴⁰

Taking Twin Lakes at its word, there is the real possibility that if the Commission grants I&E's petition for interlocutory review and Twin Lakes' petition is properly dismissed, then Twin Lakes will cease service to its customers. That cannot be allowed to happen as it is a direct violation of the Company's obligation to furnish and maintain adequate, efficient, safe and reasonable service under Section 1501 of the Public Utility Code.⁴¹ Twin Lakes and its parent company Middlesex have the necessary financial, managerial and technical ability to continue to provide safe and reasonable service until this proceeding or a potential abandonment proceeding relieves it of this obligation.

³⁶ Twin Lakes Petition, ¶¶ 26, 36.

³⁷ Hr. Tr., pp. 102-103.

³⁸ Hr. Tr., p. 104.

³⁹ Hr. Tr., pp. 104-105.

⁴⁰ Hr. Tr., pp. 138-139.

⁴¹ 66 Pa. C.S. § 1501.

Therefore, the Commission may and should request that its Chief Counsel exercise the powers bestowed upon it in Sections 502 and 503.⁴² The Commission may institute injunction, mandamus, or other appropriate legal proceedings to restrain the threatened violations when the Commission is of the opinion that a corporation or person is about to violate the Public Utility Code.⁴³

V. CONCLUSION.

I&E respectfully requests that the Commission find that the intent of the legislature is clear that Section 529 was intended solely for use by the Commission on its own motion. Further, small certificated water and wastewater public utilities are not permitted to act on their own motion to avail themselves of Section 529. And finally, the Twin Lakes Petition requesting that the Commission issue an order, on an expedited basis, that authorizes the acquisition of Twin Lakes pursuant to 66 Pa. C.S. § 529 by a “capable public utility” should be dismissed with prejudice.

Respectfully submitted,



Scott B. Granger
Prosecutor
Bureau of Investigation and Enforcement
PA Attorney ID No. 63641

Dated: August 31, 2020

⁴² 66 Pa. C.S. §§ 502, 503.

⁴³ *Id.*

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Petition of Twin Lakes Utilities, Inc. for :
a Commission Order Authorizing the :
Acquisition of Twin Lakes Utilities, Inc. : Docket No.: P-2020-3020914
by a Capable Public Utility Pursuant to :
66 Pa. C.S. §529 :

CERTIFICATE OF SERVICE

I hereby certify that I am serving the foregoing **Brief of the Bureau of Investigation and Enforcement in Support of the Petition for Interlocutory Review of the Bureau of Investigation and Enforcement** dated August 31, 2020, in the manner and upon the persons listed below.

Served via Electronic Mail Only

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A handwritten signature in cursive script that reads "Scott B. Granger". The signature is written in black ink and is positioned above a horizontal line.

Scott B. Granger
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