



COMMONWEALTH OF PENNSYLVANIA

November 16, 2021

E-FILED

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

**Re: Pennsylvania Public Utility Commission v. Community Utilities of Pennsylvania Inc.-
Water & Community Utilities of Pennsylvania Inc.- Wastewater Divisions 2021 Base
Rate Filings / Docket No. R-2021-3025206 & R-2021-3025207**

Dear Secretary Chiavetta:

Enclosed please find the Brief, on behalf of the Office of Small Business Advocate (“OSBA”), in the above-captioned proceedings.

Copies will be served on all known parties in these proceedings, as indicated on the attached Certificate of Service.

If you have any questions, please do not hesitate to contact me.

Sincerely,

/s/ Erin K. Fure

Erin K. Fure
Assistant Small Business Advocate
Attorney ID No. 312245

Enclosures

cc: Brian Kalcic
Parties of Record

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission	:	
	:	
v.	:	R-2021-3025206
	:	R-2021-3025207
Community Utilities of PA, Inc.	:	
Water/Wastewater	:	

**BRIEF ON BEHALF
OF THE
OFFICE OF SMALL BUSINESS ADVOCATE**

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Date: November 16, 2021

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I. INTRODUCTION

The Office of Small Business Advocate (“OSBA”) is an agency of the Commonwealth of Pennsylvania authorized by the Small Business Advocate Act (Act 181 of 1988, 73 P.S. §§ 399.41 – 399.50) to represent the interests of small business consumers as a party in proceedings before the Pennsylvania Public Utility Commission (“Commission”).

The OSBA files this Brief in accordance with 52 Pa. Code. § 5.305(c).

II. PROCEDURAL HISTORY

On April 12, 2021, Community Utilities of Pennsylvania Inc. (“CUPA” or the “Company”) Water Divisions filed *Supplement No. 9 to Tariff Water—Pa. PUC No. 1* (“*Supplement No. 9*”). CUPA’s proposed *Supplement No. 9* seeks approval for rates designed to produce an annual revenue increase of approximately \$757,517 for all customers in the service territories formerly known as Penn Estates Utilities, Inc., Pennsylvania Utility Co., and Utilities, Inc.--Westgate. Also on April 12, 2021, CUPA Wastewater Divisions filed *Supplement No. 7 to Tariff Wastewater—Pa. PUC No. 1* (“*Supplement No. 7*”). CUPA’s proposed *Supplement No. 7* seeks approval for rates designed to produce an annual revenue increase of approximately \$998,705 for all customers in the service territories formerly known as Penn Estates Utilities, Inc., Pennsylvania Utility Co., and Utilities Inc., of Pennsylvania.

On April 14, 2021, CUPA filed an *Errata* on both dockets correcting portions of the original filings made April 12, 2021.

The OSBA filed a *Notice of Appearance and Complaint* at both dockets on April 15, 2021. The OSBA’s *Complaint* concerning *Supplement No. 9* was docketed at C-2021-3025263. The OSBA’s *Complaint* concerning *Supplement No. 7* was docketed at C-2021-3025260.

On April 26, 2021, the Commission’s Bureau of Investigation and Enforcement (“I&E”) filed a *Notice of Appearance* at both dockets.

By Order entered May 6, 2021, the proposed *Supplement No. 9* and proposed *Supplement No. 7* were suspended by operation of law until January 12, 2022. The Commission ordered an investigation into the lawfulness, justness, and reasonableness of the rates, rules, and regulations contained in the proposed *Supplement No. 9* and proposed *Supplement No. 7*.

The Office of Consumer Advocate (“OCA”) filed *Notices of Appearance and Complaints* on May 7, 2021 at both dockets.

On May 7, 2021, Notice was issued at both dockets that a telephonic pre-hearing conference was scheduled for May 13, 2021 at 10:00 a.m. before Administrative Law Judge (“ALJ”) Dennis J. Buckley. ALJ Buckley issued a *Prehearing Conference Order* at both dockets on May 10, 2021.

On May 13, 2021, a telephonic prehearing conference was held and procedural schedule was adopted.

On June 1, 2021, ALJ Buckley consolidated the rate proceedings for hearing and adjudication.

On or about June 16, 2021, the Commission’s Secretary’s Bureau began serving customer complaints received for filing. Approximately 100 similar form complaints against the proposed rate increases were filed.

On June 29, 2021, a telephonic public input hearing was held. No commercial customers presented testimony at the public input hearing.

On July 22, 2021, Chief ALJ Rainey issued an *Order* approving the parties’ request for extension of procedural schedule, which extended the statutory suspension period from January 12, 2022 to February 18, 2022 and allowed for CUPA to recover any rate increase granted in these proceedings back to the original suspension date of January 12, 2022.

On July 23, 2021, ALJ Buckley issued a revised procedural schedule.

On August 31, 2021, ALJ Buckley issued a *Protective Order*.

On September 8, 2021, an evidentiary hearing was held. All of the parties preserved testimony and exhibits with accompanying verifications were entered into the record, as reflected in *Joint Hearing Exhibit 1* (amended September 10, 2021) and memorialized in an *Order* dated September 10, 2021.

On September 28, 2021, ALJ Buckley granted CUPA's unopposed motion and admitted *CUPA W Exhibit 1-T* with accompanying verification.

On September 30, 2021 ALJ Buckley issued a notice of telephonic post-hearing conference.

On October 4, 2021 ALJ Buckley extended the date for filing a joint petition for settlement to October 12, 2021.

On October 5, 2021, a telephonic post-hearing conference was held.

On October 12, 2021, the active parties filed a unanimous *Joint Petition for Settlement* ("*Settlement*"), which proposes to resolve all issues raised in this proceeding with accompanying statements in support from each of the signatories ("*Joint Petitioners*").

On October 21, 2021, Complainant Bryan Donnelly filed a formal *Objection* to the proposed *Settlement*.

On October 22, 2021, Complainant Yajaida Rodriguez and Mona Annicaro each filed a formal *Objection* to the proposed *Settlement*.

On November 9, 2021, ALJ Buckley issued an *Order Rejecting the Proposed Joint Settlement and Certifying a Material Question to the Commission* ("*Certification Order*").

On November 10, 2021, CUPA filed *Unopposed Requests for Extension of Page Limits for Briefs on Material Question*, which were granted by Secretarial Letter on November 12, 2021.

III. SUMMARY OF ARGUMENT

The body of the *Settlement* as well as the *Statements in Support* authored by each signatory to the *Settlement* provide ample justification as to why the *Settlement* suits the public interest. As the *Settlement* suits the public interest, the ALJ's refusal to accept the *Settlement* was improper.

IV. LEGAL STANDARDS

Section 1301(a) of the Pennsylvania Public Utility Code (“Code”) mandates that “[e]very rate made, demanded, or received by any public utility ... shall be just and reasonable, and in conformity with [the] regulations or orders of the [C]ommission.” (66 Pa. C.S. § 1301(a)).

Pursuant to the just and reasonable standard, a utility may obtain “a rate that allows it to recover those expenses that are reasonably necessary to provide service to its customers [,] as well as a reasonable rate of return on its investment.” (*City of Lancaster Sewer Fund v. Pa. PUC*, 793 A.2d 978, 982 (Pa. Cmwlth. 2002)). There is no single way to arrive at just and reasonable rates, and “[t]he [Commission] has broad discretion in determining whether rates are reasonable” and “is vested with discretion to decide what factors it will consider in setting or evaluating a utility’s rates.” (*Popowsky v. Pa. PUC*, 683 A.2d 958, 961 (Pa. Cmwlth. 1996)).

The burden of proof to establish the justness and reasonableness of every element of a public utility’s rate increase request rests solely upon the public utility in all proceedings filed under Section 1308(d) of the Code. The standard to be met by the public utility is set forth in Section 315(a) of the Code, 66 Pa. C.S. § 315(a), as follows:

Reasonableness of rates. – In any proceeding upon the motion of the [C]ommission, involving any proposed or existing rate of any public utility, or in any proceedings upon complaint involving any proposed increase in rates, the burden of proof to show that the rate involved is just and reasonable shall be upon the public utility.

In reviewing Section 315(a) of the Code, the Pennsylvania Commonwealth Court interpreted a public utility's burden of proof in a rate proceeding as follows:

Section 315(a) of the Public Utility Code, 66 Pa. C.S. § 315(a), places the burden of proving the justness and reasonableness of a proposed rate hike squarely on the public utility. It is well-established that the evidence adduced by a utility to meet this burden must be substantial.

(Lower Frederick Twp. Water Co. v. Pa. PUC, 409 A.2d 505, 507 (Pa. Cmwlth. 1980). See also, Brockway Glass Co. v. Pa. PUC, 437 A.2d 1067 (Pa. Cmwlth. 1981)).

In general rate increase proceedings, the burden of proof does not shift to parties challenging a requested rate increase. Rather, the utility's burden of establishing the justness and reasonableness of every component of its rate request is an affirmative one, and that burden remains with the public utility throughout the rate proceeding. There is no similar burden placed on the non-utility parties to justify a proposed adjustment to the utility's filing. The Pennsylvania Supreme Court has held:

[T]he appellants did not have the burden of proving that the plant additions were improper, unnecessary or too costly; on the contrary, that burden is, by statute, on the utility to demonstrate the reasonable necessity and cost of the installations, and that is the burden which the utility patently failed to carry.

(Berner v. Pa. PUC, 116 A.2d 738, 744 (Pa. 1955)).

The Commission encourages parties in contested on-the-record proceedings to settle cases. *See* 52 Pa.Code § 5.231. Settlements eliminate the time, effort and expense of litigating a matter to its ultimate conclusion, which may entail review of the Commission's decision by the appellate courts of Pennsylvania. Such savings benefit not only the individual parties, but also

the Commission and all ratepayers of a utility, who otherwise may have to bear the financial burden such litigation necessarily entails.

By definition, a “settlement” reflects a compromise of the parties’ positions, which arguably fosters and promotes the public interest. When parties in a proceeding reach a settlement, the principal issue for Commission consideration is whether the agreement reached suits the public interest. (*Pa. Pub. Util. Comm’n v. CS Water & Sewer Assocs.*, 74 Pa. PUC 767, 771 (1991)).

V. ARGUMENT

A. Public Interest

In the *Certification Order*, ALJ Buckley states, “In this case, the parties contend that because the Settlement resolves all issues in the proceeding it is in the public interest. Proposed Joint Settlement at 28-34.” (*Certification Order*, p. 25). This statement vastly oversimplifies the rationale for the parties’ support of the proposed *Settlement*, as can be gleaned by the citation to six pages of the proposed *Settlement*. These six cited pages are not inclusive of the *Statements in Support* written by each of the parties with additional justifications for signing the proposed *Settlement*. The *Settlement* contained an introductory section which summarized those six pages as follows:

Section IV explains the proposed Settlement is in the public interest because:

- The proposed Settlement provides a reasonable resolution based on an extensive investigation of CUPA’s filings, including informal and formal discovery and the submission of direct, rebuttal, surrebuttal and rejoinder testimony the Joint Petitioners, and exhaustive settlement negotiations. The Joint Petitioners in this proceeding had substantially different views on many issues in this proceeding. Where the Joint Petitioners agreed, with regard to the need for certain improvements, investigation and reporting, the Settlement adopts those requirements and commitments. The Joint Petitioners were able to reach a balanced compromise on all issues that recognizes the benefit to CUPA’s ratepayers of providing CUPA with the opportunity to receive sufficient revenue to fund the provision of adequate, efficient, safe and reasonable service, while also addressing the principle of gradualism in rate changes, particularly given the ongoing hardships that may be faced by some customers. Further, the proposed Settlement adopts most of the recommendations by the I&E and OCA witnesses to provide the Joint Petitioners with information to monitor CUPA’s efforts.

- The Settlement is consistent with Commission policies promoting negotiated settlements. The Joint Petitioners arrived at the Settlement, after conducting extensive discovery and numerous in-depth discussions. The Settlement constitutes reasonably negotiated compromises on the issues addressed. Thus, the Settlement is consistent with the Commission’s rules and practices encouraging settlements, 52 Pa. Code §§ 5.231, 69.391, 69.401-69.406, and is supported by a substantial record.

- The Settlement produces just and reasonable rates that demonstrate[] gradualism and will not result in rate shock to any customer class while still allowing CUPA adequate revenue and rate of return, particularly given that the

Settlement addresses low-income programs for both water and wastewater customers, which was a contested issue in this proceeding.

- CUPA, who has made significant investment the facilities for these service territories to modernize infrastructure and the provision of service, is receiving 17% less than the increase in revenues that it requested, while agreeing to various settlement provisions to increase adequacy of service.

The rate design further mitigates impacts to customers in various ways. First, for low-income customers who will be most impacted by any rate increase, the Settlement provides an immediate low-income program for water customers and a proposal for a wastewater low-income program in CUPA's next base rate case. Those programs are a pilot program with lower volumetric rates for ratepayers who meet the income threshold. CUPA also commits to participate in the new in the Low Income Household Water Assistance Program, which provides monetary assistance to ratepayers who meet the income threshold to help pay their bills and avoid service termination. Under the proposed Settlement, rates for water service will increase more than wastewater, by percentage, and these programs will help to offset those increases for those most impacted.

- Full consolidation of Tamiment customers (which CUPA proposed in its original filing and other parties contested) is not achieved, so Tamiment customers are receiving a smaller rate increase than originally proposed. This demonstrates gradualism, with full consolidation in CUPA's next rate case. While Tamiment watercustomers receive the highest rate increase by percentage, they will still pay less per average bill than water customers in the consolidated CUPA systems. At the same time, however, the Settlement serves to substantially reduce the rate differences between the CUPA and Tamiment customers, water and wastewater.

- There are no increases to residential customer charges, only to volumetric charges. This promotes conservation and allows customers more control over their bills.

- To the extent service issues raised at the public input hearings were not resolved through the provision of additional evidence, the Settlement provides for further resolution of those issues, reflecting CUPA's agreement to various requests I&E and OCA made in their testimony to address these issues, including: reporting on boil water advisories, do not consume advisories, compliance with the DEP Consent Order & Agreement; submission of information on lost and unaccounted for water broken down by service territory and cause; record keeping on isolation valve exercising; advance notice to Tamiment customers regarding planned system maintenance that may discolor water; terms to address low water pressure and improvement of water supply for Penn Estate customers; provision of information to wastewater customers regarding grinder pumps; and updated call center performance data.

- The proposed Settlement avoids necessity of further proceedings what would have been a substantial cost to the Joint Petitioners and CUPA's customers.

(*Settlement*, pp. 3-6 (internal citations omitted)). While resolving all issues in this highly contested rate case furthers the public interest, it is clear from the body of the *Settlement* as well as the *Statements in Support* attached to the *Settlement* that there are numerous reasons why the *Settlement* is in the public interest, and should be approved by the Commission.

B. Rate Shock and Gradualism

ALJ Buckley's determined that "the proposed Joint Settlement is more about facilitating the Company's request than protecting the customers from rate shock." (*Certification Order*, p. 24). In response, the OSBA notes that during the litigation process, the parties are unaware of what ultimate decision will be rendered by the ALJ assigned to that case, or what the ultimate decision of the Commission will be. All parties to litigated proceedings are similarly situated and no party in the proceeding, prior to receiving the ALJ's recommended decision and the PUC's final opinion and order, can or should feel entirely confident that it will prevail in its litigation positions. Thus, throughout the negotiation process, all parties must consider their best case (i.e. its litigation position prevails on all issues) and worst case (i.e. its litigation position fails on all issues) scenarios. The parties cannot foretell how the ALJ or the PUC will decide each issue. Rather, all parties come to the table to negotiate settlement equally uncertain, and therefore equally ready to compromise on certain issues to facilitate settlement, in order to more likely assure the ultimate outcome of the case.

Unlike I&E and OCA, the OSBA did not file testimony addressing the level of CUPA's claimed water and/or wastewater revenue requirements. However, after reviewing the parties' litigation positions with respect to revenue requirements, the OSBA determined that the *average* of the water increases proposed by CUPA, I&E and OCA was approximately \$639,000 per year, while the average proposed wastewater increase was approximately \$818,000 per year.

Accordingly, the OSBA concluded that the proposed settlement increases for water and wastewater of \$630,000 and \$830,000 per year, respectively, were consistent with the average of the parties' litigation positions, and therefore represented a reasonable outcome that served the public interest.

Additionally, it is worth noting that negotiation does not take place only between the utility and the non-utility parties; rather, negotiation occurs among all parties, as the non-utility parties represent various interests that may conflict with each other (for example, the interests of the commercial class may at times conflict with the interests of the residential class, and often this is the case when discussing revenue allocation). The *Settlement* reflected that it was a compromise among the varying positions of **all parties** in Paragraph 56:

In establishing a proposed base rate increase, the proposed Settlement fairly balances CUPA's revenue needs with the challenges raised by the parties concerning a rate increase and the structure of that rate increase, particularly given each of the Joint Petitioners had a different view on rate design. The Settlement also contains provisions to address the other concerns the parties identified about various aspects of CUPA's operations and service including customer service, customer assistance, safety and customer education. As such, it represents a comprehensive resolution of issues in dispute and a reasonable compromise of differing objectives and views.

(*Settlement*, pp. 28-29).

While the OSBA's *Statement in Support* provides additional detail as to why it believed the revenue requirement provisions of the *Settlement* were reasonable, the body of the *Settlement* itself provided compelling justifications. Notably, justification for the revenue requirement and rate design provisions of the *Settlement* are found in Paragraphs 57 and 58, which state:

57. Fairly balancing the Joint Petitioner's positions, the proposed Settlement provides for a total combined increase for water and wastewater of \$1,460,000, which is approximately 17% less than the originally proposed increase. The rate design also fairly balances positions of the parties. While CUPA wanted to fully consolidate Tamiment rates, other parties disagreed with full consolidation in this proceeding due to magnitude of rate increase necessary to achieve full

consolidation. Instead, the Settlement provides for approximately 50% consolidation for Tamiment rates toward the rates of the other CUPA customers. Moreover, the Settlement allocates rate increases to volumetric charges, not fixed customer charges, to encourage conservation.

58. The combination of the negotiated revenue increase and rate design results in rate increases to customers that are fair. For those customers most impacted, the Settlement provides for low income rates for water, provision for CUPA to propose a low income pilot program for wastewater customers in its next base rate case, and participation by CUPA in the Low Income Household Water Assistance Program and commitment to help promote registration by eligible customers. The Settlement also provides for a stay-out, so that customer base rates will not increase again for at least two years.

Settlement, p. 29. As signatory to the *Settlement*, the OSBA supported the rationales detailed in these paragraphs as justification that the *Settlement* was in the public interest.

C. Quality of Service

ALJ Buckley also determined “the ongoing quality of service issues argue against adoption of the Settlement.” (*Certification Order*, p. 35). In support of his conclusion, ALJ Buckley cites to the testimony provided at the June 29, 2021 Public Input Hearing. (*Certification Order*, p. 33). No commercial customers testified at or participated in the Public Input Hearing in this proceeding and CUPA did not receive any customer service complaints from commercial customers regarding water quality issues over the past twelve months. (*OSBA Statement No. 1*, p. 16).

Despite the lack of record evidence that CUPA’s commercial customers have been impacted by service quality issues, the OSBA recognized that several service-related commitments in the proposed *Settlement* would benefit commercial customers. As noted in the OSBA’s *Statement in Support*:

[T]he requirements for CUPA to provide increased and more detailed information on a variety of topics in its next base rate case, to provide more information in its reporting requirements for its valve records, and to provide a breakdown of its Lost and Unaccounted For Water (“LUAF”), all will enhance

transparency and provide the Settlement Parties with information that will assist in litigating the Company's next base rate case effectively and efficiently. (*Settlement*, pp. 12-13, ¶¶ 21-22, 24, 26-27).

Additionally, the requirement for CUPA to provide advanced notice to customers served by the Tamiment Water System regarding planned system maintenance that may discolor water should alleviate service concerns when customers encounter discolored water, as the Company will have prepared them for encountering such an issue. (*Settlement*, p. 12, ¶ 23).

(*OSBA Statement in Support*, p. 4). Thus, OSBA believes the proposed *Settlement* is in the public interest as the evidentiary record is devoid of service-related issues for commercial customers, but the proposed *Settlement* requires CUPA to implement affirmative service-related commitments that will benefit commercial customers.

VI. CONCLUSION

In view of the foregoing, the OSBA respectfully requests that the Commission find that ALJ Buckley's refusal to accept the proposed *Settlement* was improper, and issue an Opinion and Order adopting the proposed *Settlement*.

Respectfully submitted,

/s/ Erin K. Fure

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Office of Small Business Advocate
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Harrisburg, PA 17101

Dated: November 16, 2021

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission	:	
	:	
v.	:	R-2021-3025206
	:	R-2021-3025207
Community Utilities of PA, Inc.	:	
Water/Wastewater	:	

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing have been served via email (*unless other noted below*) upon the following persons, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant).

The Honorable Dennis J. Buckley
Administrative Law Judge
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