

BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

OFFICE PARTNERS XXIII BLOCK GI LLC,
Complainant,

Docket Nos. C-2022-3033251
C-2022-3033266

Vs.
THE PITTSBURGH WATER AND SEWER
AUTHORITY,

Respondent,

COMPLAINANT'S RESPONSE TO RESPONDENT'S PRELIMINARY OBJECTIONS

1. Admitted and Denied. It is admitted that Office Partners filed a Complaint, it is believed it was divided by administrative process by the PUC into two identical complaints with two docket numbers. Office Partners consents to the PWSA's motion to consolidate, to consolidate the two Complaints.

2. Denied to the extent this allegation attempts to characterize the complaint, which shall speak for itself. It is admitted that the PWSA seeks to impose an inapplicable fee.

3. Admitted in part. There are several parcels involved in the FNB Financial Center Development for which Office Partners owns some, but not all.

4. Admitted and Denied. It is admitted that Office Partners requires the connection. The PWSA may charge fees to property owners but those fees are subject statutory limitations and PUC approval.

5. It is admitted that the language is included in the cited statute.

6. Admitted.

7. It is denied that this action falls solely to the PUC, the parties agreed to this forum by consent.

8. It is admitted that Exhibit A includes this language. As to whether the PWSA's fees are and were actually approved by the PUC, after reasonable, investigation Office Partners is without sufficient information to form a belief as to the allegation and it is thus denied with strict proof required at trial.

9. Denied. There is no tariff that forms the basis of this matter as PWSA is attempting to charge a tariff to Office Partners which does not apply.

10. Denied. The document referred to shall speak for itself. In further response, the docket consists of 239 separate documents and the PWSA has failed to identify the specific document which Office Partners cannot identify or locate. Further, it is of no issue what the 2021 tap in fees are as the applicable fees are the 2022 fees.

11. It is admitted that the Developers Manual contains the cited quotation.

12. It is admitted that the Developer's Manual contains the cited quotation. The cited section also goes on to state "A permit is not considered issued until all fees are paid."

13. Admitted.

14. Denied. While this language is present in the complaint, acceptance of the permit does not amount to issuance which is not permitted until the permit fees are paid. Thus, no permit was issued. Further as stated in Exhibit C, if not paid within 6 months, the application would become void. This same language is present in the PWSA Developer's Manual, Exhibit A, P. 20 "A permit is not considered issued until all fees are paid."

15. Admitted. It is admitted that Office Partners withdrew its permit application as pled.

16. Denied. The February 4, 2022 Application ("2022 Application") is not a reapplication. It is substantially different from the 2021 application as it encompasses only one

parcel (owned by Office Partners) and contains significant structural and other differences from the 2021 permit application. Office Partners paid the requisite application fee for the 2022 Application. PWSA's attempt to plead facts outside of the complaint must be ignored as speaking objections.

17. Denied. Office Partners properly pleads it withdrew the 2021 Application and submitted a new one. Due to changes in the design, Office Partners was required to either amend the application or file a new application. Office Partners chose to file a new application.

Response to paragraph 16 is incorporated herein. The 2022 Application had not been approved and this was not a resubmittal. It is a different application, encompassing some, but not all of the property covered by the 2021 application. Office Partners objects to any factual allegations raised by PWSA and such constitute speaking objections and should not be considered for the purpose of preliminary objections. Furthermore, that Office Partners may not have to pay a tap in fee and would receive a benefit should be of no concern to the PWSA.

The PWSA is empowered by the laws of the Commonwealth of Pennsylvania and, by its admissions herein, the PUC to follow the law and charge only those fees that are applicable. PWSA should not be concerned with an applicant's pocket book and this allegation should be stricken. Normally, Office Partners would have filed Preliminary Objections to these Preliminary Objection however, 52 Pa. Code § 5.1(b) does not permit such a filing.

18. Admitted in part. Again, Office Partners objects to the interjection of language that is impertinent ("Of course"). Office Partners did indeed withdraw and abandon the 2021 application and PWSA did and is still attempting to charge inapplicable fees. In fact, Office Partners submitted a new application, the 2022 Application and paid the applicable application fees therefor.

19. Admitted.

20. Denied. Again, Office Partners objects to the language utilized by the PWSA.

There is no mandatory statute requiring that Office Partners pay for its 2022 permit application utilizing the 2021 Fee Schedule. The statute requires PWSA to only charge the applicable fees. PWSA as pled, is attempting to reap a profit by double dipping.

ARGUMENT

This dispute boils down to a relatively simple proposition. PWSA, for years, misused capital funds for operating expenses, using permit fees to offset deficits caused by low usage charges. In 2022, the PUC forced the PWSA to reduce the permit fees and increase the usage charges to better operate the water and sewer systems on a sustainable basis. At the time of the 2021 Application, permit fees were high and usage fees were low. Before the permit was issued, PWSA reduced the permit fee and increased the usage fee. While PWSA accuses Office Partners of taking advantage of the permit fee reduction, it fails to inform that Office Partners will be subject to the newly raised usage rates and if PWSA is successful, Office Partners would pay the old high permit fee and new high rates. Whereas by Office Partner's process, it will pay the lower permit fee and the higher usage rates.

PWSA sought to obtain the best of both worlds by unilaterally treating the reapplication as a modification and rejecting Office Partner's right to withdraw the application. Had Office Partners simply done nothing, the permit would not have been issued and become void.

Thus, any contention that Office Partners is acting in bad faith is disingenuous; rather, it is PWSA that is acting in bad faith. Response to Paragraph 28 is incorporated herein.

21. Paragraph 21 is an incorporation paragraph and no response is required. Office Partners hereby incorporates its responses to Paragraphs 1 through 20 of the Preliminary

Objections as if fully stated herewith. Further, the Complaint is fully incorporated.

A. STANDARD

22. Admitted. Further, it is the PWSA's burden and the PUC should not accept or consider any factual allegations not raised in Office Partner's Pleading as such would be considered a speaking demurrer. As PWSA admits this, all of PWSA's allegations raising facts outside of the record, including denials that the 2021 Application and Permit was withdrawn, that the 2022 Application is the same as the 2021 Application, that Office Partners sought to resubmit its 2021 Application, and allegations as to Office Partners' motivation should be stricken or alternatively, ignored.

23. The PUC does not dismiss a complaint per se, but would strike a pleading and the complainant has an opportunity to amend its complaint. 52 Pa. Code § 5.101(h).

B. PRELIMINARY OBJECTION IN THE NATURE OF DEMURRER

Since the PUC Rules do not identify a "demurrer" as a basis for preliminary objections, we will assume the objection is that the claim is "legally insufficient", 52 Pa.Code § 5.101(a) (3).

24. This is a statement of the law for which no answer is required and may not be related to the issues in this case.

25. This is a statement of the law for which no answer is required and may not be related to the issues in this case.

26. This is a statement of the law for which no answer is required and may not be related to the issues in this case.

27. Denied. As will be explained in the following paragraph, PWSA is requesting the PUC to hold that the time of application is the same as the time of payment. However, they are

not and the statute does not prescribe that. The PWSA is trying to bend the plain language of the statute.

28. The cited statute, 53 Pa.C.S.A. § 5607(d)(24) states as follows:

“To charge enumerated fees to property owners who desire to or are required to connect to the authority’s sewer or water system. Fees shall be based upon the duly adopted fee schedule which is in effect at the time of payment and shall be payable at the time of application for connection or at a time to which the property owner and the authority agree.”

Taking PWSA’s interpretation on its face, this objection must be dismissed. Office Partners pled the 2021 application was withdrawn and thus, we are dealing only with the 2022 Application. The 2022 fees are applicable pursuant to the schedule (using either the application or payment dates pursuant to the statute). Moreover, the Complaint and Answer make clear that the fee was not paid.

It is apparently PWSA’s position that Office Partners cannot withdraw the 2021 Application. This is non-sensical. The PWSA Developer’s Manual states that permits are only issued upon payment, and any permit will expire and become invalid if not paid within 6 months. (Exhibit A, P. 4). The PWSA is apparently contending that it can void a permit, prior to issuance, for failure of payment. But, an applicant cannot withdraw or void a permit. There is no legal authority for this.

The 2022 Application is separate from the 2021 Application. At the time of payment, Office Partners tendered the then applicable fees. PWSA refused to accept payment and issue the permit unless the 2021 fees were paid. PWSA is violating the very statute it cites for its authority.

Even if the PUC were to consider only the 2021 Application (which it should not), the 2022 fee schedule would still apply. PWSA only issues an approved permit upon payment. 53

Pa.C.S.A. § 5607(d)(24) requires the fee to be calculated pursuant to the fee schedule in effect *at the time of payment*. In accordance with this, the PWSA Developer's Manual specifically states that a permit is issued only upon payment. (Exhibit A, P. 4).

The PWSA has argued the plain language rule. However, in this allegation (paragraph 28) PWSA adds "i.e. the time of application" to its quoted language in 53 Pa.C.S.A. § 5607. The statute does not say this and it is inappropriate to include it. The statute is clear that the fee is to be determined upon the fee schedule *in effect at the time of payment*. PWSA is bound to only charge those fees applicable when it accepts payment. (Exhibit A, P. 4). Furthermore, PWSA has opted to allow applicants 6 months from the time of permit approval, to pay for the permit (and would charge more if fees were increased as they historically had). Thus, PWSA is doubly bound as it is their policy.

Here, payment was tendered at the time the 2022 fee schedule was in effect. Thus, that fee should apply. Any attempt to somehow charge the 2021 Fees for either the 2021 or 2022 Applications would violate the specific language of 53 Pa.C.S.A. § 5607(d)(24).

Previously, the PWSA would have charged the tap in fees at the time payment was tendered, because tap in fees always went up until it was determined that this was impermissible and changed pursuant to PUC order. Thus, the 2022 fees are reduced to nothing because usage fees have been substantially increased. The Project will be subject to the increased usage fees for its life. Regardless of the decision of the PUC in this case.

PWSA is attempting to double dip. It is attempting to subject Office Partners to the 2021 tap in fees as well as the increased usage fees. PWSA is accusing Office Partners of withdrawing the 2021 Application to save money, in fact it is the opposite, PWSA is attempting to impose the 2021 fees to profit, which is impermissible.

29. Denied. Response to paragraph 28 is incorporated herein. While PWSA is taking the position that the 2021 Application was either not withdrawn or somehow applies, that is improper. Office Partners pled that it withdrew the 2021 Application and submitted the 2022 Application which was approved. Therefore, the 2022 fee schedule would apply to the approved 2022 Application, which was also pled by PWSA. The foregoing must be taken as true.

30. Denied. Responses to Paragraphs 28 and 29 are incorporated herein. As pled, Office Partners withdrew the permit and applied for a new permit in 2022 and those fees apply.

31. Denied. Response to Paragraph 28 and 29 are incorporated herein.

32. Denied. To the extent PWSA is interjecting facts not pled, it is a speaking demurrer and this allegation should not be considered. Response to Paragraphs 28 and 29 are incorporated herein. Fees are calculated pursuant to the fee schedule in effect at the time of payment, which the PWSA has allowed for up to six months beyond the approval date. Further, the 2022 Application is not subject to the 2021 fees.

33. It is admitted that the 2021 Application was withdrawn. This allegation is otherwise denied. To the extent PWSA is interjecting facts not pled, it is a speaking demurrer and this allegation should not be considered.

34. Denied. To the extent PWSA is interjecting facts not pled, it is a speaking demurrer and this allegation should not be considered. Response to Paragraphs 28 and 29 are incorporated herein.

Furthermore, PWSA is a public utility and is required to follow the laws. Office Partners owes no duty to PWSA. The only duty owed is PWSA's duty to Office Partners to abide by the applicable rules and statutes. Here, PWSA is somehow contending that a permit application only be withdrawn or voided by PWSA and not an applicant (without any legal support). PWSA's

sole aim is to profit from Office Partners. Further, PWSA is ignoring the very statute it cites as the fee is fixed upon the date of payment.

35. Denied. Office Partners pled it withdrew the 2021 Application. Response to Paragraphs 28 and 29 are incorporated herein. Fees are calculated pursuant to the fee schedule in effect at the time of payment. Further, the 2022 Application is not subject to the 2021 fees. PWSA has not pointed to any procedure that would allow it to require a permit, not issued, stay in effect for the sole purpose of profit.

36. Denied. Response to Paragraphs 28 and 29 are incorporated herein. Fees are calculated pursuant to the fee schedule in effect at the time of payment. Further, the 2022 Application is not subject to the 2021 fees. It is not Office Partners duty to plead law. Under the Commonwealth of Pennsylvania requires facts to be pled. Office Partners has pled it withdrew the 2021 Application. To the extent PWSA is interjecting facts, they should not be considered.

Finally, the same could be said of PWSA as it has offered no legal authority to state the permit could not be withdrawn.

37. Denied. To the extent PWSA is interjecting facts not pled, it is a speaking demurrer and this allegation should not be considered (policy arguments of this sort are not proper in a Preliminary Objection). Response to Paragraphs 28 and 29 are incorporated herein. Fees are calculated pursuant to the fee schedule in effect at the time of payment. Finally, PWSA ignores that Office Partners will be subject to the PUC negotiated increased usage rates enacted to essentially make up for improper and inflated tap in charges for the life of the project. PWSA is simply attempting to profit by double dipping.

38. Denied. To the extent PWSA is interjecting facts not pled, it is a speaking demurrer and this allegation should not be considered. Response to Paragraphs 28 and 29 are

incorporated herein. Fees are calculated pursuant to the fee schedule in effect at the time of payment. While the PUC should not accept any of the facts PWSA is pleading here (that it has uniformly done this with other applicants), it is not relevant except to the point that PWSA is uniformly violating the rights of applicants.

C. (IN THE ALTERNATIVE) PRELIMINARY OBJECTION IN THE NATURE OF DEMURRER

Since the PUC Rules do not identify a “demurrer” as a basis for preliminary objections, we will assume the objection is that the claim is “legally insufficient”, 52 Pa.Code § 5.101(a) (3).

39. This is a statement of the law for which no answer is required; and may not be related to the issues in this case.

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41. This is a statement of the law for which no answer is required; and may not be related to the issues in this case.

42. Denied. The PUC will determine which fee is due and once done so, the Common Pleas Court will order the funds to be disbursed according to such order. Further, the PWSA consented to this procedure and is thus subject to this procedure. If the PUC determines that the 2022 fees apply, the Common Pleas Court will order the funds returned to Office Partners, if the 2021 fees apply, it will order the fees returned to PWSA. That PWSA even makes such an argument could amount to a fraud upon the Courts as it clearly indicated to the Court that it consented to this procedure and argued that this case should be before the PUC.

66 Pa.C.S. § 331 permits declaratory orders in PUC administrative actions and thus, such an order is clearly authorized. Even if this were granted, Office Partners would have leave to

amend, it would be a waste of PUC and the parties time and efforts to slightly amend the language of a wherefor clause and have to deal with preliminary objections, and other pleadings a second time.

43. Denied. Response to Paragraph 42 is incorporated herein.

44. Denied. Response to Paragraph 42 is incorporated herein.

WHEREFORE, Office Partners respectfully requests the PUC to deny these preliminary objections and dismiss them with prejudice.

Respectfully submitted,

MAURICE A. NERNBERG & ASSOCIATES

Date: 7/22/22

By 

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Pa.I.D. No. 205631

*Counsel for Complainant, Office Partners
XXIII Block G1 LLC*

CERTIFICATE OF SERVICE

I, David M. Nernberg, hereby certify that a true and correct copy of the within COMPLAINTANT'S RESPONSE TO RESPONDENT'S PRELIMINARY OBJECTIONS was served via email upon following:

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