

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.

**BRIEF IN RESPONSE TO
PWSA'S MOTION FOR
SUMMARY JUDGMENT**

Filed on behalf of: Plaintiff

Counsel of Record for This Party:

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I. INTRODUCTION/ISSUES:¹

The only issue in this case is the application of 53 Pa.C.S. § 5607(d)(24) (the “rate statute”) to the facts of this case. The rate statute declares the tap-in fee payable on either the application date or by agreement. However, the fee itself is calculated as of the date of actual payment. The facts are simple and laid out in Office Partners’ Motion for Summary Judgment:

- May 2021: Office Partners begins the tap-in application process with PWSA (2021 application);
- December 23, 2021: PWSA issues a plan approval letter for the 2021 application and an invoice calculated at the 2021 rates (\$508,314.79). The invoice allows payment to be made at any time before six months after the invoice date or the right to issuance of the permit expires (Appendix M²). No permit is issued until payment is made;
- Office Partners did not pay the 2021 invoice, and no permit was issued pursuant to the letter;

¹ Office Partners Incorporates its Motion for Summary Judgment and Brief in Support thereof in the interest of not repeating arguments.

² Refer to Office Partners Appendix attached to its Motion and Brief in Support of Summary Judgment

- January 13, 2022: 2022 user and permitting Rates become effective (Appendix B);
- January 31, 2022: Office Partners notifies PWSA that it is withdrawing 2021 application (Appendix J);
- February 1, 2022: PWSA unilaterally informs Office Partners that it has other options than withdrawal and will treat the new application as an amendment³, not a new application (Appendix K);
- February 2022: Office Partners submits the 2022 application excising certain real property from its plans (Appendix N);
- March 3, 2022: PWSA approves the 2022 application plans and issued an invoice calculated at the 2021 rates (\$506,647.18), a different amount than the December 23, 2021 invoice) rather than the 2022 rates, which were then in effect. (Appendix O);
- March 15, 2022: Office Partners pays the 2022 application invoice (\$506,647.18) in Court by consent agreement/order pending resolution of this dispute, and the permit is issued based upon the 2022 application plans.⁴ (Appendix O).

The rate statute is clear; the fee is calculated at the rate in effect on the date of payment.

PWSA's position is that it can disregard the clear language of the statute and charge a rate not in effect at the time the final invoice was issued or at the time of payment is wrong.

PWSA also contends that applying the 2022 rates to Office Partners is inequitable. Although this dispute involves a matter of law, i.e., statutory interpretation, if equity were to apply, the equities would favor Office Partners. The Project is subject to the 2022 tap-in rates and subsequent usage rates for its life. These usage rates are significantly higher to cover the

³ As no permit was ever issued or executed, any amendment would be to the application.

⁴ During this period, Office Partners initiated a mandamus action in the Court of Common Pleas of Allegheny County, the consent agreement/order provided for the current litigation and payment into Court.

expenses previously included in the 2021 tap-in fee rates. If there ever was a case of “wanting your cake and eating it too,” that describes PWSA’s position here. One might analogize PWSA’s position to that of a store that placed a piece of furniture on sale at 30% off but told a customer who looked at it before it was placed on sale that they had to pay full price!

II. 53 Pa.C.S. § 5607(d)(24) REQUIRES THE FEE TO BE CALCULATED AT THE THEN FEE IN PLACE ON THE DATE OF PAYMENT:

a. Law of Statutory Construction:

PWSA agrees that under the Statutory Construction Act (1 Pa.C.S. § 1501 and 1901 *et al.*), a Court’s “task is to discern the intent of the General Assembly, with the foremost indication being the statute’s plain language.” *Oliver v. City of Pittsburgh*, 11 A.3d 960, 965-66 (2011). “[I]t is well established that resort to the rules of statutory construction is to be made only when there is an ambiguity in the provision.” *Oliver, supra*, Citing *O'Rourke v. Commonwealth*, 778 A.2d 1194, 1201 (2001). Finally, terms used in a statute are presumed actionable, “we must take care to give meaning to every word and provision of the statute.” *Whitmoyer v. Workers' Comp. Appeal Bd.*, 186 A.3d 947, (Pa. 2018) citing *Borough of Heidelberg v. W.C.A.B. (Selva)*, 928 A.2d 1006, (Pa. 2007).

b. Payment and Payable are Separate Events:

The parties agree that the rate statute applies:

Fees [tap-in] 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...In the case of projects to serve existing development, fees shall be payable at a time to be determined by the authority.⁵

⁵ This is not an existing development.

53 Pa.C.S. § 5607(d)(24).

Is there any ambiguity in this provision? No, and there is nothing to interpret. Payment was made on March 15, 2022 (pursuant to an invoice issued on March 3, 2022).

PWSA contends the term “payable” and “payment” are synonymous and that payable is the same as “due and payable.” PWSA argues that when it issues an invoice (“plan approval”), the fee is due and payable at the rate then calculated. However, the statute does not state “due and payable” or “calculated upon plan approval.” It clearly separates payment and payable into separate events. Further, PWSA ignores that the invoice ultimately paid was issued in March of 2022 (when the 2022 rates were in effect).

All of us receive credit card invoices that state: “payable on or before” or “payable by” a certain date. Sometimes it is “payment due date,” which would be equivalent to “payable by.” Thus, the term “payable” can only be read in context. Without a modifier or some other term, payable is not a term of obligation.

The legislature understands these issues. In other statutes, it clearly recognizes the distinction between payable and due and how they operate when used together. The wage payment and collection law 43 P.S. § 260 et al. states:

(a) . . . Every employer shall pay all wages, other than fringe benefits and wage supplements, due to his employees on regular paydays designated in advance by the employer . . . All wages, . . ., earned in any pay period shall be **due and payable** within the number of days after the expiration of said pay period as provided in a written contract of employment or, if not so specified, within the standard time-lapse customary in the trade or within 15 days from the end of such pay period.

43 P.S. § 260.3.

A second part of the statute allows claims for wages, interest, and penalties. However, it states that such claims can only be initiated IF funds are “payable” when the claim is made. *Aita*

v. NCB Mgmt. Servs., 2023 Pa. Super. LEXIS 201, 2023 PA Super 82, 2023 WL 3445142 (Pa. Super. Ct. May 15, 2023) interpreted the foregoing by its plain meaning, once wages are unpaid beyond the date they are due and payable, a claim for penalties arises. If paid prior to that date, no claim arises. Due and payable is a trigger.

72 P.S. § 5860.306 is another example of the legislature acknowledging the meaning of “due and payable.” This statute deals with the return of property, interest, and settlement by tax collectors stating in part:

(a) It shall be the duty of each receiver or collector of any county, city, borough, town, township, school district or institution district taxes to make a return to the bureau on, or before the last day of April of each year, but no earlier than the first day of January of that year. The return shall be typewritten on a form provided by or acceptable to the county and shall include a list of all properties against which taxes were levied, the whole or any part of which were **due and payable** in the calendar year immediately preceding and which remain unpaid...

72 P.S. § 5860.306(a). The legislature requires payment of interest on only those taxes that were both due and payable in the preceding calendar year. If paid before due, no interest would arise.

Payable and payment are not interchangeable and are used to denote separate events, and each must be given effect. *Whitmover, supra*. This is sensible, considering rates can change.⁶ The statute is clear, the payment date is designated as the date of fee calculation.

PWSA’s Practice Is to Agree to a Time of Payment:

PWSA contends that its “plan approval” and issuance of an invoice make the fee “payable.” PWSA also contends that the “plan approval” and issuance of the invoice is the time of application under the statute. (PWSA MSJ Paragraphs 52-54). First, PWSA has no adopted policy or regulation stating the foregoing, and if it did, it could not abrogate statutory law. Second, the Developer’s Manual specifically contemplates an application prior to “plan

⁶ Historically, tap-in fees have increased year to year (See PWSA and PUC settlements from 2018-2020).

approval.” Appendix S.

On the date of payment, PWSA must calculate or recalculate the fee based upon the schedule then in place.⁷ Further, pursuant to PWSA’s own argument, the March 3, 2022 invoice should have been calculated at the 2022 rates because it was the final and actual invoice for the issued permit. (Appendix S).

III. CONCLUSION:

The rate statute is clear. The only operative date is the date of payment. Had the legislature desired otherwise, it would have been written that the tap-in fee is calculated on the fee in effect on the date of application or approval. Here, the legislature specifically chose the date of payment.

Respectfully submitted,

MAURICE A. NERNBERG & ASSOCIATES

Date: June 30, 2023

By  _____

David M. Nernberg
Pa.I.D. No. 205631

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

⁷ Even if the fee were payable, payment is still the operative date.

CERTIFICATE OF COMPLIANCE

I certify this filing complies with the provisions of the *Public Access Policy of the United Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Submitted by: David M. Nernberg, Esq.

Signature:  _____

Name: David M. Nernberg

Attorney No. (if applicable) 205631

CERTIFICATE OF SERVICE

I, David M. Nernberg, hereby certify that a true and correct copy of the within **Brief in Support of Motion for Summary Judgment** was served via email upon following:

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