

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,

**MOTION FOR DIRECTED
VERDICT OR
ALTERNATIVELY TO
SUPPLEMENT MOTION FOR
SUMMARY JUDGMENT AND
RESPONSE TO PWSA'S
MOTION FOR SUMMARY
JUDGMENT AND TO EXTEND
TIME FOR STIPULATIONS
AND STATUS REPORT**

Filed on behalf of: Plaintiff

Counsel of Record for This Party:

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Pa. I.D. No. 205631

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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.

NOTICE TO PLEAD

To: THE PITTSBURGH WATER AND SEWER AUTHORITY

Pursuant to 52 Pa. Code § 5.102(a), you are hereby notified to file an answer or other responsive pleading to the Motion to Amend and Supplement Motion for Summary Judgment and Response to PWSA's Motion for Summary Judgment and to Extend Time for Stipulations and Status Report filed on July 25, 2023, at this case number, within twenty (20) days from service hereof.


Pursuant to 52 Pa. Code § 1.4, all document must be filed with the Secretary of the Pennsylvania Public Utility Commission, with a copy served on counsel, and where applicable, the Administrative Law Judge presiding over the issue, or electronically on the Commission's electronically filing system if the document is a qualified document.

Respectfully submitted,

MAURICE A. NERNBERG & ASSOCIATES

Date: July 25, 2023

By


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

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

BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

OFFICE PARTNERS XXIII BLOCK G1 LLC,
Complainant,

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

Vs.

THE PITTSBURGH WATER AND SEWER
AUTHORITY,

Respondent,

**MOTION FOR DIRECTED VERDICT OR ALTERNATIVELY TO SUPPLEMENT
MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO PWSA’S MOTION FOR
SUMMARY JUDGMENT AND TO EXTEND TIME FOR STIPULATIONS AND
STATUS REPORT**

I. Introduction:

1. In another action before the Pennsylvania Utility Commission “PUC,” the Pittsburgh Water and Sewer Authority “PWSA” admitted that it calculates tap-in fees on the date of permit payment pursuant to 53 Pa.C.S.A. § 5607(d)(24) (the “Act”) which contradicts its assertions in this action and is an admission that should be evidence in this action.

2. On or about June 17, 2022, 2022 Office Partners XXIII Block G1, LLC (“Office Partners”) filed an action before the PUC. Dispositive motions and responses were completed on June 30, 2023. This Tribunal issued an order that it could not make determinations unless facts were established by stipulation or through a hearing.

3. On June 28, 2023, it was revealed by counsel for PWSA that a similar action dealing with similar issues of fact and law was also in the formal complaint process before the PUC.

4. On June 28, 2023, counsel for Office Partners reviewed the docket for the similar case, C-2023-3038775 (3213 Penn LLC. v. PWSA); however, none of the pleadings were public as they were all filed under a private docket. Those included the formal complaint, amended formal complaint, answer and new matter to the formal complaint, and the amended answer and new matter to the amended complaint. (See Exhibit A, Docket, and note those available to the public).

5. On June 28, 2023, Office Partners requested the pleadings from PWSA's counsel as part of its prior discovery obligations and also issued requests to PWSA and the PUC under the open records laws.

6. Despite there being no justification for the private filings, PWSA's counsel did not produce the documents, and Office Partners did not obtain access until the open records response was received on July 18, 2023 (Exhibit B, email requests to PWSA and Exhibit C, open records response).¹

7. The pleadings in the 3213 Penn Action are material evidence because PWSA asserted and admitted that tap-in fees are to be calculated at the time of permit payment which, if it were consistently applied, would require a verdict in Office Partner's favor.

II. The PWSA Pleadings in the 3213 Penn Action are Material Admissions and Dispositive of the Issues Raised in Office Partner's Complaint and Motion for Summary Judgment:

A. Office Partners Action and Issues:

8. Material Facts: ²

¹ Office Partners was able to obtain two of the pleadings on July 11, 2023.

² PWSA has not denied these facts.

- a. May 2021: Office Partners begins the tap-in application process with PWSA (2021 application);
 - b. December 23, 2021: PWSA issued a plan approval letter for the 2021 application and an invoice calculated at the 2021 rates (\$508,314.79). No permit is issued until payment is made;
 - c. Office Partners did not pay the 2021 invoice, and no permit was issued pursuant to the letter;
 - d. January 13, 2022: 2022 user and permitting Rates become effective;
 - e. January 31, 2022: Office Partners notified PWSA that it is withdrawing the 2021 application;
 - f. February 1, 2022: PWSA's Tribunal informed Office Partners that it has other options than withdrawal and will treat the new application as an amendment;
 - g. February 2022: Office Partners submitted the 2022 application excising certain real property from its plans;
 - h. March 3, 2022: PWSA approved 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;
 - i. March 15, 2022: Office Partners pays the 2022 application invoice (\$506,647.18).
9. Office Partners made three arguments in its Motion for Summary Judgment:
- a. 53 Pa.C.S.A. § 5607(d)(24) requires the tap-in fee to be at the 2022 rates because it was the fee in effect at the time of payment; alternatively, the parties agreed to the fees being paid and payable on March 15, 2022;
 - b. Even if PWSA's contention that fees are to be calculated on the date of "Permit

Approval” is accepted, permit approval occurred while the 2022 rates were in effect, either at that time of payment (when the permit is executed and issued by PWSA on March 15, 2022) or when the final 2022 permit fee calculation was made, on March 3, 2022;

- c. PWSA utilized, pled, and argued ad hoc policy with regard to denying withdrawal of the 2021 application and twisted the plain meaning of 53 Pa.C.S.A. § 5607(d)(24) to justify using the 2021 rates.

10. PWSA contended in its pleadings, Motion for Summary Judgment and Response to Office Partners Motion for Summary Judgment, that pursuant to its policies, tap-in fees become payable, and the fee is to be calculated upon the date of tap-in permit “approval.” And that approval is the date it sends a letter approving the plans and issues a fee invoice, December 23, 2021 (not the date of payment). PWSA Response to Complaint Paragraphs 7, 20, 43; PWSA Preliminary Objections Paragraph 15; PWSA MSJ Paragraphs 52, 54, 56 and PWSA Response to Office Partners’ MSJ, Page 1, Paragraph 1 and Page 7-8 paragraph beginning at the end of Page 7.

11. Julie Ascioffa, PWSA’s, testified similarly at a deposition as PWSA’s corporate representative and verified all pleadings. See Pages 39-40 of Deposition attached hereto as Exhibit D.

B. 3213 Penn Action and Issues:

12. In the 3213 Penn Action (initiated on March 7, 2023), 3213 Penn was charged the 2021 tap-in rates, and 3213 Penn contended that the 2022 tap-in rates should apply.

13. The operative facts/pleadings are as follows:

- a. On August 2, 2021, PWSA issued an invoice and plan approval letter to 3213 Penn for \$348,110.03 pursuant to the 2021 tap-in rates; (See Exhibit E, Amended Complaint Paragraph 3 and Exhibit A to Exhibit B, tap-in plan approval letter and invoice and Exhibit F, PWSA Amended Answer and New Matter, Paragraphs 3 and 5)³;
- b. PWSA approved 3213's application on or about August 19, 2021, upon receipt of 3213 Penn's full fee payment. Exhibit F, Paragraph 6;
- c. The City of Pittsburgh Office of Permits, Licenses and Inspections ("PLI") required 3213 Penn to obtain an updated approval from PWSA, and the permit was not issued upon payment. Exhibit E, Paragraph 7;
- d. Pursuant to the PLI order, PWSA required 3213 Penn to resubmit the tap-in plans on March 11, 2022. Exhibit E, Paragraphs 9-12;
- e. PWSA approved the resubmitted tap-in plans on April 7, 2022, and issued the tap-in permit. Exhibit E, Paragraph 12 and Exhibit F, Paragraph 12;
- f. 3213 Penn contended it should receive a refund, and the 2022 tap-in rates should be utilized because no permit was issued until those rates were in effect, and any payment or approval prior to that date was meaningless.

14. PWSA contended that 53 Pa.C.S.A. § 5607(d)(24) and its policies provide that the fee is to be calculated at the time of permit "approval", which is the time of "payment." Exhibit F, Paragraphs 6, 8, 10, 11, 20, 21, 22, 24, and paragraph 17 of PWSA's new matter (Amended

³ The form letter and invoice are identical to the December 23, 2021 letter in Office Partners' action.

Answer and New Matter). And that approval of an application occurred “upon receipt of 3213’s full fee payment.” Exhibit F, Paragraph 17 of PWSA’s new matter.

15. All of PWSA’s pleadings in the 3213 Action were verified by Julie Ascioffa.

III. The foregoing Pleadings Are Judicial Admissions and Office Partners Should Be Permitted to Amend its Motion for Summary Judgment to Include the Same, and this Tribunal Should Find in Favor of Office Partners:

16. Clearly PWSA is making up ad hoc policy to justify its charging of the 2021 fees on a case to case basis, and it should not be rewarded for such conduct.

17. This information is material evidence, and this Tribunal should permit Office Partners to amend its Motion for Summary Judgment and/or its response to PWSA’s Motion for Summary Judgment because this information was not available to Office Partners until after the deadline to file said motions. *Commonwealth by Truscott v. Binenstock*, 57 A.2d 884 (Pa. 1948), *Monaco v. Gula*, 180 A.2d 893, (Pa. 1962).

18. Further, given the applicable statute and other facts admitted in this action, this Tribunal should find in favor of Office Partners on the merits of its action and hold that the 2022 tap-in rates apply as both a matter of fact and law.

19. Statements of fact by one party in pleadings, stipulations, testimony, and the like, made for that party's benefit, are judicial admissions and are binding on the party. *Nasim v. Shamrock Welding Supply Co.*, 563 A.2d 1266, 1267 (Pa.Super. 1989).

20. PWSA’s statements are statements of fact because it claims that it deems approval of a permit application as of the date it is paid. PWSA should be judicially estopped from claiming otherwise. *Tops Apparel Mfg. Co. v. Rothman*, 244 A.2d 436, (Pa. 1968).⁴

⁴ If not as a matter of law, the evidence and the controlling statute should guide this Tribunal to make a determination in favor of Office Partners.

WHEREFORE, it is Prayed that the PUC enter a verdict in this action in favor of Office Partners and against PWSA on the merits of the case and it is declared that the 2022 tap-in rates be applied to the permits at issue, and all funds in escrow in excess thereof be released to Office Partners. Alternatively, that Office Partners is granted 30 days to supplement its Motion for Summary Judgment, and an extension to reach a joint stipulation of facts be granted for 30 days from the date the supplement is due. And whatever other relief this Tribunal deems appropriate.

Respectfully submitted,

MAURICE A. NERNBERG & ASSOCIATES

Date: July 25, 2023

By 

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

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

Document Search

The Public Document Search tool allows you to access documents associated with a case such as public meeting orders, motions and statements, administrative law judge decisions, secretarial letters, etc. Documents dated from mid-2000 to present are available.

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Docket Number

Alpha-numeric code that identifies a case. Example: A-2019-1234567

C-2023-3038775

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Docket Nbr	Document Name	Post On Date	Document Type	Case Type	Utility Name	Utility Type
C-2023-3038775	JOINT REPORT OF THE PARTIES - PWSA	7/5/2023	Status Report	Formal Complaint	PITTSBURGH WATER AND SEWER AUTHORITY	Water (Municipal)
C-2023-3038775	C-2023-3038775 IO SETTING RESOLUTION CONFERENCE NOTICE.PDF	5/25/2023	Interim Order	Formal Complaint	PITTSBURGH WATER AND SEWER AUTHORITY	Water (Municipal)
C-2023-3038775	PETITION FOR EXTENTION OF TIME TO FILE REPLY TO NEW MATTER - 3213 PENN, LLC	5/4/2023	Petition for Extension of Time	Formal Complaint	PITTSBURGH WATER AND SEWER AUTHORITY	Water (Municipal)
C-2023-3038775	VERIFICATION TO ANSWER & NEW MATTER TO AMENDED COMPLAINT - PWSA	4/19/2023	Verification Statement	Formal Complaint	PITTSBURGH WATER AND SEWER AUTHORITY	Water (Municipal)
C-2023-3038775	NOTICE OF APPEARANCE - HORNAK & BUCK FOR PWSA	3/28/2023	Notice of Appearance	Formal Complaint	PITTSBURGH WATER AND SEWER AUTHORITY	Water (Municipal)

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From: David M. Nernberg <dmn@nernberg.com>
Sent: Tuesday, July 18, 2023 11:16 AM
To: Right To Know <righttoknow@pgh2o.com>
Subject: RE: RTK Request

CAUTION: This email originated from outside the authority. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Tracy,

I was recently informed you sent a formal response on July 11, 2023. I did not receive it. Can you please confirm and resend.

Thanks,

David.

From: Right To Know <righttoknow@pgh2o.com>
Sent: Thursday, July 6, 2023 2:26 PM
To: David M. Nernberg <dmn@nernberg.com>
Subject: RTK Request

Good afternoon,

Please see attached in regard to your request.

Thank you

From: David M. Nernberg <dmn@nernberg.com>
Sent: Wednesday, June 28, 2023 11:30 AM
To: Right To Know <RightToKnow@pgh2o.com>
Subject: RTK Request

CAUTION: This email originated from outside the authority. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Please see the attached right to know request.

David Nernberg

David Nernberg
Nernberg & Associates
301 Smithfield St.
Pittsburgh, PA 15222
412-232-0334
dmn@nernberg.com



Daniella A. Aceves

From: David M. Nernberg
Sent: Tuesday, July 18, 2023 11:38 AM
To: Daniella A. Aceves
Subject: FW: RTK Request
Attachments: Tracy Smith shared the folder "New folder" with you.

From: Tracy Smith <TSmith@pgh2o.com>
Sent: Tuesday, July 18, 2023 11:29 AM
To: David M. Nernberg <dmn@nernberg.com>
Subject: RE: RTK Request

Yes, of course.

I've attached it for you. Please let me know if I can be of further assistance.

Thank you



Tracy Smith
Risk Coordinator
Office: 412.255.8800
Cell: 412.475.5344

Pittsburgh Water and Sewer Authority
1200 Penn Ave, Pittsburgh, PA 15222

<https://pgh2o.com>



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t/daa07/18

1 to Page Office Partners_50.
2 Who is Mr. Flanagan? Do you
3 recognize that name?

4 A. I recognize the name. I believe he
5 was employed by the PA DEP.

6 Q. And other recipients copied on this
7 e-mail are a variety of entities, including the
8 Pittsburgh Water and Sewer Authority, Michael
9 Baker, Buccini/Pollin, and I see that you're
10 copied on this e-mail, as well as others.

11 On the last page of this exhibit,
12 Office Partners_50, there's a paragraph that
13 reads, "Based on the foregoing, please be
14 advised that the PWSA takes no exception to
15 designating the Block G flows entirely to the
16 First National Bank Financial Tower."

17 Does that sentence make sense to
18 you, based on the discussion that we just had
19 relating to flows and subdivision?

20 A. It does. It relates to PWSA
21 agreeing to prioritizing a time-sensitive
22 project, assigning flows that had previously
23 been approved for the entirety of that block to
24 that one parcel, and permitting progress on
25 subsequent approvals to advance.

1 A. Okay. Got it.

2 Q. If you could just read that e-mail
3 from Mr. Flanagan. Again, it's brief, it's
4 just several sentences.

5 Have you completed reading?

6 A. I have.

7 Q. In the middle of that e-mail
8 Mr. Flanagan states he characterizes this
9 agreement to approve something for the entire
10 site. And he states, "In order to move this
11 project forward."

12 Similar to the last question I just
13 asked you, does this, as far as Office Partners
14 is concerned, represent the PA DEP's approval
15 of moving this project forward as the
16 application then stood?

17 I can ask the question in a clearer
18 way.

19 A. If you can clarify which application
20 you're referring to. I think there's several
21 conversations here.

22 Q. Which applications are you thinking?
23 Which applications, as far as you and Office
24 Partners are concerned, are the subject of this
25 conversation in this exhibit?

1 Q. Okay. In the third bullet point
2 just above the language I just read,
3 Mr. Herring states that the disagreement is,
4 "In an effort to minimize delays."

5 Did Office Partners interpret this
6 agreement as a way to expedite consideration of
7 Office Partners' application?

8 A. Yes.

9 Q. Okay. On page Office Partners_48 of
10 the same exhibit, about halfway down there's an
11 e-mail from Thomas Flanagan, who I think we've
12 previously identified as working for the
13 Pennsylvania Department of Environmental
14 Protection. He sent that to a number of -- the
15 same entities that are the recipients of all
16 e-mails on this exhibit.

17 His e-mail is relatively brief, if
18 you could read it. It begins with "The tract
19 is the entire site."

20 A. Tell me again where that is.

21 Q. In the middle of the page. It's an
22 e-mail from Mr. Flanagan to Toby Partridge and
23 others, dated December 21, 2021, at 7:30 a.m.

24 A. What page are you on?

25 Q. I'm on Office Partners 48.

1 A. So there had been a prior approval
2 for a planning module, essentially, like a
3 capacity confirmation that had been relied upon
4 as being a completed approval.

5 A lot of these conversations deal
6 with a new interpretation for -- our belief
7 that it was a new interpretation that those
8 approvals needed to be revisited subsequent to
9 subdivision.

10 At the same time, it's my
11 understanding that we couldn't get a tap-in
12 permit -- a tap-in application approved until
13 such time that there were any questions
14 resolved with the planning module.

15 So they may be related, but I think
16 there are two distinct applications and
17 approvals that are being sought.

18 Q. You were copied on this specific
19 e-mail and on this broader communication that's
20 the subject of this exhibit, Mr. Kaplan.

21 Was your interpretation or the
22 interpretation of Office Partners at this time
23 that the PA DEP was going to stand in the way
24 of or otherwise impede either of the
25 applications that you just referenced, either



PENNSYLVANIA PUBLIC UTILITY COMMISSION

Amended Formal Complaint Docket # C-2023-3038775

*Filing this form begins a legal proceeding and you will be a party to the case.
If you do not wish to be a party to the case, consider filing an informal complaint.*

To complete this form, please type or print legibly in ink.

1. Customer (Complainant) Information

Provide your name, mailing address, county, telephone number(s), e-mail address and utility account number. It is your responsibility to update the Commission with any changes to your address and to where you want documents mailed to you.

Name 3213 Penn, LLC, c/o Bernstein Burkley, P.C.

Street/P.O. Box 601 Grant Street, 9th Floor

City Pittsburgh State PA Zip 15219

County Allegheny

Telephone Number(s) Where We Can Contact You During the Day (required):

(412) 456-8139 (Stuart Gaul, Esq.)

(412) 456-8122 (Mac Booker, Esq.)

E-mail Address (required): sgaul@bernsteinlaw.com, mbooker@bernsteinlaw.com

Utility Account Number (from your bill) PWSA Project # 20013.24

If your complaint involves utility service provided to a different address or in a different name than your mailing address, please list this information below.

Name: 3213 Penn, LLC

Street/P.O. Box: 3205 Penn Avenue

City Pittsburgh State PA Zip 15201

2. Name of Utility or Company (Respondent)

Provide the full name of the utility or company about which you are complaining. The name of your utility or company is on your bill.

Pittsburgh Water and Sewer Authority



3. Type of Utility Service

Check the box listing the type of utility service that is the subject of your complaint (check only one):

- | | |
|---|---|
| <input type="checkbox"/> ELECTRIC | <input type="checkbox"/> STORM WATER |
| <input type="checkbox"/> GAS | <input type="checkbox"/> WASTEWATER/SEWER |
| <input checked="" type="checkbox"/> WATER | <input type="checkbox"/> TELEPHONE/TELECOMMUNICATIONS (local, long distance) |
| <input type="checkbox"/> STEAM HEAT | <input type="checkbox"/> MOTOR CARRIER (e.g. taxi, moving company, limousine) |

4. Reason for Complaint

What kind of problem are you having with the utility or company? Check all boxes below that apply and state the reason for your complaint. Explain specifically what you believe the utility or company has done wrong. Provide relevant details including dates, times and places and any other information that may be important. If the complaint is about billing, tell us the amount you believe is not correct. Use additional paper if you need more space. Your complaint may be dismissed without a hearing if you do not provide specific information.

- The utility is threatening to shut off my service or has already shut off my service.

- I would like a payment agreement.

- Incorrect charges are on my bill. Provide dates that are important and an explanation about any amounts or charges that you believe are not correct. Attach a copy of the bill(s) in question if you have it/them.

- I am having a reliability, safety or quality problem with my utility service. Explain the problem, including dates, times or places and any other relevant details that may be important.

- Other (explain).

3213 Penn and the Project

1. 3213 Penn brings this complaint because the Pittsburgh Water and Sewer Authority (“PWSA”) is withholding more than \$345,000.00 of 3213 Penn’s money without any lawful justification to do so.

2. 3213 Penn is a real estate developer. It is developing a new residential complex (the “Project”) in the 3200 block of Penn Avenue in the Strip District of the City of Pittsburgh. In order to complete the Project and allow residents to move into it, 3213 Penn must tap into both fresh-water and sewer lines. PWSA provides and maintains the fresh-water and sewer lines in the vicinity of the Project.

3213 Penn’s \$348,110.03 Payment Under PWSA’s Prior Fee Schedule

3. 3213 Penn submitted its original application for the Project to tap into PWSA’s fresh-water and sewer lines in 2021. On or about August 2, 2021, PWSA approved 3213 Penn’s application (the “2021 Tap-In Approval”). Exhibit A.

4. At that time, PWSA operated under a published Fee Schedule (the “2020 Schedule”) that imposed both a “Water Tapping Fee” and a “Sewer Tapping Fee.” PWSA has asserted that it included this schedule in a tariff that it filed with this Commission.

5. For multi-family residences such as the Project, PWSA calculated both of these fees by determining the number of Equivalent Dwelling Units (“EDUs”) and multiplying the number of units by its per-unit rate. Because PWSA determined that the Project included 66.30 EDUs, PWSA required 3213 Penn pay a fee of \$348,110.03 within six months and before proceeding with the tap-in. See Exhibit B, 2020 PWSA Fee Schedule; Exhibit C, Permit Approval Including Fee Requirement. This fee included a tap-in fee of \$344,892.60 and other fees of \$3,217.43. 3213 Penn, by its managing member, paid the full \$348,110.03 demanded in fees to PWSA on or about August 19, 2021. Exhibit C.

6. On or about August 20, 2021, PWSA issued an approved tap-in permit to 3213 Penn. Exhibit C.

7. However, on or about October 18, 2021, the City of Pittsburgh Office of Permits, Licenses, and Inspections (“PLI”), demanded that 3213 Penn revise its fire permit submission. As part of these demanded revisions, PLI directed 3213 Penn to obtain an updated approval from PWSA that reflected PLI’s other demanded changes, which included an updated flow test. Exhibit D. On or about October 29, 2021, PWSA

advised 3213 Penn that, although PWSA did not believe that it actually required any new tests, PWSA would defer to PLI's demands on the issue. Exhibit E. PWSA's decision effectively canceled the 2021 Tap-In Approval, because 3213 Penn could not practically proceed with tap-in. In accordance with this new demand, 3213 Penn performed the updated flow test.

8. PWSA did not otherwise approve 3213 Penn's tap-in to PWSA's fresh-water and sewer lines prior to January 12, 2022, when PWSA abandoned the 2020 Fee Schedule.

The 2022 Application and the \$2,870.00 Fee

9. PWSA published a new fee schedule (the "2022 Schedule") on or about January 12, 2022. Exhibit F. This schedule was included in PWSA's tariff that became effective on that date ("2022 Tariff"). Exhibit G. Of particular importance here, neither the 2022 Schedule nor the 2022 Tariff includes the EDU-based tap-in fee that PWSA had included in the 2021 Schedule.

10. On or about March 11, 2022, PWSA advised 3213 Penn that 3213 Penn's application was incomplete and that 3213 Penn was required to resubmit the tap-in plan with revisions to comply with its 2022 Developer's Manual. PWSA also required 3213 Penn to pay a resubmission fee. Exhibit H. These PWSA-demanded revisions were non-substantive and did not include any technical changes to the plan.

11. On or about March 14, 2022, 3213 Penn submitted its tap-in plans for the Project. Under the 2022 Schedule, PWSA's fees for this tap-in are \$2,870.00. These fees include a \$400 fee for six-inch tap into the lines, \$1,540.00 for a compound three-inch meter, \$190.00 for a 5/8-inch by 3/4-inch meter to be used for the fire suppression system and \$740 for a development permit.

12. These new fees are \$345,240.03 less than the fees paid. Exhibit F. On or about March 24, 2022, PWSA provided comments on 3213 Penn's application. On or about April 7, 2022, PWSA approved 3213 Penn's application (the "2022 Tap-In Approval"). Exhibit I.

3213 Penn's Demand for a Refund and PWSA's Refusal

13. As noted above, PWSA's fees for 3213 Penn's 2022 application are \$345,240.03 less than the fees that 3213 Penn paid under the 2020 Schedule. This difference arose mostly because the 2022 Schedule and the 2022 Tariff eliminated EDU-based tap-in fees for approved developments like the Project. While 3213 Penn

paid that higher amount in support of the 2021 Tap-In Approval, PWSA effectively revoked that approval and made it impossible for 3213 Penn to proceed in reliance on it. 3213 Penn did nothing that caused that revocation. Rather, PWSA revoked that approval against its own judgment and solely because it chose to accede to PLI's determination.

14. PWSA directed 3213 Penn to reapply and pay a new resubmission fee in 2022. 3213 Penn has demanded that PWSA return to it the difference between the fee actually due for its 2022 application and the fees it actually paid for the revoked 2021 Tap-In Approval. This difference is more than \$345,000.00. To date, PWSA has not done so. To the contrary, though its attorney, PWSA claimed that it has retained this amount pursuant to a tariff in effect at the time of the approval of the application and refused to return any portion of the funds wrongfully retained.

Discrimination in Rates

15. PWSA's retention of 3213 Penn's funds when other similarly situated persons and entities approved to do similar work at the same time while being charged hundreds of thousands of dollars less subjects 3213 Penn to an "unreasonable prejudice or disadvantage" in violation of the Pennsylvania Public Utility Code. 66 Pa.C.S. § 1304.

Non-adherence to Tariffs

16. PWSA's retention of 3213 Penn's funds when other similarly situated persons and entities approved to do similar work at the same time while being charged hundreds of thousands of dollars less and when the published tariffs/rates indicate the lower amount constitutes the charging of a greater rate for a service rendered than that specified in the tariffs of applicable to PWSA. 66 Pa. C.S. § 1303. Further, this is a violation of the statutory requirement to "compute bills under the rate most advantageous to the patron." *Id.*

Unjust and Unreasonable Rates

17. The rates charged to 3213 Penn under the 2020 Schedule were not "just and reasonable." 66 Pa. C.S. § 1301. This is made clear by PWSA's reduction by orders of magnitude of those rates in the 2022 Schedule. On information and belief, it was in fact because PWSA recognized that the rates under the 2020 Schedule were not just and reasonable that it reduced those rates.

Additional Legal Harms Caused By PWSA's Actions

18. PWSA maintains that its unjust, inequitable, and wrongful retention of more than \$345,000 in 3213 Penn's funds was pursuant to published tariffs. As noted above, this retention was contrary to the Public Utility Code in multiple particulars. It is also, however, otherwise unlawful under Pennsylvania Law.

Unjust Enrichment

19. 3213 Penn conferred a benefit on PWSA by paying PWSA the \$348,110.03 that PWSA demanded as fees under the 2021 Tap-In Approval. PWSA has retained the full amount of this benefit.

20. The Parties entered into the final stages of an agreement when 3213 Penn was induced to pay the tap-in fee pursuant to the 2021 Fee Arrangement prior to receiving final approval to tap into the water system PWSA manages. After collecting the fee under the 2021 Fee Schedule, PWSA prevented 3213 Penn from proceeding with the tap-in, despite much later approving the tap-in plans without any technical changes to the application. Thus, despite the substantial payment made for the purpose of completing an agreement and tapping in the Project through the PWSA service, such agreement was not completed. As a result, when PWSA finally approved the Project without material changes under the 2022 Fee Schedule, the fees were vastly less than what 3213 Penn paid the prior year.

21. PWSA finally approved 3213 Penn's tap-in timeline on April 7, 2022. As a result, PWSA did not fully or functionally approve the tap-ins until after the tap-in fees were deemed unnecessary and eliminated, yet PWSA still demanded, accepted, and retained a payment of \$348,110.03 from 3213 Penn for the 2021 Tap-In Approval, upon which 3213 Penn was not able to act and which was not materially different from the 2022 Tap-In Approval. This is a substantial and unjustified enrichment of PWSA.

22. In essence, PWSA (a) induced 3213 Penn into a substantial payment, (b) effectively rescinded its approval of 3213 Penn's application, (c) subsequently eliminated the fees which 3213 Penn paid, (d) demanded a re-submission fee, and, only then, (e) provided final approval to tap-in to water services while retaining 3213 Penn's 2021 payment (as well as a resubmission fee). As a result of this scheme, 3213 Penn was forced to pay \$348,110.03 under the 2021 fee schedule for no benefit while, under the 2022 fee schedule, the period when 3213 Penn was actually able to proceed with its work, that payment had been significantly reduced to

\$2,870.00. Thus, PWSA has been unjustly enriched as a result of collecting, and refusing to return, an unjustified and substantial fee.

Quantum Meruit

23. PWSA promised 3213 Penn in 2021 that, if 3213 Penn paid the \$348,110.03 in tap-in and associated fees, PWSA would permit 3213 Penn to tap into PWSA's water lines to draw water for the residents who would live at the project. With the expectation of tapping into PWSA's water lines, 3213 Penn actually paid these fees. PWSA, as a result of inducing, receiving, and retaining 3213 Penn's 2021 fee payment, was conferred a monetary benefit of \$348,110.03.

24. By "approving" the tap-in schedule for 3213 Penn and collecting the tap-in fee, along with other fees, but not allowing tap in to proceed, while retaining the full fee payment it demanded for tap-in in 2021, PWSA substantially appreciated the benefit conferred by 3213 Penn. On or about January 12, 2022, PWSA eliminated the tap-in fees under which it extracted the fees from 3213 Penn, and yet retained the fees it had collected from 3213 Penn. Throughout this time, however, PWSA did not finalize its tap-in approval.

25. As a result, PWSA established a scheme where it received a full benefit from 3213 Penn, appreciated such benefit, failed to provide the service which the benefit was intended to secure, and subsequently ceased to demand the benefit from others for stated policy reasons that would apply equally to 3213 Penn. Other similarly situated parties in fact paid hundreds of thousands of dollars less for the same service from PWSA, at the same time, as was provided to 3213 Penn.

Breach of Contract

26. 3213 Penn and PWSA, pursuant to the approval under the 2021 Fee Arrangement, mutually assented to 3213 Penn's access to a tap-in service in exchange for monetary consideration. By accepting the 2021 application of 3213 Penn, collecting of 3213 Penn's payment pursuant to the 2021 Fee Schedule, and issuing the 2021 Tap-In Approval, PWSA contractually obligated itself to allow 3213 Penn to tap into its water and sewer lines.

27. PWSA repudiated this agreement when it effectively prevented 3213 Penn from proceeding with the tap-in in 2021. Despite this, PWSA has retained the funds that 3213 Penn paid to it as part of that agreement.

28. Furthermore, PWSA knew or should have known that its tap-in fees would be eliminated in 2022 at the time it agreed to the 2021 Fee Arrangement with 3213 Penn, but it kept that information secret while negotiating with 3213 Penn. In Pennsylvania, the negotiation of any agreement necessarily includes an implied covenant of good faith and fair dealing. Consequently, PWSA materially breached its agreement with 3213 Penn by breaking the implied covenant, as it was well aware it would reduce fees in 2022 and capitalized on the fact that 3213 Penn did not yet have access to this information.

29. Thus, PWSA induced 3213 Penn to agree to terms which PWSA itself knew to be unfair, causing the damages in the amount of \$345,240.03, the difference between the fees 3213 Penn initially paid to tap-in to the water line compared to the 2022 fees that would be incurred.

Reason for Amendment

30. 3213 Penn is amending its original complaint in response to a request from PWSA to include paragraph numbers as a convenience for preparation of a response.

5. Requested Relief

How do you want your complaint to be resolved? Explain what you want the PUC to order the utility or company to do. Use additional paper if you need more space.

3213 Penn asks that the Public Utility Commission:

1. Order that, in obtaining tap-in approval for the Project, 3213 Penn was obligated to pay PWSA no more than the amount calculated pursuant to the 2022 Schedule and the 2022 Tariff.
2. Order that the Pittsburgh Water and Sewer Authority pay to 3213 Penn, LLC \$345,240.03, the full amount of the PWSA overcharge which it has improperly, inequitably, and wrongfully retained.

3. Order that the Pittsburgh Water and Sewer Authority pay to 3213 Penn, LLC a reasonable rate of interest on the amounts which it has improperly, inequitably, and wrongfully retained.
4. Order that the Pittsburgh Water and Sewer Authority pay to 3213 Penn, LLC an amount representing 3231 Penn, LLC's reasonable attorney fees related to this action.
5. Order such other relief as the Commission deems to be just and proper.

6. Protection From Abuse (PFA)/ Domestic Violence

Has a court granted you a "Protection From Abuse" order or any other order which provides clear evidence of domestic violence against you that is currently in effect for your personal safety or welfare? The PUC needs this information to properly process your complaint so that your identity is not made public.

Has a court granted a "Protection From Abuse" order or any other order for your personal safety or welfare?

YES
 NO

If your answer to the above question is "yes," attach a copy of the current Protection From Abuse order to this Formal Complaint form.

7. Prior Utility Contact

a. Is this an appeal from a decision of the PUC's Bureau of Consumer Services (BCS)?

YES
 NO

b. If this is not an appeal from a BCS decision, have you spoken to a utility or company representative about this complaint?

YES
 NO

c. If you tried to speak to a utility company representative about your complaint but were not able to do so, please explain why.

Counsel for PWSA expressed the belief that PWSA's retention of \$345,240.03 despite failing to provide services until a time when the rates/tariffs were significantly reduced was lawful, and that

PWSA would not provide any relief to 3213 Penn. A copy of this correspondence is attached to this Complaint as Exhibit J.

8. Legal Representation

If you are filing a Formal Complaint as an individual on your own behalf, you are **not** required to have a lawyer. You may represent yourself at the hearing.

If you are already represented by a lawyer **in this matter**, provide your lawyer's name, address, telephone number, and e-mail address, (all required contact information). Please make sure your lawyer is aware of your complaint. If represented by a lawyer, both you and your lawyer must be present at your hearing.

Lawyer's Name Stuart C. Gaul, Jr., D. McArdle Booker

Street/P.O. Box 601 Grant Street, 9th Floor

City Pittsburgh State Pennsylvania Zip 15219

Area Code/Phone Number (412) 456-8139

E-mail Address sgaul@bernsteinlaw.com; mbooker@bernsteinlaw.com

9. Verification and Signature

You must sign your complaint. Individuals filing a Formal Complaint **must** print or type their name on the line provided in the verification paragraph below and **must** sign and date this form in **ink**. If you do not sign the Formal Complaint, the PUC **will not accept it**.

Verification:

I Shawn Kichline, hereby state that the facts above set forth are true and correct (or are true and correct to the best of my knowledge, information and belief) and that I expect to be able to prove the same at a hearing held in this matter. I understand that the statements herein are made subject to the penalties of 18 Pa. C.S. § 4904 (relating to unsworn falsification to authorities).


(Signature of Complainant)

3/22/23
(Date)

Managing Partner of Managing Member of 3213 Penn, LLC

Title of authorized employee or officer (only applicable to corporations, associations, partnerships, limited liability companies or political subdivisions)

10. How to File Your Formal Complaint

Electronically. You must create an account on the PUC's eFiling system, which may be accessed at <http://www.puc.pa.gov/efiling/default.aspx>.

Mail. Mail the completed form with your original signature and any attachments, by certified mail, priority mail, or overnight delivery to this address and retain the tracking information as proof of submission:

**Secretary
Pennsylvania Public Utility Commission
400 North Street
Harrisburg, Pennsylvania 17120**

If you are appealing a BCS decision: follow the directions in the cover letter you received from the Secretary's Bureau with the formal complaint form. **ONLY** Formal complaints appealing a BCS decision can be filed by fax, email or overnight delivery to meet filing deadlines. **All other formal complaints MUST be eFiled or mailed.**

If you have any questions about filling out this form, please contact the Secretary's Bureau at 717-772-7777.

Keep a copy of your Formal Complaint for your records.

Please know that your complaint form and the utility's answer will not be published to the PUC's website. Once your complaint case moves to the Office of Administrative Law Judge, any filings you make should be marked confidential if you do not want them published to the website.

EXHIBIT A



Pittsburgh
Water & Sewer
Authority

August 2, 2021

3213 Penn LLC
421 W. State Street
Columbus, OH 43215

**RE: 3205 Penn Avenue - 15201
Water and Sewer Tap-in Plans**

Dear 3213 Penn LLC,

The Pittsburgh Water and Sewer Authority (PWSA) has approved the tap-in plans for the above referenced project.

The fees have been calculated and are attached for your reference. Permits are not considered issued until permit fees are paid.

Due to the closure of the PWSA permit counter in response to COVID-19, payments will be accepted by mail only. Please send check or money order to Pittsburgh Water and Sewer Authority at 1200 Penn Avenue, PGH, PA, 15222, Attention: Permits. Permits will be processed and emailed after payment is received.

If you have any questions, please feel free to contact me at (412) 255-8800 x8030.

Sincerely,

A handwritten signature in cursive script that reads 'Wendy M. Dean'.

Wendy M. Dean
Engineering Tech II

Attachment

cc: PWSA File

Penn Liberty Plaza I
1200 Penn Avenue
Pittsburgh PA 15222

info@pgh2o.com
T 412.255.2423
F 412.255.2475

www.pgh2o.com
@pgh2o

Customer Service /
Emergencies:
412.255.2423



Pittsburgh
Water & Sewer
Authority

C-2045
3213 PENN LLC
3205 Penn Avenue – 15201

66.30	Water EDU's	=	\$147,451.20
66.30	Sewer EDU's	=	\$197,441.40
(1)	6" tap	=	\$1,314.43
(1)	3" meter	=	\$1,668.00 – Compound Domestic
(1)	5/8" x 3/4" meter	=	\$235.00 - Fireline

TOTAL = \$348,110.03

Please make check or money order payable to PWSA or Pittsburgh Water and Sewer Authority. The approved permit will be processed and emailed after payment has been received.

**** PLEASE NOTE ****
PAYMENT FOR PERMITS MUST BE RECEIVED WITHIN 6 MONTHS FROM 8/2/2021. IF PERMITS ARE NOT PAID FOR WITHIN THIS PERIOD, THIS PROJECT AND PLANS WILL BE VOIDED AND WILL REQUIRE THIS PROJECT TO START FROM THE BEGINNING.

Penn Liberty Plaza I
1200 Penn Avenue
Pittsburgh PA 15222

info@pgh2o.com
T 412.255.2423
F 412.255.2475

www.pgh2o.com
@pgh2o

Customer Service /
Emergencies:
412.255.2423

EXHIBIT B



2020 Fee Schedule

1 Single-Family Home = 1 EDU 1 PWSA EDU = 300 GPD		Waterline Shut (based on size of waterline in inches, fees are doubled for night work)	
Water Tapping Fee	\$2,224/EDU	4-12	\$1,233.23
Sewer Tapping Fee	\$2,978/EDU	16-24	\$2,009.70
Tap-In Drawing Review Fee (max. 2 reviews)	\$250	30-48	\$3,283.53
Tap-In Drawing Review Fee (additional reviews when more than 2 are required)	\$250/review	Deposit**	\$5,000.00
Permit Revisions	\$250/review	**Must be cashier's check or money order	
Connection Fee (based on size of tap in inches, fees are doubled for night work)		\$4,500 of deposit will be refunded when water is restored	
1	\$177.63	Hydrant Flow Test	\$500
1 1/2	\$329.88	Hydrant with Meter (based on size in inches)	
4	\$1,106.35	\$500 + meter cost	
6	\$1,314.43	5/8	\$680.00
8	\$1,349.95	3/4	\$780.00
10	\$1,415.93	1	\$960.00
12	\$1,481.90	2 1/2	\$1,039.50
Water Meters (based on size of meter in inches, purchased from and installed by PWSA)			
Domestic		Compound Domestic	
5/8	\$235.00	3	\$1,668.00
5/8 x 3/4 (fireline by-pass or deduct meter)	\$235.00	4	\$1,970.50
3/4	\$252.00	6	\$2,961.00
1	\$289.00	8	\$4,881.00
1 1/2	\$492.00	Fire Systems (Turbine)	
2	\$592.00	3	\$1,997.50
Turbine Domestic		4	\$2,268.00
2	\$771.50	6	\$3,041.00
3	\$1,045.00	8	\$3,593.50
4	\$1,334.00	10	\$4,761.00
6	\$2,189.00	Fire Systems (Compound)	
8	\$3,144.50	4	\$2,362.00
10	\$5,068.00	6	\$4,433.50
12	\$9,286.50	8	\$7,173.50
16	\$10,468.00	10	\$11,219.00

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

3213 PENN, LLC,)	
)	
Complainant,)	
)	
vs.)	Docket No. C-2023-3038775
)	
THE PITTSBURGH WATER AND SEWER)	
AUTHORITY,)	
)	
Respondent.)	

**RESPONDENT THE PITTSBURGH WATER AND SEWER AUTHORITY'S
AMENDED ANSWER AND NEW MATTER TO
COMPLAINANT'S AMENDED COMPLAINT**

AND NOW comes Respondent, The Pittsburgh Water and Sewer Authority (the "PWSA"), by and through its undersigned counsel, pursuant to 52 Pa. Code §§ 5.61-5.62, and files the following Amended Answer and New Matter to the Amended Complaint (the "Complaint") filed by Complainant, 3213 Penn, LLC ("3213"), as follows:

3213 Penn and the Project¹

1. This paragraph of the Complaint contains conclusions of law to which no response is required. To the extent that a response is deemed necessary, these averments are denied with strict proof demanded of the same. The PWSA denies any and all liability to 3213.
2. Admitted in part and denied in part. It is admitted that, upon information and belief, 3213 is developing residential property in the Strip District of Pittsburgh (the "Project"). It is also admitted that the PWSA provides and maintains certain water and sewer lines in the vicinity of the

¹ To aid the Commission and for ease of reference purposes, the PWSA incorporates verbatim the subheadings 3213 uses in its Complaint. The PWSA's incorporation of such subheadings shall not be deemed admissions by the PWSA, nor the adoption of any facts, allegations, or arguments contained in, or implied by, the subheadings.



Project. After reasonable investigation, the PWSA is without knowledge or information sufficient so as to form a belief as to the truth of the remaining averments contained in this paragraph of the Complaint and, accordingly, the same are denied with strict proof thereof demanded. Any remaining averments are denied with strict proof demanded thereof.

3213 Penn's \$348,110.03 Payment Under PWSA's Prior Fee Schedule

3. Admitted in part and denied in part. The averments of this paragraph refer to written documentation, the contents of which are self-explanatory, and any attempt to mischaracterize them is denied. By way of further answer, the PWSA admits that the 3213 application was initiated, evaluated and ultimately completed and approved in 2021. Any remaining averments are denied with strict proof demanded thereof.

4. The averments of this paragraph refer to written documentation, the contents of which are self-explanatory, and any attempt to mischaracterize them is denied.² Any remaining averments are denied with strict proof demanded thereof.

5. Admitted in part and denied in part. The averments of this paragraph refer, in part, to written documentation, the contents of which are self-explanatory, and any attempt to

² The PWSA incorporates herein the PWSA Rates, Rules and Regulations applicable at the time when 3213's application was received, considered and approved (the "2021 Tariff"), as well as the PWSA Rates, Rules and Regulations in effect after January 12, 2022 (the "2022 Tariff"). The PWSA does not admit, and affirmatively denies, that the 2022 Tariff applies to 3213's application.

More specifically, the original PUC Tariff that forms the basis of this matter is set forth at PUC Docket No. R-2018-3002647, and can be found at <https://www.puc.pa.gov/pedocs/1607875.pdf>. It was effective March 1, 2019 and set forth the following Tapping Fee:

Collection Fee	\$1,701 Per EDU*
Capacity Fee	\$1,277 Per EDU*
Total Tapping Fee	\$2,978 Per EDU*
	* 300 gpd/EDU.

mischaracterize them is denied. It is admitted that the PWSA calculated fees for multi-family residences such as the Project in accordance with the 2021 Tariff when the underlying applications were received, considered and approved in 2021. It is further admitted that 3213 paid the fees properly due and owing to the PWSA pursuant to the 2021 Tariff in the amount of \$348,110.03 on or about August 19, 2021. After reasonable investigation, the PWSA is without knowledge or information sufficient so as to form a belief as to the truth of the remaining averments contained in this paragraph of the Complaint and, accordingly, the same are denied with strict proof thereof demanded. Any remaining averments are denied with strict proof demanded thereof.

6. Admitted in part and denied in part. The averments of this paragraph refer, in part, to written documentation, the contents of which are self-explanatory, and any attempt to mischaracterize them is denied. It is admitted only that the PWSA approved 3213's application on or about August 19, 2021, upon receipt of 3213's full fee payment. Any remaining averments are denied with strict proof demanded thereof.

7. Admitted in part and denied in part. The averments of this paragraph refer, in part, to written documentation, the contents of which are self-explanatory, and any attempt to mischaracterize them is denied. This paragraph of the Complaint relating to the PWSA's "effective[]" cancellation contains conclusions of law to which no response is required. To the extent that a response is deemed necessary, these averments are denied with strict proof demanded of the same. To the contrary, it is expressly denied that any decision by the PWSA "effectively

The 2021 Tariff, set forth at PUC Docket No. R-2020-3017970, and which can be found at <https://www.puc.pa.gov/pcdocs/1687421.pdf>, indicated "No Changes to Part III, Section G, Tapping Fee from Original PUC Tariff" and, thus, the 2019 rates continued to apply to the Plaintiff's 2021 application.

Then, the 2022 PUC Tariff, set forth at PUC Docket No. R-2021-3024774, and which can be found at <https://www.puc.pa.gov/pcdocs/1729291.pdf>, was effective January 12, 2022 and removed the Tapping Fee from Part III, Section G of the PUC Tariff set forth above.

canceled” 3213’s application because any purported revisions were to the already-approved 2021 tap-in plans, and were made in response to the direction of a different governmental entity. Finally, after reasonable investigation, the PWSA is without knowledge or information sufficient so as to form a belief as to the truth of the remaining averments contained in this paragraph of the Complaint and, accordingly, the same are denied with strict proof thereof demanded. Any remaining averments are denied with strict proof demanded thereof.

8. Denied. To the contrary, the PWSA approved 3213’s application on or about August 19, 2021, upon receipt of 3213’s full fee payment. Therefore, any purported revisions after that date were to the already-approved 2021 tap-in plans. Further, it is expressly denied that the PWSA “abandon[ed]” the 2021 Tariff. To the contrary, the 2022 PUC Tariff was effective January 12, 2022 and, among other things, removed the Tapping Fee from the 2021 Tariff.

The 2022 Application and the \$2,870.00 Fee

9. Admitted in part and denied in part. The averments of this paragraph refer to written documentation, the contents of which are self-explanatory, and any attempt to mischaracterize them is denied. It is admitted only that the 2022 PUC Tariff was effective January 12, 2022 and, among other things, removed the Tapping Fee from the 2021 Tariff. Any remaining averments are denied with strict proof demanded thereof.

10. Admitted in part and denied in part. The averments of this paragraph refer to written documentation, the contents of which are self-explanatory, and any attempt to mischaracterize them is denied. It is admitted only that the PWSA approved 3213’s application on or about August 19, 2021, upon receipt of 3213’s full fee payment. Therefore, any purported

revisions after that date were to the already-approved 2021 tap-in plans. Any remaining averments are denied with strict proof demanded thereof.

11. Denied. To the contrary, on or about March 14, 2022, 3213 submitted modifications to its already-approved 2021 tap-in plans. By way of further answer, the PWSA approved 3213's application on or about August 19, 2021, upon receipt of 3213's full fee payment. Thus, the 2022 PUC Tariff did not and does not apply to 3213's March 14, 2022 modifications. After reasonable investigation, the PWSA is without knowledge or information sufficient so as to form a belief as to the truth of the remaining averments contained in this paragraph of the Complaint and, accordingly, the same are denied with strict proof thereof demanded.

12. Denied. The averments of this paragraph refer, in part, to written documentation, the contents of which are self-explanatory, and any attempt to mischaracterize them is denied. It is further expressly denied that the PWSA "approved" anything but 3213's March 14, 2022 modifications to its already-approved 2021 tap-in plans. After reasonable investigation, the PWSA is without knowledge or information sufficient so as to form a belief as to the truth of the remaining averments contained in this paragraph of the Complaint and, accordingly, the same are denied with strict proof thereof demanded.

3213 Penn's Demand for a Refund and PWSA's Refusal

13. Denied. This paragraph of the Complaint relating to the PWSA's "effective[]" revocation contains conclusions of law to which no response is required. To the extent that a response is deemed necessary, these averments are denied with strict proof demanded of the same. To the contrary, it is expressly denied that any decision or action by the PWSA "effectively revoked" 3213's application because any purported revisions were to the already-approved 2021 tap-in plans. It is further expressly denied that the PWSA "approved" anything but 3213's March

14, 2022 modifications to its already-approved 2021 tap-in plans. Finally, after reasonable investigation, the PWSA is without knowledge or information sufficient so as to form a belief as to the truth of the remaining averments contained in this paragraph of the Complaint and, accordingly, the same are denied with strict proof thereof demanded.

14. Admitted in part and denied in part. It is expressly denied that the PWSA directed 3213 to “reapply” in 2022. To the contrary, 3213’s March 14, 2022 modifications were to its already-approved 2021 tap-in plans. The remaining averments contained in this paragraph of the Complaint are conclusions of law to which no response is required. To the extent that a response is deemed necessary, these averments are denied with strict proof demanded of the same.

Discrimination In Rates

15. This paragraph of the Complaint contains conclusions of law to which no response is required. To the extent that a response is deemed necessary, these averments are denied with strict proof demanded of the same. The PWSA specifically denies any discrimination in its application of the subject Tariff or in its rates, and the PWSA denies any and all liability to 3213.

Non-adherence to Tariffs

16. This paragraph of the Complaint contains conclusions of law to which no response is required. To the extent that a response is deemed necessary, these averments are denied with strict proof demanded of the same. The PWSA specifically denies any non-adherence to applicable laws, rules or regulations, and the PWSA denies any and all liability to 3213. To the contrary, as part of the 2022 PUC Tariff and part of its continuing transition to regulation by the Commission, the PWSA introduced changes to residential and commercial permitting fees to simplify and standardize water, sewer, and stormwater costs. The changes came after a comprehensive 2021 fee study that evaluated the labor and material costs associated with our

permitting functions and best practices across the industry.³ The fee study was reviewed and approved by the Commission after a nine-month litigation process.⁴

Unjust and Unreasonable Rates

17. Denied. This paragraph of the Complaint relating to the citation to statutory authority contains conclusions of law to which no response is required. To the extent that a response is deemed necessary, these averments are denied with strict proof demanded of the same. The remaining averments contained in this paragraph of the Complaint are denied. The PWSA specifically denies any non-adherence to applicable laws, rules or regulations, and the PWSA denies any and all liability to 3213. To the contrary, as part of the 2022 PUC Tariff and part of its continuing transition to regulation by the Commission, the PWSA introduced changes to residential and commercial permitting fees to simplify and standardize water, sewer, and stormwater costs. The changes came after a comprehensive 2021 fee study that evaluated the labor and material costs associated with our permitting functions and best practices across the industry.⁵ The fee study was reviewed and approved by the Commission after a nine-month litigation process.⁶

Additional Legal Harms Caused By PWSA's Action

18. This paragraph of the Complaint contains conclusions of law to which no response is required. To the extent that a response is deemed necessary, these averments are denied with

³ See <https://www.pgh2o.com/news-events/news/newsletter/2022-01-28-development-report-pwsas-new-permitting-fees-support>.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

strict proof demanded of the same. To the contrary, the PWSA is upholding its obligations to its ratepayers by requiring 3213 to pay the 2021 fees assessed, as the PWSA uniformly has done with other similarly-situated applicants.

Unjust Enrichment

19. This paragraph of the Complaint contains conclusions of law to which no response is required. To the extent that a response is deemed necessary, these averments are denied with strict proof demanded of the same.

20. This paragraph of the Complaint contains conclusions of law to which no response is required. To the extent that a response is deemed necessary, these averments are denied with strict proof demanded of the same. To the contrary, the PWSA approved 3213's application on or about August 19, 2021, upon receipt of 3213's full fee payment. Further, 3213's March 14, 2022 modifications were to its already-approved 2021 tap-in plans.

21. Denied. This paragraph of the Complaint relating to a purported "substantial and unjustified enrichment" contains conclusions of law to which no response is required. To the extent that a response is deemed necessary, these averments are denied with strict proof demanded of the same. The remaining averments contained in this paragraph of the Complaint are expressly denied. To the contrary, the PWSA approved 3213's application on or about August 19, 2021, upon receipt of 3213's full fee payment. Further, 3213's March 14, 2022 modifications were to its already-approved 2021 tap-in plans.

22. This paragraph of the Complaint contains conclusions of law to which no response is required. To the extent that a response is deemed necessary, these averments are denied with strict proof demanded of the same. The remaining averments contained in this paragraph of the Complaint are denied. To the contrary, the PWSA approved 3213's application on or about August

19, 2021, upon receipt of 3213's full fee payment. Further, 3213's March 14, 2022 modifications were to its already-approved 2021 tap-in plans.

Quantum Merit

23. This paragraph of the Complaint contains conclusions of law to which no response is required. To the extent that a response is deemed necessary, these averments are denied with strict proof demanded of the same.

24. This paragraph of the Complaint contains conclusions of law to which no response is required. To the extent that a response is deemed necessary, these averments are denied with strict proof demanded of the same. To the contrary, the PWSA approved 3213's application on or about August 19, 2021, upon receipt of 3213's full fee payment. Further, 3213's March 14, 2022 modifications were to its already-approved 2021 tap-in plans.

25. This paragraph of the Complaint contains conclusions of law to which no response is required. To the extent that a response is deemed necessary, these averments are denied with strict proof demanded of the same. To the contrary, the PWSA is upholding its obligations to its ratepayers by requiring 3213 to pay the 2021 fees assessed, as the PWSA uniformly has done with other similarly-situated applicants.

Breach of Contract

26. This paragraph of the Complaint contains conclusions of law to which no response is required. To the extent that a response is deemed necessary, these averments are denied with strict proof demanded of the same.

27. This paragraph of the Complaint contains conclusions of law to which no response is required. To the extent that a response is deemed necessary, these averments are denied with strict proof demanded of the same.

28. This paragraph of the Complaint contains conclusions of law to which no response is required. To the extent that a response is deemed necessary, these averments are denied with strict proof demanded of the same.

29. This paragraph of the Complaint contains conclusions of law to which no response is required. To the extent that a response is deemed necessary, these averments are denied with strict proof demanded of the same.

Reason for Amendment

30. It is admitted only that the PWSA requested 3213 to amend its original complaint to comply with 52 Pa. Code § 1.31. The original complaint did not comply with that regulatory provision.

PWSA'S NEW MATTER

1. The PWSA incorporates by reference the preceding paragraphs of this Answer as if the same were set forth at length herein.

2. 3213 is not entitled to relief under any circumstances as a matter of law.

3. At all relevant times hereto, 3213 was developing residential property known as the Project, as defined above.

4. 3213's construction of the Project requires PWSA approval of an application for the connection to a PWSA main. See 53 Pa.C.S.A. § 5607(d)(24) (among other things, authorizing the PWSA to "charge enumerated fees to property owners who desire to or are required to connect to the authority's sewer or water system.").

5. 53 Pa.C.S.A. § 5607(d)(24) further provides, in relevant part: "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." (Emphasis added.)

6. 53 Pa.C.S.A. § 5607(d)(24) must be interpreted pursuant to its plain language in accordance with rules of statutory interpretation.

7. Per the express language of 53 Pa.C.S.A. § 5607(d)(24), fees are payable *at the time of application*, and fees are determined based upon the duly adopted fee schedule which is in effect at the time of payment, *i.e.*, the time of application. See also PWSA Tariff (effective January 14, 2021) ("A Main Extension Applicant shall pay enumerated fees to the Authority. 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.").

8. Per the PWSA's Developer's Manual then in effect: "All fees are established in the PWSA Water and Wastewater Tariffs and approved by the PUC." See Ex. 1, p. 35. A true and correct copy of the PWSA's 2021 Developer's Manual is attached hereto as Exhibit "1."

9. The PUC Tariff that forms the basis of this matter was effective March 1, 2019 and is set forth at PUC Docket No. R-2018-3002647, providing the following Tapping Fee:

Collection Fee	\$1,701 Per EDU*
Capacity Fee	\$1,277 Per EDU*

Total Tapping Fee \$2,978 Per EDU*
 * 300 gpd/EDU.

10. The 2021 PUC Tariff, set forth at PUC Docket No. R-2020-3017970, indicated: “No Changes to Part III, Section G, Tapping Fee from Original PUC Tariff;” thus, the 2019 rates continued to apply to 2021 applications.

11. The PWSA Developer’s Manual provides: “PWSA will calculate the appropriate fees based upon the related project information submitted by the applicant.” *See Ex. 1, p. 35.*

12. The PWSA Developer’s Manual states: “After the final review, PWSA will supply the applicant with a permit fee invoice.” *See Ex. 1, p. 20.*

13. 3213 submitted an application to tap in to the PWSA’s infrastructure in 2021.

14. On August 2, 2021, the PWSA accepted and approved 3213’s application, identifying the fees due and owing as \$348,110.03.

15. The PWSA calculated fees for multi-family residences such as the Project in accordance with the 2021 Tariff when the underlying applications were received, considered and approved in 2021.

16. 3213 paid the fees properly due and owing to the PWSA pursuant to the 2021 Tariff in the amount of \$348,110.03 on or about August 19, 2021.

17. The PWSA approved 3213’s application on or about August 19, 2021, upon receipt of 3213’s full fee payment.

18. Any purported revisions after August 19, 2021 were to 3213’s already-approved 2021 tap-in plans.

19. The 3213 application was initiated, evaluated and ultimately completed and approved in 2021.

20. At no point during 3213's application or modification process did it request a reduction in fees.

21. As part of the 2022 PUC Tariff and part of its continuing transition to regulation by the Commission, the PWSA introduced changes to residential and commercial permitting fees to simplify and standardize water, sewer, and stormwater costs.

22. The changes came after a comprehensive 2021 fee study that evaluated the labor and material costs associated with our permitting functions and best practices across the industry.⁷

23. The fee study was reviewed and approved by the Commission after a nine-month litigation process.⁸

24. The 2022 PUC Tariff was effective January 12, 2022.

25. When 3213 learned that the PWSA's tariff rates changed to a structure that eliminated tap-in fees, 3213 sought to obtain a refund of already-paid fees.

26. When 3213 sought a refund, it was advised by the PWSA that the 2021 fees previously conveyed to 3121 pursuant to the 2021-approved application were applicable.

27. 3213 is nevertheless essentially asking the Commission to permit 3213 to exempt itself from a mandatory statute requiring 3213 to pay the 2021 fees in effect at the time of its application and approval.

28. The applicable fees must be determined pursuant to the date 3213 applied for its permit and the date when such application was approved, and, as such, the controlling fees are the 2021 fees.

⁷ See <https://www.pgh2o.com/news-events/news/newsletter/2022-01-28-development-report-pwsas-new-permitting-fees-support>.

⁸ *Id.*

29. 3213 submitted an application for a tap-in permit in 2021; that application was considered and negotiated throughout 2021; that application was ultimately approved and invoiced in 2021; and that invoice was paid in 2021.

30. The 2021 application was only *modified* by 3213 in 2022 and, as admitted by 3213, any purported changes to 3213's 2021 application in 2022 were non-substantive and not technical.

31. 3213 cannot rely on its non-substantive and not technical modifications to shirk its statutory obligations to pay the 2021 fees.

32. 3213 does not and cannot identify any factual or legal support for the proposition that such modifications have the legal or factual effect of exempting such application from the rates applicable to such application when it was initially presented, considered, approved, invoiced, and paid.

33. 3213's arguments and allegations ignore the deleterious result to the public that would result from depriving the PWSA and its ratepayers of the amounts that are due under the 2021 fee structure in place when 3213 applied for the subject permit, and 3213's actions represent an attempt to obtain favorable rates at the expense of the PWSA's ratepayers.

34. The PWSA is upholding its obligations to its ratepayers by requiring 3213 to pay the 2021 fees assessed, as the PWSA uniformly has done with other similarly-situated applicants.

35. The PWSA acted reasonably in its consideration and approval of 3213's application for the subject permit.

36. The PWSA's treatment of 3213's application was consistent with its treatment of other applicants similarly-situated to 3213 and represented a rational and fair attempt to protect the interests of applicants for permits and ratepayers alike.

37. 3213's causes of action are barred by the defenses of consent, justification, waiver, payment, privilege, estoppel, and the voluntary payment doctrine.

38. 3213 cannot recover money voluntarily paid with a full knowledge of the facts and without any fraud, duress, or extortion, even if no obligation to make such payment existed.

39. The PWSA acted in full compliance with its obligations under applicable laws, rules and regulations throughout the longevity of its consideration and approval of 3213's application.

WHEREFORE, the PWSA respectfully requests that: (1) the relief sought in the Complaint be denied, upon a finding that 3213 is not permitted to obtain a refund for an approved and paid application for the purpose of securing a more favorable rate; (2) declare that the 2021 Tariff rates apply to 3213's permit; and (3) dismiss 3213's Complaint against the PWSA with prejudice.

Dated: July 6, 2023

/s/ Ashley L. Buck Esq.

Samuel A. Hornak, Esquire

Pa. I.D. No. 312360

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Attorneys for Respondent,

The Pittsburgh Water and Sewer Authority

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 **MOTION TO AMEND AND SUPPLEMENT MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO PWSA'S MOTION FOR SUMMARY JUDGMENT AND TO EXTEND TIME FOR STIPULATIONS AND STATUS REPORT** was served via email upon following:

Samuel A. Hornak, Esq.
Ashley L. Buck, Esq.
CLARK HILL PLC
One Oxford Centre
301 Grant Street, 14th Floor
Pittsburgh, PA 15219
shornak@clarkhill.com
abuck@clarkhill.com

Date: July 25, 2023



David M. Nernberg

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,

ORDER OF COURT

AND NOW, this _____ day of _____, 2023, it is hereby ORDERED that a verdict be entered in this action in favor of Office Partners and against PWSA on the merits of the case and it be declared that the 2022 tap-in rates be applied to the permits at issue and all funds in escrow in excess thereof be released to Office Partners. Alternatively, that Office Partners is granted 30 days to supplement its Motion for Summary Judgment and an extension to reach a joint stipulation of facts be granted for 30 days from the date the supplement is due.

BY THE COURT:

_____ J.