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August 8, 2023

**Via Electronic Filing**

Rosemary Chiavetta, Secretary  
PA Public Utility Commission  
P.O. Box 3265  
Harrisburg, PA 17105-3265

Re: John Kerr Musgrave, IV v. Pittsburgh Water and Sewer Authority  
Docket No. C-2020-3020714

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Dear Secretary Chiavetta:

Enclosed for electronic filing please find The Pittsburgh Water and Sewer Authority's Exceptions with regard to the above-referenced matter. Copies to be served in accordance with the attached Certificate of Service.

Sincerely,

*/s/ Lauren M. Burge*

Lauren M. Burge

Enclosure

Cc: Hon. Katrina L. Dunderdale w/enc.  
Cert. of Service w/enc.  
[Ra-osa@pa.gov](mailto:Ra-osa@pa.gov) w/enc.

## **CERTIFICATE OF SERVICE**

I hereby certify that this day I served a copy of PWSA's Exceptions upon the persons listed below in the manner indicated in accordance with the requirements of 52 Pa. Code Section 1.54.

### **Via Email Only**

John Kerr Musgrave, IV  
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Hon. Katrina L. Dunderdale  
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PA Public Utility Commission  
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Dated: August 8, 2023

/s/ *Lauren M. Burge*

Lauren M. Burge, Esq.

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

John Kerr Musgrave, IV,	:	
Complainant	:	
	:	
v.	:	Docket No. C-2020-3020714
	:	
The Pittsburgh Water and Sewer Authority,	:	
Respondent	:	
	:	

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**EXCEPTIONS OF  
THE PITTSBURGH WATER AND SEWER AUTHORITY**

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**I. INTRODUCTION**

John Kerr Musgrave, IV (“Complainant”) filed a Formal Complaint against The Pittsburgh Water and Sewer Authority (“PWSA” or “Authority”) with the Pennsylvania Public Utility Commission (“PUC” or “Commission”), which was served on July 8, 2020. In his initial Formal Complaint and subsequent Amended Formal Complaint, Mr. Musgrave raised a variety of issues related to the party water service line that served the property located at 6059 Bunkerhill Street prior to November 11, 2020.<sup>1</sup> The vast majority of those issues were either resolved or previously addressed, dismissed and/or withdrawn from this proceeding. The sole remaining issue in this proceeding is whether PWSA had maintenance or repair responsibility over the service line running along the private portion of Bunkerhill Street prior to November 11, 2020, and whether PWSA failed to perform those maintenance/repair responsibilities, resulting

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<sup>1</sup> The party water service line was replaced on November 11, 2020 as part of PWSA’s Commission-approved Lead Service Line replacement program.

in line breaks in January 2018, February 2020 and July 2020, in violation of its Tariffs and/or Section 1501 of the Public Utility Code.<sup>2</sup>

Evidentiary hearings were held in this matter on February 8 and 9, 2023 before Administrative Law Judge (“ALJ”) Emily I. DeVoe. On June 28, 2023, a Judge Change Notice was issued stating that ALJ Katrina Dunderdale was now assigned to this matter.<sup>3</sup> On July 18, 2023, the ALJ issued an Initial Decision (“I.D.”) which granted the Complaint in part and denied it in part, finding that PWSA failed to provide reliable, safe and quality water service to the subject property by failing to provide reasonable and adequate maintenance and repair services between May 2018 and November 2020, and by unreasonably replacing a relocating the customer’s curb stop and service line. I.D. at 1. The I.D. requires that PWSA submit a plan to relocate the curb box to be “near or within ten feet of the service address,” to make a direct connection to the main line, and a timely schedule for remedial work to be completed. I.D. at Ordering ¶ 5.

Pursuant to 52 Pa. Code § 5.533 and the Secretarial Letter issued on July 19, 2023, PWSA submits the following Exceptions to the I.D. PWSA respectfully requests that the Commission reject certain findings in the I.D. and dismiss the Complaint in its entirety.

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<sup>2</sup> See PWSA Main Brief (“MB”) at 9; March 18, 2022 Interim Order, Ordering ¶ 6; *see, e.g.*, Tr. 42. Note that, during the February 8, 2023 hearing, the Complainant withdrew his complaint regarding water quality issues. Tr. 202.

<sup>3</sup> Section 334(a) of the Public Utility Code provides that “[t]he same presiding officer who presides at the reception of evidence **shall make the recommended decision or initial decision** except where such presiding officer becomes unavailable to the commission.” 66 Pa. C.S. § 334(a) (emphasis added).

## II. EXCEPTIONS

1. Exception No. 1: The ALJ Erred by Finding that PWSA Did Not Provide Adequate Service When It Relocated the Complainant's Curb Box and By Requiring PWSA to Move the Curb Box Closer to the Service Address and Make a Direct Connection to the Main Line. (I.D. at 17, 20-21, 22-23; Findings of Fact ¶¶ 31-33; Conclusions of Law ¶ 7; Ordering ¶¶ 3 and 5).

The I.D. finds that PWSA “failed to provide reasonable and adequate service when it determined and took actions to move Complainant’s curb box from 10 feet from the service address to a location 190 feet further away...and installing the service line across the real property owned by five neighbors before connecting the service line to a shared portion of the water line.” I.D. at 20. The I.D. would then require PWSA to re-install the curb box “near or within ten feet of the service address” and to make “a direct connection to the main line.” I.D. at 25-26, Ordering ¶ 5. These findings contain a number of legal and factual errors, and would require PWSA to perform work that is also operationally infeasible. Importantly, these issues are not within the limited scope of this proceeding pursuant to repeated orders issued by the ALJ. For these reasons, the Commission should reject the I.D.’s conclusions and dismiss the Complaint in its entirety.

A. The Curb Box Location Is Outside the Scope of This Proceeding Pursuant to Repeated Orders Issued by the ALJ.

First, the curb box location was not one of the limited issues being addressed in this proceeding. Over the course of this proceeding – which has been ongoing for over three years – the Complainant had multiple opportunities to state the claims he was raising as part of his complaint, including through his original Formal Complaint served on July 8, 2020 and his Amended Formal Complaint served on December 22, 2021. The ALJ permitted the Complainant to file an Amended Complaint after he raised “several claims which were not raised in his Initial

Complaint” during a prehearing conference held on December 2, 2021.<sup>4</sup> The specific purpose of allowing for an Amended Complaint to be filed was to ensure that Mr. Musgrave had an opportunity to raise all issues he intended to pursue in this matter, and to give PWSA an opportunity to respond to those issues. The ALJ reiterated this during the evidentiary hearing:

...the purpose of your complaint and the amended complaint is not to prove your case. The purpose is to lay out all of the claims that you have and the reasons why you’re making those claims....I just want to be clear that the purpose of the complaint is to lay out all of your claims... I think I was clear in my instructions to Mr. Musgrave that **the purpose of the amended complaint was for him to raise any and all claims** that he had regarding this case.

Tr. 98-99 (emphasis added) (as a result of this discussion, the ALJ sustained an objection by PWSA to the Complainant’s attempt to raise a new issue during the hearing). Mr. Musgrave did not raise the location of the curb box as an issue in his Amended Complaint despite the ALJ’s clear and unequivocal direction that he raise any and all claims at that time.

Following the submission of the Amended Complaint, PWSA filed an Answer with New Matter and Motion to Dismiss. In the Interim Order issued on March 18, 2022, the ALJ granted PWSA’s Motion to Dismiss in part by dismissing the vast majority of issues raised in the Amended Complaint as being outside the Commission’s jurisdiction. As a result, the only remaining items to be addressed through evidentiary hearings were specifically limited to the following:

- (1) Whether at the time the alleged break of the service line occurred in January 2018, (a) PWSA had a maintenance/repair responsibility over the line that broke, (b) the break was a direct result of PWSA failing to perform its responsibilities under the Official Prior Tariff, and (c) PWSA violated the Official Prior Tariff by failing to adequately repair the break; and
- (2) Whether at the time the alleged breaks occurred in February 2020 and July 2020, (a) PWSA had a maintenance/repair responsibility over the line(s) that broke, (b) the

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<sup>4</sup> March 18, 2022 Interim Order at 3.

breaks were a direct result of PWSA failing to perform its responsibilities under its Commission-approved Tariff No. 1 and/or Section 1501 of the Public Utility Code,<sup>5</sup> and (c) PWSA violated Tariff No. 1 and/or Section 1501 by failing to properly repair the breaks.<sup>6</sup>

March 18, 2022 Interim Order at 18-19. The March 18, 2022 Interim Order limited the scope of this proceeding to addressing whether PWSA's maintenance and repair responsibilities for the shared service line *prior to* November 11, 2020, and *did not include* PWSA's responsibilities from November 11, 2020 going forward. *See* March 18, 2022 Interim Order at Ordering ¶ 6. These limited items do not include any topics related to the location of the curb box, and do not include any issues relating to the new service line and relocated curb box.

During the evidentiary hearing, Mr. Musgrave attempted to raise the issue regarding the location of the curb box for the first time. Counsel for PWSA objected to this testimony as being irrelevant and outside the limited scope of issues remaining in this proceeding, pursuant to the March 18, 2022 Interim Order. Tr. 101-102. After discussion (Tr. 101-111), the ALJ sustained PWSA's objection and reiterated that "[t]his proceeding is restricted to whether PWSA had maintenance and repair responsibilities prior to November 11<sup>th</sup>, 2020... So with that ruling, then, the – the objection to the question... [regarding the curb stop location] is sustained." Tr. 110-111.

Mr. Musgrave had previously made a related argument that as of November 11, 2020, PWSA has maintenance and repair responsibilities for the water line along Bunkerhill Street to the original location of the Musgrave curb box. This claim was also addressed and dismissed in the March 18, 2022 Interim Order. As discussed in that Order, this claim involves the

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<sup>5</sup> 66 Pa. C.S. § 1501.

<sup>6</sup> The Interim Order also allowed Mr. Musgrave to pursue his claims that PWSA was providing unsafe water pursuant to Section 1501 (March 18, 2022 Interim Order at 20), but Mr. Musgrave later withdrew this claim. Tr. 202.

applicability and interpretation of the Lead Service Line Replacement Agreement and the Temporary Easement Agreement, which are “private contractual matters which lie outside the Commission’s jurisdiction.” March 18, 2022 Interim Order at 16. This allegation has been considered and dismissed for lack of jurisdiction, and the requested relief cannot be granted. Further, the limited issues in this proceeding only relate to service *before* the service line was replaced in November 2020 (*see, e.g.*, Tr. 110-111) and do not relate to the new curb box or new service line.

Despite the fact that the ALJ repeatedly ruled that the remaining issues in this proceeding were limited in scope in a way that did not include the location of the curb box and new service line, the I.D. now faults PWSA for not explaining why it relocated the curb box or otherwise responding to the Complainant’s argument. I.D. at 20. This is a serious legal error. PWSA (or any party) must be able to rely on an ALJ’s ruling properly limiting the scope of a proceeding pursuant to their authority under the Commission’s regulations<sup>7</sup> without fear that the party will later be blamed for not defending themselves against claims that were clearly and repeatedly excluded.

To address these issues now, when PWSA does not have an opportunity to respond through testimony, is a violation of PWSA’s due process rights and is fundamentally unfair. The Complainant had multiple opportunities to raise any and all issues in his complaints, and he did not raise the issue regarding curb box location until the hearing (which was held approximately 2 ½ years after the complaint was first filed). Of course PWSA did not provided a detailed response regarding why it was necessary to relocate the curb box, since it relied upon the ALJ’s rulings in the March 2022 Interim Order and during the hearing that this issue was not within the

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<sup>7</sup> See 52 Pa. Code § 5.483 (giving presiding officers the authority to, *inter alia*, “regulate the course of the proceeding.”).



scope of the proceeding. For these reasons, the I.D. incorrectly found that PWSA did not provide adequate service when relocating the curb stop. The Commission should reject the I.D.'s findings and dismiss the Complaint.

B. The New Curb Box Is Required to be Located in the Public Right of Way, Not on the Complainant's Private Property.

Even though the ALJ ruled that the curb box location was outside the scope of this proceeding, PWSA did, in fact, briefly respond to Mr. Musgrave on this topic during the evidentiary hearing. When asked about the curb box location, PWSA witness William McFaddin explained that “[w]hen PWSA replaced the service lines, the curb box had to be moved into the public right of way. This is common practice with this. We cannot run a public line across private property. And the private service line of ... 200 feet is not uncommon.” Tr. 381.

PWSA's tariff clearly provides that “[t]he Authority has maintenance responsibility for the Curb Stop, the Curb Box, and for that portion of the Water Service Line running from the Curb Stop to the Water Main for Residential water service lines 1-inch diameter and smaller. PWSA Tariff Water – Pa. P.U.C. No. 1 at 34; PWSA Exh. 9. Because PWSA maintains the curb box and the service line between the curb box and the main, PWSA cannot install those facilities on the customer's private property; these must be located in the public right of way so PWSA can access and repair them as necessary.”<sup>8</sup>

Again, PWSA relied on the ALJ's rulings that this topic is outside the scope of this proceeding. As a result, PWSA did not have a full opportunity to respond on these points. The record does not support the I.D.'s requirement that PWSA move the curb box closer to the house,

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<sup>8</sup> The party water service line serving the subject property was replaced on November 11, 2020 as part of PWSA's Commission-approved Lead Service Line replacement program. Under this program, PWSA has specific legal authority to perform work on a customer's private service line and private property, and obtains temporary easement agreements to do so. See Tr. 380-381.

and also constitutes a violation of PWSA's due process rights. Additionally, requiring PWSA to move the curb box onto private property would be infeasible and at odds with PWSA's obligation going forward to maintain the curb box, and PWSA cannot locate its facilities on private property.

C. The I.D.'s Discussion on the Location of Service Lines is Factually Incorrect and Outside the Scope of This Proceeding.

The I.D. states that PWSA "install[ed] the service line across the real property owned by five neighbors before connecting the service line to a shared portion of the water line," and faults PWSA for not explaining why a more direct route was not used to connect to the main line. I.D. at 20. The I.D. also states that PWSA connected the new service line to the old shared line. These statements are factually incorrect and there is nothing on the record to substantiate these conclusions. Additionally, this issue is not within the limited scope of this proceeding and is outside the Commission's jurisdiction.

It is unclear on what basis the I.D. makes these findings. The I.D. does not include cites to the record to support these conclusions, and PWSA was unable to locate any discussion in the record or in the hearing transcripts. During the hearing, when asked what relief he was seeking, the Complainant alleged that he would have to obtain easements to repair his water line "[b]ecause each house owns the section of the road across from the house." Tr. 192. This is the only mention of this issue during the hearing, and Mr. Musgrave presented no evidence to support this claim.

The I.D.'s conclusions regarding the configuration of the new service line are incorrect, but PWSA has not had the opportunity to respond on this topic through presenting evidence to clarify how the new service line was designed and located and to provide support for this design. That is because this issue was not one of the limited issues in this proceeding. To fault PWSA

for not providing any explanation on this topic, once again, is a violation of PWSA's due process rights, given the repeated direction from the ALJ limiting the scope of this proceeding. Further, this claim involves the applicability and interpretation of the Lead Service Line Replacement Agreement and the Temporary Easement Agreement, which are "private contractual matters which lie outside the Commission's jurisdiction" and thus cannot be addressed here. March 18, 2022 Interim Order at 16.

Even if this claim could be considered here (which it cannot), Mr. Musgrave did not meet his burden of proof. He has not presented any evidence to substantiate these claims. The Complainant raised this topic in his Main Brief but only in the final section stating the relief sought, and did not include any citations to the record (and indeed, PWSA could not identify any discussion in the record).

For these reasons, the I.D. commits a serious error in finding that PWSA provided inadequate service by relocating the curb box, and by requiring PWSA to move the curb box to within approximately ten feet of the service address and reconfigure the service line to provide a "direct connection" to the main line. The Commission should reject the I.D.'s conclusions and dismiss the Complaint.

2. Exception No. 2: The ALJ Erred by Finding that PWSA Did Not Provide Adequate Service When It Did Not Repair the Private Service Line Prior to November 2020 and by Not Providing Sufficient Notice that the Private Line was the Property Owners' Responsibility to Repair. (I.D. at 18-19; Findings of Fact ¶ 20, 25, 27; Conclusion of Law ¶ 8; Ordering ¶ 2).

The I.D. errs by finding that PWSA did not provide adequate service when it refused to repair the private service line. The I.D. essentially recognizes that the line serving the subject property was a private party service line, but because PWSA had at times voluntarily assisted customers with repairs to the private line *prior to coming under PUC jurisdiction*, the I.D. finds that PWSA should have continued to make such repairs. I.D. at 19. The record is clear that the

shared service line was a private line on private property. There is no evidence in the record or any legal basis providing that PWSA had responsibility to maintain or repair the line prior to November 2020. As such, the I.D. errs by finding that PWSA provided inadequate service when it refused to make repairs in January 2018, February 2020 and July 2020, since in fact, PWSA legally could not make these repairs as it transitioned to being a PUC-regulated entity.

Section 1501 does not require PWSA to bear repair and maintenance responsibility for any and all water lines in the City, regardless of ownership. Neither Section 1501 nor any other provision of the Public Utility Code empowers the Commission to direct PWSA to use public utility funds to benefit private individual(s) by repairing, maintaining or replacing a privately-owned water service line on a privately owned street.<sup>9</sup>

Additionally, PWSA's tariffs establish that the shared party line was a private line and therefore was the customer's responsibility to maintain. *See* PWSA M.B. at 15-19. The Commission has no authority to allow a public utility to deviate from its tariff even where the Commission concludes it is in the public interest.<sup>10</sup> As such, the I.D. is paradoxically finding that PWSA provided inadequate service by complying with the applicable law, its Official Prior Tariff, and its Commission-approved water tariff. This is inappropriate and legally unsound.

The I.D. also claims that PWSA did not provide adequate notice to the Complainant that it would no longer be making repairs to the private party line. Neither the Complainant nor the I.D. point to any statute, regulation or Commission order that would require such notice, or

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<sup>9</sup> 53 Pa. C.S. § 5612; *Price v. Philadelphia Parking Authority*, 221 A.2d 138 (Pa. 1966) (A public corporation, exercises public powers and its engagements are public in nature, and its facilities are public property. Empowered to act only for the public benefit, a public corporation may not employ its resources for the primary and paramount benefit of a private endeavor. An engagement essentially private in nature may not be justified on the theory that the public will be incidentally benefitted.)

<sup>10</sup> *Philadelphia Suburban Water Co. v. Pa. Pub. Util. Comm'n*, 808 A.2d 1044 (Pa.Cmwlth. 2002).

specify the timing or content of such a notice. PWSA MB at 21; Tr. 378. Further, PWSA did, in fact, provide notice. The Authority's Answer to the original Complaint describes how, in February 2018, PWSA's Director of Field Operations met in-person with the property owners who were served by the private party line, including the Complainant, to discuss the leak on the private service line (which PWSA would not repair) and the customers' options for installing new, separate service lines. PWSA Exh. 1 at 5.

It is important to note the timing of PWSA's decision to no longer voluntarily assist with repairs to the private service line beginning with the leak that occurred in January/February 2018. This occurred during the brief transition period between when Governor Wolf signed Act 65 of 2017 into law on December 21, 2017 (which amended the Public Utility Code to add a new Chapter 32 and bring PWSA under the Commission's jurisdiction) and when the Commission's jurisdiction over PWSA began on April 1, 2018. PWSA was about to become subject to a variety of statutory and regulatory requirements that did not previously apply. As part of this transition, PWSA would no longer have flexibility to assist with repairs to a private service line, for example, as it may have previously done voluntarily when it was not regulated by the Commission. As discussed herein, doing so would violate PWSA's tariff and would be an impermissible use of public funds to benefit private property.

The I.D. says that PWSA should have provided notice that it would no longer be repairing the private service line *before* a leak occurred. However, the January/February 2018 leak occurred just one month after Act 65 was passed. It is unclear at what other time PWSA would have provided notice that it would no longer be able to voluntarily assist with repairs to the private party line. Further, PWSA made innumerable other changes to its service as a result of coming under PUC jurisdiction; it would have been impossible to provide notice of every

change in its operations due to this transition. The transition to being a regulated utility was a significant undertaking and PWSA cannot be faulted for making good faith efforts to bring its operation into compliance with newly applicable requirements.<sup>11</sup>

The I.D. also faults PWSA for not repairing the private service line in February 2020, “which was less than one month before the county and state was affected adversely by the COVID pandemic.” I.D. at 19. The I.D. essentially would expect PWSA to foresee the global COVID-19 pandemic and make repairs to a private service line in anticipation of that event. This is entirely unreasonable. Even when facing a pandemic, PWSA still had no responsibility to maintain or repair the private party line, and there was no PUC order or other statutory or regulatory requirement that would have allowed PWSA to use public funds to repair the private service line.

Even though PWSA may have previously repaired the private party line voluntarily in an effort to assist customers prior to coming under PUC jurisdiction, the record is clear that PWSA was never under any obligation to repair or maintain the private service line. Similarly, neither the Complainant nor the I.D. have pointed to any authority that would require PWSA to provide notice when it could no longer voluntarily choose to assist with repairs to the private party line when transitioning to Commission jurisdiction. PWSA has not violated any statute, regulation, Commission order, or other requirement. As such, the I.D. erred in finding that PWSA did not provide adequate service pursuant to Section 1501 of the Public Utility Code, 66 Pa. C.S. § 1501. The Commission should reject the I.D.’s findings and dismiss the Complaint in its entirety.

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<sup>11</sup> During this transitional period, the Commission stated that it “has no reason to penalize PWSA as it makes progress to transition from regulation under the [Municipality Authorities Act] to the Public Utility Code.” *Implementation of Chapter 32 of the Public Utility Code*, Docket Nos. M-2018-2640802 (water) and M-2018-2640803 (wastewater), Final Implementation Order entered March 15, 2018, at 24.

### III. CONCLUSION

For the reasons set forth herein, PWSA respectfully requests that the Commission grant these Exceptions and reject the conclusions of the Initial Decision consistent with the foregoing discussion, and dismiss the Complaint in its entirety.

Respectfully submitted,

/s/ *Lauren M. Burge*

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Date: August 8, 2023

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