



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
COMMONWEALTH KEYSTONE BUILDING
400 NORTH STREET, HARRISBURG, PA 17120

BUREAU OF
INVESTIGATION
&
ENFORCEMENT

August 18, 2023

Via Electronic Filing

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

Re: Pennsylvania Public Utility Commission,
Bureau of Investigation and Enforcement v.
East Dunkard Water Authority
Docket No. C-2021-3027615
I&E Reply to Exceptions

Dear Secretary Chiavetta:

Enclosed for electronic filing please find the Bureau of Investigation and Enforcement's ("I&E") Reply to the Exceptions of the East Dunkard Water Authority in the above-referenced proceeding.

Copies have been served on the parties of record in accordance with the Certificate of Service. If you have any questions, please do not hesitate to contact me.

Sincerely,

A handwritten signature in blue ink, appearing to read 'G. Rosul', written in a cursive style.

Grant Rosul
Prosecutor
Bureau of Investigation and Enforcement
PA Attorney ID No. 318204
(717) 783-5243
grosul@pa.gov

GR/ac
Enclosures

cc: Office of Special Assistants (*via email* – ra-OSA@pa.gov – *Word Version*)
Michael L. Swindler, Deputy Chief Prosecutor, I&E (*via email*)
As per Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission, :
Bureau of Investigation and Enforcement :
 :
v. : Docket No. C-2021-3027615
 :
East Dunkard Water Authority :

**THE BUREAU OF INVESTIGATION AND ENFORCEMENT'S
REPLY TO THE EXCEPTIONS OF
THE EAST DUNKARD WATER AUTHORITY**

Grant Rosul
Prosecutor
PA Attorney ID No. 318204

Pennsylvania Public Utility Commission
Bureau of Investigation and Enforcement
Commonwealth Keystone Building
400 North Street, 3rd Floor
Harrisburg, PA 17120

Dated: August 18, 2023

I. INTRODUCTION

I&E filed a Formal Complaint against the East Dunkard Water Authority (“EDWA”) on August 2, 2021, alleging that since 2011, EDWA had been impermissibly furnishing water service to the public for compensation outside of the corporate limits of the Authority’s incorporating municipality without first obtaining from the Commission a Certificate of Public Convenience. I&E alleged that such action violated 66 Pa. C.S. § 1102(a)(5), which prohibits municipal corporations from furnishing public utility services beyond its corporate limits. I&E also alleged that EDWA failed to furnish and maintain adequate, efficient, safe, and reasonable service and facilities to customers located beyond its corporate limits in violation of 66 Pa. C.S. § 1501.¹

The parties filed a Joint Petition for Approval of Settlement on September 26, 2022. ALJ Guhl issued an Initial Decision granting the Joint Petition for Approval of Settlement (“Settlement”) on June 27, 2023. EDWA filed Exceptions on August 9, 2023.

II. I&E REPLY TO THE EXCEPTIONS OF EDWA

A. **I&E does not contest EDWA’s request to amend the timeframe for EDWA to pay its agreed-upon civil penalty.**

The Initial Decision by ALJ Guhl to grant the Settlement included a provision that the civil penalty be paid by September 1, 2023.² This provision was part of the agreed-upon settlement terms between EDWA and I&E that had been agreed to in September 2022 and was included as a provision in ALJ Guhl’s Initial Decision. Typically, Initial Decisions issued by ALJs on Joint Petitions for Settlement will include a clause or

¹ Initial Decision (“I.D.”) at 2.

² I.D. at 16-17.

provision that the agreed-upon civil penalty be paid within a certain timeframe upon entry of a Final Commission Order— usually 30 days.

Here, the Settlement filed in September 2022 included a civil penalty due date of September 2023, with the expectation that this 12-month period would provide the Authority extra time to pay beyond the usual 30-days from entry of a Commission Final Order. However, the filing of customer comments and a customer formal complaint resulted in the Settlement being held in abeyance until an Interim Order dated March 31, 2023, significantly delaying the entry of an Initial Decision and ultimately a Commission Final Order.

EDWA excepts to the Initial Decision in that it adopts the settlement provision that directs EDWA to pay the agreed-to civil penalty of \$225,000 by September 1, 2023. I&E agrees that this clause or provision of ALJ Guhl’s Initial Decision should be modified to state that the payment of the \$225,000 civil penalty that EDWA negotiated with I&E and which was accepted by ALJ Guhl after careful consideration of the factors enumerated at 52 Pa. Code § 69.1201 be paid within 30 days of the entry of a Commission Order adopting the Initial Decision of the ALJ without modification and approving the Joint Petition for Approval of Settlement. I&E further avers that such modification of the time for EDWA to pay the civil penalty does not negatively affect the settlement agreement.

B. The civil penalty of \$225,000 that EDWA agreed to pay is fair and reasonable and the alleged reliance on “advice of counsel” by EDWA is not a defense to its violation of 53 P.S. § 5607(b)(3)(i).

In its second exception to the Initial Decision, EDWA avers that it should not be held liable for the payment of the agreed-upon civil penalty of \$225,000 because it was acting on advice of counsel when it failed to seek a Certificate of Public Convenience from the Commission to provide water to five townships outside of EDWA’s jurisdiction. This is a frivolous argument and EDWA provides no citation to any court that has held, or even suggested, that a municipal authority may escape penalty for violating this statute or any Commission law, rule, or regulation because it relied on advice of counsel. In fact, EDWA concedes this point in its Exceptions, stating that such a defense is “not necessarily exculpatory in nature.”³

The EDWA then proceeds to argue that “the fact that the Authority may have been advised improperly ... tends to make the Authority ... less culpable.”⁴ This is because it would tend to show inadvertence and a good-faith attempt at following the law rather than an intentional flouting of the applicable law or a reckless disregard for it. This argument would go toward the third *Rosi* factor, adopted at 52 Pa. Code § 69.1201, regarding “whether the conduct at issue was deemed intentional or negligent. ***This factor may only be considered in evaluating litigated cases.***” 52 Pa. Code § 69.1201(c)(3) (emphasis added).

³ EDWA Exceptions at 11.

⁴ Id.

Because the parties agreed to settle the case, as detailed in the Settlement that has been approved by ALJ Guhl, EDWA’s intentionality, recklessness, or negligence *vel non* is irrelevant to the amount of the civil penalty agreed upon by the parties and approved by the ALJ. Further, EDWA already raised this issue in its Statement in Support of the Joint Petition for Settlement.⁵

Further, EDWA pleads poverty to now get out from paying the civil penalty it has already agreed to pay. EDWA notes that it is in the process of making upgrades to its water treatment facilities, at least some of which are mandated by either a DEP Field Order or a Consent Order that EDWA has entered into with the DEP. However, EDWA’s financial problems are belied by its own statements in its Exceptions. EDWA notes that the upgrades will cost \$700,000. While EDWA also notes that it “does have some grant funding available,” it omits that the amount of grant funding it has received is nearly \$2,000,000 from the Community Development Block Grant-CARES Act program.⁶ This is enough to pay the mandated immediate upgrades *as well as* the civil penalty that it agreed to pay in order to avoid formal enforcement action.

Further, the Pennsylvania American Water Company (“PAWC”) intends to purchase EDWA. EDWA has stated in its Exceptions that it informed PAWC of the penalty and that their agreement “makes provision for the fine to be paid by the Authority on or before the transfer of assets to [PAWC].” The penalty was levied before PAWC

⁵ I.D. at 13-14.

⁶ See Senator Bartolotta, “Snyder, Bartolotta secure \$1.9 million to rehabilitate East Dunkard Water Authority,” May 31, 2022, <https://www.senatorbartolotta.com/2022/05/31/snyder-bartolotta-secure-1-9-million-to-rehabilitate-east-dunkard-water-authority/>.

announced its planned takeover of EDWC, PAWC is aware of the penalty, and their agreement makes provision for its payment.⁷

The Settlement accepted by ALJ Guhl does not dictate the funding source from which the civil penalty should be paid. EDWA has discretion to arrange its finances in the way that best suits it and its customers, such as utilizing grant money to pay the civil penalty, obtaining a loan, rearranging its agreement with PAWC to require PAWC to pay the civil penalty ahead of the takeover, or any number of funding sources or financial arrangements. Ultimately, compliance with the agreed-to settlement terms (i.e., the payment of a \$225,000 civil penalty) is in the public interest.

Additionally, the civil penalty amount was a compromise of what I&E could have sought if the parties had proceeded to litigation, and which I&E may still seek if EDWA's Exceptions are granted. These included directing EDWA to refund four years of customer charges with interest for those customers EDWA collected fees from unlawfully. I&E could also have sought a much larger civil penalty, as the \$225,000 settlement amount is far lower than the statutory maximum civil penalty which could have been imposed.

Further, as ALJ Guhl discusses in her Initial Decision, the \$225,000 civil penalty takes into consideration all the concerns EDWA raises in its Exceptions regarding its small size, low customer base, and need for equipment upgrades and system improvements. These variables were known at the time of settlement and were factored into the amount of the civil penalty agreed upon by I&E and EDWA.

⁷ EDWA Exceptions at 7.

III. CONCLUSION

For the reasons set forth above, I&E does not contest EDWA's first exception requesting that the timeline for payment of the civil penalty be modified from that specified in the Settlement. I&E proposes that the Initial Decision be amended to require payment of the civil penalty 30 days after the adoption by the Commission of the Initial Decision.

As for EDWA's second exception, I&E respectfully submits that the \$225,000 civil penalty agreed to by EDWA and I&E is fair, reasonable, and in the public interest, and EDWA's second exception is without merit and should be denied.

Respectfully submitted,



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Dated: August 18, 2023

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PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission,	:	
Bureau of Investigation and Enforcement	:	
	:	
v.	:	Docket No. C-2021-3027615
	:	
East Dunkard Water Authority	:	

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing **Reply to Exceptions** dated August 18, 2023, upon the parties listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

Service by Electronic Mail

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