BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

OFFICE PARTNERS XXIII BLOCK GI LLC,
Complainant,

Vs.

THE PITTSBURGH WATER AND SEWER AUTHORITY,

Respondent,

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

BRIEF IN RESPONSE TO PWSA'S RESPONSE TO 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

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I. The Pleadings are Dispositive:

The Office Partners Action and the 3121 Penn Action are similar. Both parties applied for tap-in permits in 2021. Both parties received approval letters for their tap-in plans from PWSA in 2021. Both approval letters required payment for the permit to be issued. The only difference is that 3121 Penn paid the invoice when the 2021 rates applied, while Office Partners made payment when the 2022 rates applied. These facts are admitted by PWSA.

In both Actions, PWSA contended that 53 Pa.C.S.A. § 5607(d)(24) (the "Act") is controlling, and it states in 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.

Though the Act says nothing about "approval," PWSA contended in both Actions that its policy is to calculate fees at the time of "approval." And that its policy should control.

However, in the Office Partners Action, PWSA explained in its motion for summary judgment and presented testimony through Julie Asciola that "approval" is the date it sends a

letter and invoice. Despite the sworn testimony in Office Partners, in the 3121 Penn Action, PWSA pled (verified by Julie Asciola) that permit "approval" means the date of payment and argued that the plain meaning of the Act supported its position.

Clearly, PWSA has no policy (and even if it did, it cannot override the Act). PWSA is taking contrary positions before this Court. In one case, PWSA argued that the Act's plain meaning governed the outcome (3121 Penn Action), but in the other, it asked the Court to disregard the plain meaning of the statute. (Office Partners' Action). The law and the facts are dispositive, and PWSA's opposing declaration in the 3121 Penn Action requires judgment in Office Partners' favor.

II. The Matters are Not Protected by Settlement Disclosures, and Any Rule was Breached; it was the Duty of Candor by PWSA (RPC 3.3):

Rule 3.3 of the Professional Rules of Conduct requires candor to the tribunal. Rule 3.4 requires fairness and candor to the opposing party. The pleadings in the 3121 Penn Action are adverse to the position PWSA takes in this case, and PWSA refused to produce the pleadings when asked to do so. Office Partners had to resort to a Right-to-Know Request. If there was any ethical lapse, it was PWSA's failure to notify the tribunal of the 3121 Penn Action and failure to produce the same to Office Partners (a Right-to-Know Request was required, and it took weeks to obtain).

In *Ligon v. Middletown Area School Dist.*, 566, 584 A.2d 376 (Pa. Cmwlth. 1990), the Court noted

> the established rule that under the doctrine of judicial estoppel, a party is precluded from switching positions or asserting contrary positions in the same or related actions. Moreover, "federal courts have long applied this principle of estoppel where litigants 'play fast and loose' with the courts by switching legal positions to suit their own ends."

Id., 584 A.2d at 380. Furthermore, in *Tops Apparel Mfg. Co. v. Rothman*, 244 A.2d 436 (Pa. 1968), the Pennsylvania Supreme Court stated that admissions contained in the pleadings and stipulations are usually regarded as "judicial admissions" and cannot be later contradicted by the party who made them.

Gross v. City of Pittsburgh, 686 A.2d 864, 867 (Pa. Cmwlth. 1996) is also applicable. While the *Gross* case dealt with judicial estoppel, it is important to note that the purpose of the rule is applicable to this case, i.e., the rule of judicial estoppel is primarily to protect the dignity of the Court and prohibit litigants from "playing fast and loose" with the Court by taking opposing positions in similar cases and with similar facts. While a litigant may do so, they have a duty to inform the Court and explain if they believe the positions are not contradictory but coherent. Rather than Office Partners having to bring up the Penn Avenue case, the duty was incumbent upon PWSA, and its failure to do so is violative of the Rule.

Settlement negotiations are protected by Rule and by statute. However, the purpose of the Rule is to prevent a party from utilizing an offer in compromise as constituting an admission of liability. It does not protect every communication during negotiations, see e.g., *Rochester Machine Corp. v. Mulach Steel Corp.*, 449 A.2d 1366 (Pa. 1982), (the party who admitted liability for certain items in a contract claim during negotiations could not prevent the admissions from evidence, they were not offers in compromise). Importantly the parties were not negotiating a settlement; there was only a brief discussion as to whether the parties could negotiate, and there was no offer of compromise.

While Office Partners knew of cases, it did not know the specifics of the 3121 Penn Action or any other case. After the disclosure by PWSA, Office Partners researched every open case

before the PUC with PWSA and was able to locate it and confirm it involved the same issues only upon receiving a response to the Right-to-Know Request.

Respectfully submitted,

MAURICE A. NERNBERG & ASSOCIATES

Date: August 29, 2023

By _____

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

Counsel for Complainant, Office Partners XXIII Block G1 LLC

CERTIFICATE OF COMPLIANCE

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

Submitted by: David M. Nernberg, Esq.

Signature: _____

Name: David M. Nernberg

Attorney No. (if applicable) 205631

CERTIFICATE OF SERVICE

I, David M. Nernberg, hereby certify that a true and correct copy of the within **Brief in Response to PWSA'S Response to 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** was served via email upon following:

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