DEPARTMENT OF LAW
City Hall | 340 North Washington Avenue | Scranton, PA 18503 |570.348.4105

May 17, 2024

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

RE: Pennsylvania Public Utility Commission v.
Pennsylvania-American Water Company
Docket Nos. R-2023-3043189 (Water)
R-2023-3043190 (Wastewater)
COS Exceptions

Dear Secretary Chiavetta,

Attached please find the Exceptions of the City of Scranton for filing in the above-captioned proceedings.

Copies will be served on all known parties in these proceedings, as indicated on the attached Certificate of Service

Respectfully,

K. Kennedy

Katie Kennedy, Esq.
First Assistant City Solicitor for the City of Scranton

Enclosures

cc: Counsel/All Parties Per Certificate of Service

BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

Pennsylvania Public Utility Commission v. Pennsylvania-American Water Company	Docket Nos. R-2023-3043189 (Water) R-2023-3043190 (Wastewater)

EXCEPTIONS OF THE CITY OF SCRANTON

Exceptions

Filed on behalf of:

The City of Scranton

Counsel of Record for this Party:

KATIE KENNEDY
First Assistant Solieitor
PA ID No. 317237
kkennedy@scrantonpa.gov

JESSICA ESKRA
Solicitor
PA ID No. 319426
jeskra@scrantonpa.gov

Law Department
City of Scranton
340 North Washington Avenue
Scranton, PA 18503
P: 570-348-4105
F: 570-348-4263

Dated: May 17, 2024

TABLE OF CONTENTS

1. INTRODUCTION 1

2. EXCEPTIONS 1

City of Scranton Exception No. 1: The ALJs err as a matter of law by supporting rate increases after holding that the Petitioner has not met its burden for its request for relief, especially in the context of the wastewater rate increase.
R.D. at 392.....1

3. CONCLUSION.....6

TABLE OF AUTHORITIES

Cases

Allegheny Ctr. Assocs. v. Pa. Pub. Util. Comm'n.,
570 A.2d 149 (Pa. Commw. Ct. 1990) 1

Cicero v. Pa. Pub. Util. Comm'n,
300 A.3d 1106 (Pa. Commw. Ct. 2023).....4

Citizens Water Co. Of Washington, Pa. v. Pa. Pub. Util. Comm'n.,
124 A.2d 123 (Pa. Super Ct. 1956) 2

Com. v. Sanchez,
36 A.3d 24, 65 (Pa. 2011).....4

Cooper v. Oklahoma,
517 U.S. 348 (1996).....4

Hurley v. Hurley,
754 A.2d 1283 (Pa. Super Ct. 2000).....2, 3

Lower Frederick Twp. Water Co. v. Pa. Pub. Util. Comm'n.,
409 A.2d 505 (Pa. Commw. Ct. 1980).....4

NRG Energy, Inc. v. Pa. Pub. Util. Comm'n.,
233 A.3d 936 (Pa. Commw. Ct.. 2020).....2

Riedel v. County of Allegheny,
633 A.2d 1325 (Pa. Commw. Ct. 1993).....3

United States Steel Corp. v. Pa. Pub. Util. Comm'n.,,
456 A.2d 686 (Pa. Commw. Ct. 1983).....3

Administrative Decisions

Dickson v. National Fuel Gas Distribution Corporation,
Docket No. C-2009-2132947 (Opinion and Order entered August 20, 2010).....2-3

Pa. Pub. Util. Comm'n v. Breezewood Tel. Co.,
Docket No. R-00901666 (Opinion and Order entered Jan. 31, 1991).....5

Pa. Pub. Util. Comm'n v. Phila. Elec. Co.,
Docket No. R-00891364 (Opinion and Order entered May 16, 1990).....4-5

Pub. Util. Comm'n v. UGI,
Docket No. R-2017-2640058 (Opinion and Order entered October 25, 2018).....3

Statutes

66 Pa.C.S.A. § 315.....2

1. INTRODUCTION

On November 8, 2023, Pennsylvania-American Water Company (hereafter "PAWC" or "Company" or "Petitioner") filed Supplement No. 45 to Tariff Water-PA. P.U.C. No. 5 (Supplement No. 45) with the Pennsylvania Public Utility Commission ("PUC" or "the Commission") to become effective January 7, 2024. On or about December 21, 2023, the PUC ordered an investigation into the request and suspended the implementation of the rate increases until August 7, 2024. On or about January 8, 2024, the City of Scranton (hereafter "City") petitioned to intervene as an active party, and participated as an active party, to the rate cases. The City does not object nor offer alternative procedural history to that of the Administrative Law Judges (hereafter "ALJs," respectfully) as outlined in their Recommendation (hereafter "R.D."), issued on or about May 8, 2024, in this matter. However, the City of Scranton challenges the instant recommendation as it is respectfully the City's position that the ALJs committed an error in law in seeking a holding for an increase in wastewater rates following its immediate holding that the Petitioner did not meet its evidentiary burden in the underlying rate requests.

2. EXCEPTIONS

City of Scranton Exception No. 1: <u>The ALJs err as a matter of law by supporting rate increases after holding that the Petitioner has not met its burden for its request for relief, especially in the context of the wastewater rate increase.</u> *R.D. at 392.*

The City agrees with the recitation of Legal Standard and Burden of Proof as espoused by the ALJs in the R.D. from pages 54-56. A utility has the burden to prove the reasonableness of its proposed rates. *Allegheny Ctr. Assocs. v. Pa. Pub. Util. Comm'n,* 570 A.2d 149, 153 (Pa. Commw. Ct. 1990). To that end, though, the City respectfully argues that upon finding that the rate increase requests were unjust, unreasonable, and unlawful, and specifically due to the Company not having met their evidentiary burden to support their requested relief, the ALJs

were not authorized to further order an increase in rates, especially as to wastewater rates. In other words, since the ALJs held that the Petitioner did not meet its burden nor standard of proof to warrant rate increases, it is improper to then recommend that PUC still issue rate increases for customers directly thereafter.

In a base rate case, the burden of proof of the proposed rate is on the public utility. *66 Pa.C.S.A. § 315. Please also see Citizens Water Co. of Washington, Pa. Pub. Util. Comm'n,* 124 A.2d 123, (Pa. Super Ct. 1956). Section 315 also states that "any proceeding upon the motion of the [C]ommission, involving any proposed or existing rate of any public utility, or in any proceedings upon complaint involving any proposed increase in rates, the burden of proof to show that the rate involved is just and reasonable shall be upon the public utility." *NRG Energy, Inc. v. Pennsylvania Pub. Util. Comm'n*, 233 A.3d 936, 949 (Pa. Commw. Ct. 2020). The public utility must satisfy its burden of proof by a preponderance of the evidence, which "means only that one party has presented evidence that is more convincing, by even the smallest amount, than the evidence presented by the other party. *Id.*

The "burden of proof" is comprised of two distinct burdens: the burden of production and the burden of persuasion. *Hurley v. Hurley*, 754 A.2d 1283 (Pa. Super Ct. 2000).

> "The burden of production, also called the burden of producing evidence or the burden of coming forward with evidence, determines which party must come forward with evidence to support a particular proposition. This burden may shift between the parties during the course of a trial. If the party (initially, this will usually be the complainant, applicant, or petitioner, as the case may be) with the burden of production fails to introduce sufficient evidence the opposing party is entitled to receive a favorable ruling. That is, the opposing party would be entitled to a compulsory nonsuit, a directed verdict, or a judgment notwithstanding the verdict. Once the party with the initial burden of production introduces sufficient evidence to make out a prima facie case, the burden of production shifts to the opposing party. If the opposing party introduces evidence sufficient to balance the evidence introduced by the party having the initial burden of production, the burden then shifts back to the party who had the initial burden to introduce more evidence favorable to his position. The burden of production goes to the

> legal sufficiency of a party's case." *Dickson v. National Fuel Gas Distribution Corporation,* Docket No. C-2009-2132947 (Opinion and Order entered August 20, 2010).

Here, the R.D. holds that the Company did not meet its evidentiary burden to support its requests for rate increases. *R.D. at 1.* In a traditional forum, the City would have been permitted to move for nonsuit. Instead, the R.D. recommends an increase in rates despite the Company failing to meet its burdens to prove justification for the same.

Following the burden of production, the next legal hurdle for a petitioner is the burden of persuasion (within the burden of proof schema). *Id.* "[T]he burden of persuasion never leaves the party on whom it is originally cast, but the burden of production may shift during the course of the proceedings." *Riedel v. County of Allegheny*, 633 A.2d 1325; 1328 n. 11 (Pa. Commw. Ct. 1993). The burden of persuasion, usually placed on the complainant, applicant, or petitioner , determines which party must produce sufficient evidence to meet the applicable standard of proof. *Hurley v. Hurley*, 754 A.2d 1283 (2000). Unlike the burden of production, the burden of persuasion includes determinations of credibility and acceptance or rejection of inferences. Thus, to bear the burden of proof and be entitled to a decision in his favor, a party must bear both the burden of production and the burden of persuasion. *Dickson.*

> "In general rate increase proceedings, it is well established that the burden of proof does not shift to parties challenging a requested rate increase. Rather, the utility's burden of establishing the justness and reasonableness of every component of its rate request is an affirmative one, and that burden remains with the public utility throughout the course of the rate proceeding. There is no similar burden placed on parties to justify a proposed adjustment to the Company's filing."
> *Pub. Util. Comm'n v. UGI,* Docket No. R-2017-2640058 (Opinion and Order entered October 25, 2018).

The mere rejection of evidence contrary to that adduced by the public utility is not an impermissible shifting of the evidentiary burden. *United States Steel Corp. v. Pa. Pub. Util. Comm'n.*, 456 A.2d 686 (Pa. Commw. Ct. 1983). The City respectfully argues that the increase

to wastewater customers was only contemplated by and through the argument of another party, and it is an error of law to adopt the increase of the same while denying the rate increase on its face as proffered by the Petitioner. Or, simply stated, the ALJs commit an error of law in adopting another party's request for relief when the burden of proof did not shift to allow for the argument to be persuasive.

While burden of proof is, in short, the responsibility to prove a case, the degree to which the factfinder must be satisfied with the same is the standard of proof. The evidence necessary to meet that burden must be substantial. *Lower Frederick Twp. Water Co. v. Pa. Pub. Util. Comm'n*, 409 A.2d 505, 507 (Pa. Commw. Ct. 1980). The Supreme Court of the United States has explained that "[t]he function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." *Com. v. Sanchez*, 36 A.3d 24, 65 (Pa. 2011), *citing Cooper v. Oklahoma,* 517 U.S. 348, 362 (1996). The Supreme Court gives "substantial deference" to procedures grounded in common law tradition, then looking to the fairness of the same, while, lastly, giving consideration to contemporary practice. *Id.* at *65*. In this instant action, the preponderance of the evidence standard applies. This standard "means only that one party has presented evidence that is more convincing, by even the smallest amount, than the evidence presented by the other party." *Cicero v. Pa. Pub. Util. Comm'n*, 300 A.3d 1106, 1118 (Pa. Commw. Ct. 2023), reargument denied (Sept. 26, 2023).

Those opposing the rate increase requests (respondents) seemingly prevailed in this case as the R.D. begins and ends with strong holdings that deny the relief requested by Petitioner. The burden and standard of proof remained on Petitioner, and Petitioner failed. This is line with the

above analyses and the schema that the ALJs discuss in the R.D. *Please* see Pa. *Pub. Util. Comm'n v. Phila. Elec. Co.*, Docket No. R-00891364 (Opinion and Order entered May 16, 1990); *Pa. Pub. Util. Comm'n v. Breezewood Tel. Co.*, Docket No. R-00901666 (Opinion and Order entered Jan. 31, 1991). Despite holding that the Petitioner did not meet its burden nor standard of proof to substantiate its requested rate increases, not only did the ALJs recommend a rate increase as to wastewater thereafter, the ALJs recommend an increase **over four times** the rate as requested by the Petitioner in its wastewater filings.

In short, the R.D. asserts that the Petitioner failed to meet its burden and standard of proof, at the preponderance of the evidence standard, and in spite thereof recommended an increase in wastewater rates for customers whereby the majority of those affected reside in the City of Scranton and surrounding areas.

For these reasons, and the reasons set forth by the City in its case in chief to date, the City excepts to the R.D.'s recommendations that the Commission approve rate increases, **and more** in the terms of wastewater rates, despite the Company failing to meet its burden of proof to justify the same. We respectfully recommend that the Commission hold that both rate increases be denied "because the Company has not met its burden of proving by a preponderance of the evidence the justness and reasonableness of every element of its requested increases[1]," and simply close the order and proceedings to that end.

[PLEADING CONTINUES ON NEXT PAGE]

[1] R.D. at 1.

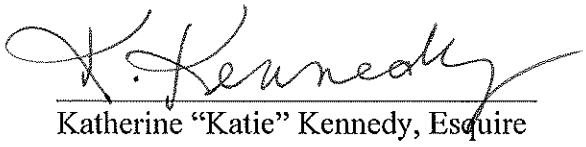
3. CONCLUSION

Wherefore, for all the foregoing reasons, the City of Scranton respectfully requests that the Commission uphold the holding contained within the Recommended Decision of Deputy Chief Administrative Law Judge Christopher P. Pell and Administrative Law Judge John M. Coogan, issued on May 7, 2024 in that the Company failed to meet its burden and standard of proof for rate increases. However, the City of Scranton respectfully requests that the Commission **deny** the relief as recommended by the R.D. in still allowing for an increase in rates, especially as to wastewater rates.

Respectfully submitted,

CITY OF SCRANTON
LAW DEPARTMENT

Date: May 17, 2024



Katherine "Katie" Kennedy, Esquire
First Assistant City Solicitor
Attorney I.D. 317237
340 N. Washington Ave.
Scranton, PA 18503
(570) 348-4105

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Pennsylvania Public Utility Commission	:	
	:	
v.	:	Docket Nos. R-2023-3043189 (Water)
	:	R-2023-3043190 (Wastewater)
Pennsylvania-American Water Company	:	

CERTIFICATE OF SERVICE

I hereby certify that I am serving the foregoing **The City of Scranton's Exceptions** dated May 17, 2024, in the manner and upon the persons listed below:

Served via Electronic Mail Only

Elizabeth Rose Triscari, Esq.
Teresa K. Harrold, Esq.
Erin K. Fure, Esq.
Pennsylvania-American Water Company
852 Wesley Drive
Mechanicsburg, PA 17055
elizabeth.triscari@amwater.com
teresa.harrold@amwater.com
erin.fure@amwater.com
Counsel for PAWC

Kenneth M. Kulak, Esq.
Brooke E. McGlinn, Esq.
Catherine Vasudevan, Esq.
Mark A. Lazaroff, Esq.
Morgan, Lewis & Bockius LLP
2222 Market Street
Philadelphia, PA 19103-2921
ken.kulak@morganlewis.com
brooke.mcglinn@morganlewis.com
catherine.vasudevan@morganlewis.com
mark.lazaroff@morganlewis.com
Counsel for PAWC

Steven C. Gray, Esq.
Rebecca Lyttle, Esq.
Office of Small Business Advocate
555 Walnut Street
1st Floor, Forum Place
Harrisburg, PA 17101
sgray@pa.gov
relyttle@pa.gov

Andrew J. Zerby, Esq.
Melanie J. El Atieh, Esq.
David T. Evrard, Esq.
Erin L. Gannon, Esq.
Christopher M. Andreoli, Esq.
Office of Consumer Advocate
555 Walnut Street
5th Floor, Forum Place
Harrisburg, PA 17101-1923
OCAPAWC2023@paoca.org

Joseph L. Vullo, Esq.
Burke Vullo Reilly Roberts
1460 Wyoming Avenue
Forty Fort, PA 18704
jlvullo@bvrrlaw.com
Counsel for CEO

Ria M. Pereira, Esq.
Lauren N. Berman, Esq.
John W. Sweet, Esq.
Elizabeth R. Marx, Esq.
Pennsylvania Utility Law Project
118 Locust Street
Harrisburg, PA 17101
pulp@pautilitylawproject.org
Counsel for CAUSE-PA

Adeolu A. Bakare, Esq.
Charis Mincavage, Esq.
Ryan Block, Esq.
McNees, Wallace & Nurick, LLC
100 Pine Street
P.O. Box 1166
Harrisburg, PA 17108-1166
abakare@mcneeslaw.com
cmincavage@mcneeslaw.com
rblock@mcneeslaw.com
Counsel for PAWLUG

Ralph C. Smith
Mark S. Dady
Megan Eliasz
Dawn Bisdorf
Larkin & Associates PLLC
15728 Farmington Road
Livonia, MI 48154
OCAPAWC2023@paoca.org
Consultants for OCA

Jerome D. Mierzwa
Exeter Associates, Inc.
10480 Little Patuxent Parkway, Suite 300
Columbia, MD 21044
OCAPAWC2023@paoca.org
Consultant for OCA

Barbara Alexander
Barbara Alexander Consulting, LLC
44 Beech Street
Hallowell, ME 04347
OCAPAWC2023@paoca.org
Consultant for OCA

David Garrett
Resolve Utility Consulting PLCC
101 Park Avenue, Suite 1125
Oklahoma City, OK 73102
OCAPAWC2023@paoca.org
Consultant for OCA

Terry Fought
780 Cardinal Drive
Harrisburg, PA 17111
OCAPAWC2023@paoca.org
Consultant for OCA

Roger Colton
Fisher Sheehan & Colton
34 Warwick Road
Belmont, MA 02478
OCAPAWC2023@paoca.org
Consultant for OCA

Brian Kalcic
Excel Consulting
7330 Dorset Avenue
St. Louis, MO 63130
excel.consulting@sbcglobal.net
Consultant for OSBA

Heller Geller
118 Locust Street
Harrisburg, PA 17101
hgeller@pautilitylawproject.org
Consultant for CAUSE-PA

Kevin Higgins
Courtney Higgins
Shantell Garrett
Energy Strategies
111 East Broadway, Suite 1200
Salt Lake City, UT 84111
khiggins@energystrat.com
chiggins@energystrat.com
sgarrett@energystrat.com
Consultants for OSBA

J. Chadwick Schnee, Esq.
Schnee Legal Services, LLC
74 E. Main Street, #648
Lititz, PA 17543
chadwick@schneelegal.com
Counsel for Exeter Township

Kurt J. Boehm, Esq.
Jody Kyler Cohn, Esq.
Boehm, Kurtz & Lowry
36 East Seventh Street, Suite 1510
Cincinnati, OH 45202
kboehm@bkllawfirm.com
jkylercohn@bkllawfirm.com
Counsel for Cleveland Cliffs Steel

Sean M. Gallagher, Esq.
Gallagher Law Group
110 East Diamond Street, Suite 101
Butler, PA 16001
smgallagher@gallagher.legal
Counsel for Cleveland Cliffs Steel

Joan E. London, Esq.
Kozloff Stoudt, P.C.
2640 Westview Drive
Wyomissing, PA 19610
jlondon@kozloffstoudt.com
Counsel for Borough of St. Lawrence

Karen O. Moury, Esq.
Eckert Seamans Cherin & Mellott 213
Market Street, 8th Floor Harrisburg,
PA 17101
kmoury@eckertseamans.com *Counsel for Victory Brewing Company*

Lauren M. Burge, Esq.
Eckert Seamans Cherin & Mellott,
LLC 600 Grant Street, 44th Floor
Pittsburgh, PA 15219
lburge@eckertseamans.com
Counsel for Victory Brewing Company

Robert K. Ralls
254 Red Haven Road
New Cumberland, PA 17070
rralls73@yahoo.com

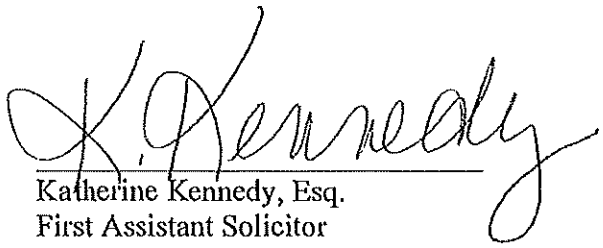
Carrie Wright
Prosecutor
Bureau of Investigation and
Enforcement
Pennsylvania Public Utility
Commission
Commonwealth Keystone Building
2nd Floor, Room-N201
Harrisburg, PA 17120
Phone: 717-783-6156
Email: carwright@pa.gov

Kyle Donahue
621 Gibbons Street
Scranton, PA 18505
kyle.23.donahue@gmail.com

markwh24@ptd.net
ltunzi@yahoo.com
carl.meyer@yahoo.com
keith.j.sauer@gmail.com
Ivanfigueroa60@gmail.com
senatorschwank@pasenate.com
jeffhenry1@me.com
nardiseast@gmail.com
whr19606@ptd.net
sd2734@yahoo.com
obrien1280@gmail.com
rksen1@gmail.com
meselznick@yahoo.com
eknight475@aol.com
smonatesti@verizon.net
zibadauw@frontiernet.net
bridgetleal15@yahoo.com
natewoodford@gmail.com
jmcbac@comcast.net
scotacy@icloud.com
jlondon@kozloffstoudt.com
tucker@tucker-hull-law.com
chadwick@tucker-hull-law.com
trish.luberda@gmail.com
latrese.laporte@yahoo.com
sseidel@comcast.net
Mandaln79@gmail.com
samantha.maize@yahoo.com
haotang@live.com
darlene.starfisch@gmail.com
kejeffries@hotmail.com
jorge.m.salazar@gmail.com
xuletian71@gmail.com
LJamesWatters3@gmail.com
weissjessica22@yahoo.com
palermojl@yahoo.com
JAGarofolo@comcast.net

Richard Baudino
J. Kennedy & Associates
1347 Frye Road
Westfield, NC 27053
rbaudino@jkenn.com
Consultant for Cleveland-Cliffs Steel

BYourkavitch828@comcast.net
Frankpiccola@live.com
dianemichalowski@aol.com
samanthawesner1@gmail.com
Pez44321@gmail.com
xuletian71@gmail.com
haynes06_22@msn.com
john@skilkennylaw.com
abakare@mcneeslaw.com
kmoury@eckertseamans.com
Lyband.jj@gmail.com
lynraeturquoise@aol.com
lburge@eckertseamans.com
haynes06_22@msn.com



Katherine Kennedy, Esq.
First Assistant Solicitor
City of Scranton
PA Attorney ID No. 317237
570-348-4105
kkennedy@scrantonpa.gov