

# BEARD LAW COMPANY

220 Regent Court, Suite A  
State College, PA 16801  
ph. 814-548-0028 fax 814-548-0030  
www.beardlawco.com

**RODNEY A. BEARD**  
rod@beardlawco.com

November 6, 2025

*VIA E-FILING*

Matthew L. Homsher, Secretary  
Pennsylvania Public Utilities Commission  
Commonwealth Keystone Building  
400 North Street  
Harrisburg, PA 17120

Re: I&E Petition to Request that Commission Open a Section 529 Investigation into the  
Acquisition of Rock Spring Water Company/Docket No. P-2024-3051313

Dear Secretary Homsher:

Enclosed for filing with the Pennsylvania Public Utilities Commission is the Brief of  
Rock Spring Water Company Opposing the Section 529 Acquisition Proceeding. A copy of this  
filing is being served in accordance with the attached Certificate of Service.

If you have any questions, please do not hesitate to contact me. Thank you.

Very truly yours,



Rodney A. Beard

RAB/nld

Enclosure

c: Rock Spring Water Company

All parties on the attached Certificate of Service in the manner specified.

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Petition to Request the Commission :  
Open a Section 529 Investigation Into : Docket No. P-2024-3051313  
The Acquisition of Rock Spring Water :  
Company :

**CERTIFICATE OF SERVICE**

I hereby certify that I am on this 6<sup>th</sup> day of November, 2025, serving the Brief of Rock Spring Water Company Opposing the Section 529 Acquisition Proceeding upon the persons in the manner indicated below:

**Served Via Electronic Mail Only**

Alexander R. Stahl, Esquire  
Aqua Services, Inc.  
726 W. Lancaster Avenue  
Bryn Mawr, PA 19010  
[astahl@aquaamerica.com](mailto:astahl@aquaamerica.com)  
Counsel for Aqua Pennsylvania, Inc.

Robert A. Mix, Esquire  
Robert Mix Law  
211 Kimport Avenue  
Boalsburg, PA 16827  
[bmix470@gmail.com](mailto:bmix470@gmail.com)  
[bmix@lmgrlaw.com](mailto:bmix@lmgrlaw.com)  
Counsel for  
State College Borough Water Authority

Elizabeth Rose Triscari, Esquire  
Teresa K. Harrold, Esquire  
Pennsylvania-American Water Company  
852 Wesley Drive  
Mechanicsburg, PA 17055  
[elizabeth.triscari@amwater.com](mailto:elizabeth.triscari@amwater.com)  
[teresa.harrold@amwater.com](mailto:teresa.harrold@amwater.com)  
Counsel for  
Pennsylvania-American Water Company

Elizabeth A. Dupuis, Esquire  
Morgan M. Madden, Esquire  
Babst, Calland, Clements & Zomnir, P.C.  
330 Innovation Blvd., Suite 302  
State College, PA 16803  
[bdupuis@babstcalland.com](mailto:bdupuis@babstcalland.com)  
[mmadden@babstcalland.com](mailto:mmadden@babstcalland.com)  
Counsel for the Township of Ferguson

David P. Zambito, Esquire  
Jonathan P. Nase, Esquire  
Cozen O'Connor  
17 North Second Street, Suite 1410  
Harrisburg, PA 17101  
[dzambito@cozen.com](mailto:dzambito@cozen.com)  
[jnase@cozen.com](mailto:jnase@cozen.com)  
Counsel for  
Pennsylvania-American Water Company

Jacob D. Guthrie, Esquire  
Melanie Joy El Atieh, Esquire  
Office of Consumer Advocate  
555 Walnut Street  
5<sup>th</sup> Floor, Forum Place  
Harrisburg, PA 17101-1923  
[OCARockSpring@paoca.org](mailto:OCARockSpring@paoca.org)

Rebecca Lyttle, Esquire  
Steven C. Gray, Esquire  
Office of Small Business Advocate  
555 Walnut Street  
1<sup>st</sup> Floor, Forum Place  
Harrisburg, PA 17101  
[relyttle@pa.gov](mailto:relyttle@pa.gov)  
[sgray@pa.gov](mailto:sgray@pa.gov)

Amanda Chaplin, Esquire  
Glenn Masser, Esquire  
Commonwealth of Pennsylvania  
Department of Environmental Protection  
Northcentral Regional Office  
208 West Third Street, Suite 101  
Williamsport, PA 17701  
[achaplin@pa.gov](mailto:achaplin@pa.gov)  
[gmasser@pa.gov](mailto:gmasser@pa.gov)  
Counsel for Commonwealth of  
Pennsylvania, Department of Environmental  
Protection

J. Roy Campbell  
Rock Spring Water Company  
1750 Tadpole Road  
Pennsylvania Furnace, PA 16865  
[rsw5@comcast.net](mailto:rsw5@comcast.net)

Carrie B. Wright, Esquire  
Deputy Chief Prosecutor  
Bureau of Investigation and Enforcement  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street  
Harrisburg, PA 17120  
[carwright@pa.gov](mailto:carwright@pa.gov)

The Honorable John Coogan  
Administrative Law Judge  
Pennsylvania Public Utilities Commission  
Commonwealth Keystone Building  
400 North Street  
Harrisburg, PA 17120  
[jcoogan@pa.gov](mailto:jcoogan@pa.gov)

Respectfully submitted:

11-6-25  
Date

  
Rodney A. Beard, Esquire  
PA I.D. No. 49909  
220 Regent Court, Suite A  
State College, PA 16801  
(814) 548-0028

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Petition to Request the Commission :  
Open a Section 529 Investigation Into : Docket No. P-2024-3051313  
The Acquisition of Rock Spring Water :  
Company :

**BRIEF OF ROCK SPRING WATER COMPANY OPPOSING  
THE SECTION 529 ACQUISITION PROCEEDING**

AND NOW, comes Rock Spring Water Company (“RSWC”), by and through its undersigned counsel, and in accordance with the Briefing Order entered by Honorable Administrative Law Judge John Coogan in this matter submits the following Brief in Opposition to the 529 Acquisition Proceeding.

I. STATEMENT OF THE CASE

RSWC is a Commission-certificated public utility that provides water utility services to the public. RSWC’s services are provided within Ferguson Township, Centre County, Pennsylvania. RSWC provides service to approximately 1,000 people, with approximately 490 customer connections. Therefore, Rock Spring Water Company is classified as a small water utility.

RSWC was started by a group of farming families in 1947. RSWC is a private, for-profit entity that is owned by its shareholders. The current shareholders are essentially descendants of the original farming families that started RSWC.

Over the years, operations of RSWC were largely handled by the Campbell family. Eventually, J. Roy Campell became the certified operator for RSWC.

Although originally designed to provide water to farms, as various residential developments occurred within the area of Ferguson Township served by RSWC, RSWC also served the residential customers. RSWC currently has one (1) well permitted to produce 230 gallons per minute of water, and a storage tank with the capacity of 209,000 gallons. RSWC also has various mains, pipes, valves, hydrants, sanitation apparatus, and other necessary materials to deliver water to its customers.

As a water supplier, RSWC is regulated by the Pennsylvania Department of Environmental Protection (“DEP”). As DEP regulations have become more stringent over the years, RSWC, due to lack of financial resources, has not kept pace with the requirements of the regulations. There is no dispute that RSWC has been cited with various violations by DEP over the years, and has not taken full action to correct all matters regarding the violations. One of the major violations for RSWC pertained to unaccounted for water. The percentage of unaccounted for water was too high for many years. RSWC’s unaccounted for water often ran in the 65-70% range. Although RSWC engaged in leak detection efforts, and often requested assistance from other parties in regard to leak detection and repair, the unaccounted for water percentage remained high.

RSWC’s last rate case in 2012 resulted in a Consent Agreement between RSWC and the PUC requiring RSWC to take certain actions in order to reduced unaccounted for water, and to make inquiries regarding selling the water system.

In 2014, RSWC met with members of the community, Ferguson Township, DEP, and the Public Utility Commission to discuss the status of RSWC and how to move forward with

improvements. DEP, PUC, and Ferguson Township did not follow up on those discussions. See testimony of Mark Glenn, Transcript, Oct. 20, 2025, page 537. Although SCBWA and Ferguson Township have engaged in discussions, and even entered into a Memorandum of Understanding (see testimony of Brian Heiser, Oct. 20, 2025, page 529-531), those parties, and the Commission and DEP have not engaged in discussions with RSWC regarding alternatives to acquisition as required by the statute.

As a result of non-compliance with the Consent Order from the PUC rate case in 2012, and violations of DEP regulations pertaining to RSWC, the Commission's Bureau of Investigation and Enforcement ("I & E") filed a petition on September 20, 2024, to request the Commission open a Section 529 investigation into the acquisition of RSWC. Various parties intervened in the proceeding, but no party filed an Answer to I & E's Petition.

On February 6, 2025, the Office of Consumer Advocate ("OCA") filed a Petition for Issuance of an Interim Emergency Order pursuant to 52 Pa. Code Sections 3.1 – 3.11. On February 20, 2025, Honorable Administrative Law Judge John Coogan issued an Order granting OCA's Interim Emergency Petition and certifying the material question to the Commission. On March 13, 2025, the Commission adopted a joint motion which appointed Pennsylvania American Water Company ("PAWC") as Receiver for RSWC, and directed RSWC to negotiate in earnest to transfer its water system to the State College Borough Water Authority ("SCBWA"). As of March 21, 2025, the Commission appointed PAWC as Receiver for RSWC. PAWC has operated RSWC since March 21, 2025. The Campbell family has been cooperative with PAWC in the transition to receivership and continuing operations of RSWC. As of August 25, 2025, all DEP violations were corrected except for the unaccounted for water percentage (which has been substantially reduced) and what DEP refers to as "data integrity issues."

## II. SUMMARY OF THE ARGUMENT

RSWC respectfully opposes the Section 529 proceeding seeking its forced acquisition. Despite acknowledged non-compliance with certain DEP regulations, RSWC continues to provide safe and reliable water service to its customers and can reasonably be expected to maintain such service in the future. Section 529 requires that specific findings be made, and that alternatives to acquisition be considered. Two of the required specific findings are not supported by the evidence, and the alternatives have not been considered in this case. It is not appropriate for the Commission to engage in the findings required under Section 529(a), without considering the alternatives required to be considered under Section 529(b).

Although customer rates need to be increased to provide funding for modifications needed to bring RSWC back into compliance with DEP and PUC requirements, and allow for improved management, that is exactly the type of considerations that the Commission must legally consider prior to ordering acquisition. The recent substantial improvements in service and compliance demonstrate that the statutory requirements for forced acquisition are not satisfied. Therefore, the Commission should deny the acquisition request as the statutory requirements for forced acquisition have not been satisfied.

## III. ARGUMENT

### 1. Section 529 Requires Multiple Statutory Findings Before Forced Acquisition

Section 529 of the Pennsylvania Public Utility Code empowers the Commission to order acquisition of a small water utility only after making specific statutory findings. *Public Service*

Water Company v. Fairview Water Company, 1992 Pa. PUC LEXIS 75, Docket No. C-00924451.

The Commission must find that: (1) the small water or sewer utility is no longer capable of providing and maintaining safe, adequate, efficient, and reasonable service and facilities in violation of statutory and regulatory standards; (2) alternatives have been considered and found to be impractical or uneconomic; and (3) the acquiring utility is technically, financially, and managerially capable and the acquisition will not unreasonably increase the acquiring utility's existing customers' rates. 66 Pa.C.S.A § 529.

The specific findings required under Section 529(a) are:

- (1) that the small water or sewer utility is in violation of statutory or regulatory standards, including, but not limited to, the act of June 22, 1937 (P.L.1987, No.394), known as The Clean Streams Law, the act of January 24, 1966 (1965 P.L.1535, No.537), known as the Pennsylvania Sewage Facilities Act, and the act of May 1, 1984 (P.L.206, No.43), known as the Pennsylvania Safe Drinking Water Act, and the regulations adopted thereunder, which affect the safety, adequacy, efficiency or reasonableness of the service provided by the small water or sewer utility;
- (2) that the small water or sewer utility has failed to comply, within a reasonable period of time, with any order of the Department of Environmental Resources or the commission concerning the safety, adequacy, efficiency or reasonableness of service, including, but not limited to, the availability of water, the potability of water, the palatability of water or the provision of water at adequate volume and pressure;
- (3) that the small water or sewer utility cannot reasonably be expected to furnish and maintain adequate, efficient, safe and reasonable service and facilities in the future;
- (4) that alternatives to acquisition have been considered in accordance with subsection (b) and have been determined by the commission to be impractical or not economically feasible;

- (5) that the acquiring capable public utility is financially, managerially and technically capable of acquiring and operating the small water or sewer utility in compliance with applicable statutory and regulatory standards; and
- (6) that the rates charged by the acquiring capable public utility to its preacquisition customers will not increase unreasonably because of the acquisition.

RSWC submitted direct testimony of Gene and Sharon Byers verifying that they are customers of RSWC, and that RSWC has always and continues to provide safe and reliable water to them. See RSWC Exhibit, Transcript, Oct. 20, 2025, pages 545 and 558.

Dennis Malichosky testified at the public input hearings in this matter that RSWC has for over 42 years provided safe and reliable water to his family as a customer, and continues to do so. See Transcript, Sept. 30, 2025, pages 289-293.

Richard Holsopple, even speaking in opposition to RSWC at the public input hearings, testified that he has never been out of water since 1979! See Transcript, Sept. 30, 2025, pages 267-268.

There has been no evidence submitted that RSWC cannot reasonably be expected to furnish and maintain adequate, efficient, safe and reasonable service and facilities in the future. All regulatory violations have been corrected except for the unaccounted for water violation. See testimony of Nathan White, Transcript, Oct. 20, 2025, pages 511-512.

The Commission may order acquisition only if it determines that the small water utility "cannot reasonably be expected to furnish and maintain adequate, efficient, safe and reasonable service and facilities in the future." *Application of James Black Water Service Company for Approval to Provide Water Service to the Public in Jefferson Township, Lackawanna County, Pennsylvania, 2018 Pa. PUC LEXIS 119, A-2013-2395443.* There must be evidence in the record to support such a finding. This forward-looking standard requires more than mere regulatory

violations—it demands a finding of future incapacity to provide adequate service. RSWC is today providing adequate service (under receivership), and can be expected to continue providing adequate service in the future. Of course, upgrades and improvements to the water system are needed, but those can be implemented over time in an orderly manner given appropriate funding and revenue. RSWC has not given notice to its customers that it will cease providing water service, and RSWC did not lose its certified operator. See Twin Lakes Utilities v. Pa. PUC, 281 A.3d 384 \*; 2022 Pa. Commw. LEXIS 109; appeal denied by Twin Lakes Utils., Inc. v. Pa. PUC, 293 A.3d 566, 2023 Pa. LEXIS 315, 2023 WL 2383405 (Pa., Mar. 7, 2023)

## 2. Regulatory Non-Compliance Alone Does Not Mandate Acquisition

While Section 529 permits the Commission to consider violations of regulatory standards, such violations are "not exclusive but only illustrative." Pennsylvania Public Utility Commission, v., Deer Haven, LLC d/b/a Deer Haven Sewer Company, 2011 Pa. PUC LEXIS 1864, R-2010-2194577; C-2010-2201891; C-2010-2202859; C-2010-2204514. The statute provides the Commission with discretion in determining whether acquisition is warranted, even when regulatory violations exist. *Id.* The Commission's authority is not automatically triggered by regulatory non-compliance but requires a comprehensive analysis of the utility's ability to provide adequate service. The statute specifically requires that the small water utility "cannot reasonably be expected to furnish and maintain adequate, efficient, safe and reasonable service and facilities in the future." Pennsylvania Public Utility Commission William E. Brown, et al. v. Sunshine Hills Water Company, 1992 Pa. PUC LEXIS 85, R-912023, R-912023C001. Rock Spring Water Company's current provision of safe and reliable water service demonstrates its continued capability to serve customers adequately, despite regulatory non-compliance issues.

Under the current management of PAWC, RSWC is doing fine. All RSWC needs is a more robust management and operations team.

### 3. Alternatives to Acquisition Must Be Considered

Section 529 mandates that "alternatives to acquisition have been considered in accordance with subsection (b) and have been determined by the commission to be impractical or not economically feasible." Public Service Water Company v. Fairview Water Company, 1992 Pa. PUC LEXIS 75, Docket No. C-00924451. This requirement reflects a legislative determination that it is in the public interest to encourage a small water utility to avail itself of an alternative to forced acquisition in order to avoid the taking of private property, the costs and the resource commitments engendered by a forced acquisition hearing. The Commission is obligated under the statute to respect this legislative determination. The Commission cannot proceed with forced acquisition without first considering and rejecting the listed alternatives as impractical or economically unfeasible.

Although not an exhaustive or exclusive list of alternatives, the specific alternatives that are listed in Section 529(b), and which must be considered, are:

- (1) The reorganization of the small water or sewer utility under new management.
- (2) The entering of a contract with another public utility or a management or service company to operate the small water or sewer utility.
- (3) The appointment of a receiver to assure the provision of adequate, efficient, safe and reasonable service and facilities to the public.
- (4) The merger of the small water or sewer utility with one or more other public utilities.

(5) The acquisition of the small water or sewer utility by a municipality, a municipal authority or a cooperative.

Section 529(b) further requires that: the commission shall discuss with the small water or sewer utility, and shall give such utility a reasonable opportunity to investigate, alternatives to acquisition.

The only listed alternative that has been pursued in this case is the potential acquisition of the small water or sewer utility by a municipal authority; e.g., SCBWA. That consideration did not materialize, but that does not mean that the other alternatives are to be ignored. There is no reason that reorganization under new, more robust management, should not be considered, as well as possibly contracting with a management service.

As stated by the Commission in *Pa. PUC v. Deer Haven, LLC, d/b/a Deer Haven Sewer Company*, 2011 Pa. PUC LEXIS 1864:

Finally, we agree with the ALJ that Section 529(b) of the Code requires the Commission to discuss with the small water or sewer utility, and give it a reasonable opportunity to investigate alternatives to acquisition, before the Commission may consider ordering the acquisition of the utility pursuant to Section 529(a). There is no indication in the record that these discussions have taken place.

At Page 65. Therefore, it is apparent that discussions of the alternatives must take place with RSWC **before** the Commission may consider ordering acquisition of RSWC. There is no evidence in the record that these discussions have occurred. The Commission has not investigated reorganization of RSWC under different management, or investigated possibly contracting with a management company skilled in the water industry, to provide services. Based on this record, it would be inappropriate for the Commission to order acquisition of RSWC by another capable public utility.

With sufficient funding, there is no doubt that RSWC could reorganize under new management and bring matters back into compliance. Indeed, the PAWC receivership itself is proof that this alternative is available. The evidence shows that RSWC, under proper management through the receivership, has demonstrated its ability to correct violations and provide adequate service. The substantial reduction in unaccounted for water loss and correction of multiple DEP violations prove that the utility can reasonably be expected to furnish adequate service in the future. Furthermore, the success of the receivership indicates that alternatives to acquisition remain viable and have not been fully explored as required by Section 529(b). The Commission should allow the receivership to continue for a short period of time rather than proceed with forced acquisition.

Under receivership, RSWC has corrected all DEP violations except for the unaccounted for water (which has been substantially reduced). RSWC to this day continues to provide safe and reliable water service to its customers. Given RSWC's demonstrated ability to provide safe and reliable service, alternatives such as compliance assistance, or technical support, should be explored before resorting to the drastic measure of forced acquisition.

Because the items listed in Section 529(b) are not exclusive, an additional item that would be appropriate would be to consider requiring interconnection with the SCBWA system to address concerns with supply of water in the event of a catastrophic failure of RSWC's single well.

#### 4. Burden of Proof Requirements Favor the Utility

Even if the Commission determines that the findings required under Section 529(a) are satisfied, under Section 529(i), once a prima facie case for acquisition is established, "the small

water . . . utility shall have the burden of proving its ability to render adequate, efficient, safe and reasonable service at just and reasonable rates." Public Service Water Company v. Fairview Water Company, 1992 Pa. PUC LEXIS 75, Docket No. C-00924451. RSWC can meet this burden by demonstrating its current provision of safe and reliable water service to customers. The evidence in this case reveals that no customer has suffered harm or gotten sick from RSWC water. Testimony of Nathan White, Transcript, Oct. 20, 2025, page 524. And PAWC is operating RSWC and continuing to provide safe and reliable water to customers with the existing infrastructure of RSWC. All that is needed is more revenue to support a more robust management team. The improvements that are needed to the RSWC infrastructure can be implemented over time with appropriate financial planning.

The Commission's inherent authority to direct acquisition exists "even where the small utility disputes the basis for the acquisition," but the objecting utility "may present evidence to show how it will meet its future statutory duties." Pennsylvania Public Utility Commission, v., North Heidelberg Sewer Company, 2018 Pa. PUC LEXIS 36, M-2018-2645983. The central concern remains "whether the customers could be reasonably assured of the future performance of the utility's duty to provide safe and adequate water service at a reasonable rate." Pennsylvania Public Utility Commission, v., North Heidelberg Sewer Company, 2018 Pa. PUC LEXIS 36, M-2018-2645983.

Furthermore, it is only after I & E has established a *prima facie* case that the small utility shall have the burden of proving its ability to render adequate, efficient, safe and reasonable service. See Section 529(i). There has been no *prima facie* showing by I & E or determination by the Commission that it would be in the public interest to force the acquisition of RSWC. However, RSWC has shown its ability to provide safe and adequate service.

5. Section 529 Is an Emergency Provision Requiring Immediate Public Interest Concerns

Aging infrastructure poses a significant challenge for utilities nationwide, with unaccounted for water often viewed as a negative consequence. However, unaccounted for water actually represents a valuable opportunity because the problems can be corrected with appropriate expertise. Addressing the problem of unaccounted for water effectively requires customized strategies and advanced technologies such as water audits, smart metering, pressure management, and leak detection. Section 529 "is in the nature of an emergency provision in which the Public Utility Code authorizes the Commission to take immediate action to protect the public interest." *Application of James Black Water Service Company for Approval to Provide Water Service to the Public in Jefferson Township, Lackawanna County, Pennsylvania, 2018 Pa. PUC LEXIS 119, A-2013-2395443.* The emergency nature of this provision suggests it should be reserved for situations where customers face immediate threats to their water service. The issue of unaccounted for water is not an emergency situation. Although it is a correctable problem, water utilities often have significant percentages of unaccounted for water. Having a high unaccounted for water percentage does not constitute an emergency situation; it is something to be corrected over time in a methodical fashion.

RSWC's continued provision of safe and reliable water service – albeit through the receivership of PAWC - negates any emergency justification for forced acquisition. The absence of immediate public safety concerns undermines the rationale for invoking this emergency provision. When the original Petition was filed in this case, there were concerns about the continued provision of safe and reliable water service by RSWC. However, the receivership by PAWC is proof that safe and reliable water service can be provided by RSWC under a more

robust management team that would include appropriate financial and engineering planning, as well as operations. Rather than ordering acquisition of RSWC by another capable public utility, the Commission should order that RSWC increase its rates to a level to support the appropriate engineering and operational requirements to continue to provide safe and reliable water service to its customers. The receivership can be wound down in an orderly fashion, and the operations turned over to a more robust management team. This is not a situation where the operator has walked away from the utility. Rather, this is a situation where the operator needs additional revenue and assistance to keep up with regulatory requirements.

#### IV. PROPOSED FINDINGS OF FACT

1. Rock Spring Water Company is a commission-certificated small water utility.
2. Rock Spring Water Company provides water service to approximately 1000 people in the western portion of Ferguson Township, Centre County, Pennsylvania pursuant to approximately 475 customer connections.
3. The Pennsylvania Department of Environmental Protection has cited Rock Spring Water Company for numerous violations of regulatory provisions applicable to RSWC over the years.
4. Although RSWC worked to correct the DEP violations, prior management of RSWC failed to adequately address or correct all of the DEP violations in a timely fashion.
5. RSWC is currently being managed by Pennsylvania American Water Company (PAWC) pursuant to a receivership ordered by the Commission.

6. Under current management by PAWC, RSWC has addressed and/or corrected all violations of DEP regulations, and has significantly reduced unaccounted for water.
7. The infrastructure of RSWC, consisting of pumps, tanks, water lines, valves, and other apparatus, is currently providing adequate, safe, and reliable service to customers of RSWC.
8. RSWC needs to implement a plan to improve and replace various infrastructure items utilized in the water system.
9. RSWC needs sufficient quantities of revenue in order to provide the dollars necessary to replace and/or improve the infrastructure components of the water system.
10. The commission has not engaged in discussions with RSWC regarding alternatives to acquisition as specified in Section 529(b) of the Public Utility Code.
11. The Bureau of Investigation and Enforcement has not set forth a *prima facie* case that RSWC cannot reasonably be expected to furnish and maintain adequate, efficient, safe and reasonable water services and facilities in the future because PAWC is currently operating RSWC and furnishing and maintaining adequate, efficient, safe and reliable water services to customers .
12. RSWC needs to raise its rates to customers in order to provide the necessary funding to implement appropriate management and infrastructure improvements into the future.

V. CONCLUSIONS OF LAW

1. The Public Utility Commission has jurisdiction over RSWC as a small water utility.
2. The Bureau of Investigation and Enforcement's petition in this matter is governed by Section 529 of the Public Utility Code.

3. Section 529 of the Public Utility Code requires that specific findings be made by the Commission before ordering acquisition of a small water utility.
4. Based on the fact that PAWC is safely operating RSWC under receivership, all specific findings required by Section 529(a) are not satisfied. In particular, it has not been shown by *prima facie* evidence that RSWC will not be able to provide and maintain adequate, efficient, safe and reasonable service to customers in the future.
5. Based on the lack of evidence in the record, it is a conclusion of law that the alternatives to acquisition that are required to be considered in accordance with subsection (b) of Section 529 have not been discussed with RSWC.
6. It is not appropriate to order acquisition of RSWC by another capable public utility.

#### VI. PROPOSED ORDERING PARAGRAPHS

1. The petition of the Bureau of Investigation and Enforcement is denied.
2. The commission shall have the appropriate agencies within its jurisdiction engage in discussions with Rock Spring Water Company regarding the alternatives to acquisition listed in Section 529(b) of the Public Utility Code,
3. Those discussions shall take place over the next 120 days, and the parties shall determine how to compensate PAWC as receiver and also determine how to compensate counsel for RSWC.
4. At the conclusion of the 120-day period for discussions, RSWC and the appropriate agency within the commission shall provide a joint status report regarding the status of the discussions.

VII. CONCLUSION

The Commission should deny the Section 529 acquisition proceeding because the statutory requirements for forced acquisition have not been satisfied. Rock Spring Water Company's provision of safe and reliable water service demonstrates its continued capability to serve customers adequately, alternatives to acquisition have not been properly considered, and no emergency circumstances justify the drastic remedy of forced acquisition. The Commission should exercise its discretion to deny the acquisition request and work with Rock Spring Water Company to address regulatory compliance issues through less intrusive means.

Respectfully submitted:

11-6-25

\_\_\_\_\_  
Date



\_\_\_\_\_  
Rodney A. Beard, Esquire  
PA I.D. No. 49909  
220 Regent Court, Suite A  
State College, PA 16801  
(814) 548-0028

**2011 Pa. PUC LEXIS 1864**

Pennsylvania Public Utility Commission

May 19, 2011, Entered; May 19, 2011, Adopted

R-2010-2194577; C-2010-2201891; C-2010-2202859; C-2010-2204514

***PA Public Utility Commission Decisions***

**Reporter**

2011 Pa. PUC LEXIS 1864 \*

**Pennsylvania Public Utility Commission; v.; Deer Haven, LLC d/b/a Deer Haven Sewer Company**

---

**Core Terms**

---

recommend, month, wastewater, customer, was, annual, haven, has, sewer, public utility, deer, tariff, acquisition, reply, commercial customer, rate increase, residential customer, proposed rate, plant, effluent, miscellaneous expenses, compliance, bureau, safe, fail to provide, beauty, notice, managerial, modify, input

**Panel:** Commissioners Present: Robert F. Powelson, Chairman; John F. Coleman, Jr., Vice Chairman; Tyrone J. Christy; Wayne E. Gardner; James H. Cawley

**Opinion**

---

Public Meeting held May 19, 2011

**OPINION AND ORDER**

**BY THE COMMISSION:**

Before the Commission for consideration and disposition is the Recommended Decision of Administrative Law Judge (ALJ) Angela T. Jones, issued on March 16, 2011, relative to the above-captioned general rate increase proceeding, and the Exceptions and Replies filed with respect thereto.

On April 5, 2011, the following Parties filed Exceptions to the ALJ's Recommended Decision: (1) White Pines on the Lake Homeowners' Association (White Pines) and White Beauty View Estates Homeowners' Association (White Beauty) (collectively, HOA); and (2) the Office of Consumer Advocate (OCA). Also on April 5, 2011, Deer Haven LLC (Deer Haven) d/b/a Deer Haven Sewer Company (DHS or Company) and the Office of Trial Staff (OTS) each filed a Letter notifying the Commission that it would not be filing Exceptions to the R.D. On April 15, 2011, the Company filed Reply Exceptions. Also on April 15, 2011, HOA filed a Letter indicating that it would not be filing Reply Exceptions.

### **I. History [\*2] of the Proceeding**

The following history of the proceeding is based on pages 1-7 of the Recommended Decision.

On August 19, 2010, Mr. Sam Shahar, General Manager of DHS <sup>1</sup> filed a request with the Commission which proposed an increase in the Company's wastewater service rates. The Company proposed an overall rate increase of \$ 40,314 per year. The increase would affect a residential customer in billed service per month from \$ 20.00 to \$ 95.00 or an increase of 375%.

**[\*3]**

On September 27, 2010, a Formal Complaint was filed with the Commission by Mr. George Marshack, at Docket No. C-2010-2202859, opposing the proposed rate increase. Mr. Marshack represented that he is President of White Pines and that he intended to file the complaint on behalf

---

<sup>1</sup>Deer Haven started operations of both water and wastewater operations in July 2004 in Palmyra Township, Pike County, Pennsylvania. DHS provides wastewater service for forty-six customers. Deer Haven owns Haven Development Company LLC. Deer Haven did not apply for a Certificate of Public Convenience from the Commission until March 8, 2006. Therefore, the Company was operating for almost two years before filing the appropriate application with the Commission for its operations. After protracted litigation, the Commission approved the Company's application to operate as a utility in Pennsylvania on March 25, 2010. Consequently, from July 2004 through March 2010, Deer Haven was not permitted to request a rate increase.

of it. The Formal Complaint opposed increases to the rates of both water and wastewater services provided to members of White Pines by Deer Haven Water Company (DHW) and DHS, respectively.

On September 30, 2010, a Formal Complaint, at Docket No. C-2010-2201891, was filed with the Commission by the OCA. The OCA stated that the proposed rate increase would be unjust, unreasonable and in violation of Pennsylvania law as it may allow the Company an opportunity to recover an excessive rate of return on its utility property investment, or may discriminate against certain customers, or may compensate the Company for providing inadequate service to some of its customers.

On October 12, 2010, a Formal Complaint, at Docket No. C-2010-2204514, was filed by Mr. Michael Horrigan opposing the proposed rate increase. Mr. Horrigan represented that he was President of White Beauty and that he intended to file the Complaint on [\*4] its behalf. The Complaint opposed increases to the rates of both water and wastewater services provided to the members of White Beauty by DHW and DHS, respectively.

On October 14, 2010, the Commission issued an Order suspending the operation of the proposed rate increase until May 18, 2011. The Commission determined that an investigation be instituted into the lawfulness, justness and reasonableness of the Company's proposed rates for wastewater service and assigned the case to the Office of Administrative Law Judge for prompt scheduling of a hearing culminating in the issuance of a Recommended Decision.

On October 18, 2010, DHS filed a Petition for Extraordinary or Emergency Rate Relief (Interim Relief Petition), at Docket No. P-2010-2204818, for an immediate increase in rates for wastewater service.<sup>2</sup> The Interim Relief Petition requested the Commission to approve the proposed rate increase from \$ 20.00 to \$ 95.00 per month immediately, in order that the Company could cover its basic operational expenses for daily operations.

---

<sup>2</sup>A companion Petition for Extraordinary or Emergency Rate Relief for Water Service, at Docket No. P-2010-2204817, was also filed at the same time.

[\*5]

On October 21, 2010, Administrative Law Judge (ALJ) Angela T. Jones issued a Prehearing Order in the Interim Relief Petition proceedings. On October 26, 2010, the OTS filed an Answer to the Interim Relief Petition, arguing that the Petition should be denied because the Company did not demonstrate that the requested relief was immediately necessary, pursuant to Section 1308(e) of the Public Utility Code (Code). 66 Pa. C.S. § 1308(e). However, the OTS did recommend that the Commission grant relief in the form of a \$ 22,320 increase in annual revenues in order that the Company could pay its immediate expenses.

On the same date, HOA, through counsel, filed a Formal Complaint and Answer in opposition to the Interim Relief Petition. Also, on October 26, 2010, the OCA filed an Answer in opposition to the Interim Relief Petition.

On November 5, 2010, DHS amended its Interim Relief Petition and reduced the request for emergency relief from \$ 40,314 to \$ 30,236, or 75% of the requested rate base relief. On November 12, 2010, an evidentiary hearing on the amended Interim Relief Petition was held in Harrisburg, Pennsylvania. On November 15, 2010, ALJ Jones [\*6] issued an Order certifying the record of the Interim Relief Petition at Docket No. P-2010-2204818 to the Commission for decision.<sup>3</sup>

By Notice dated December 1, 2010, a Public Input Hearing was scheduled for the rate proceeding on December 14, 2010.

By Opinion and Order entered December 2, 2010, at Docket No. P-2010-2204818 (*Interim Relief Order*) the Commission ruled that DHS met its burden of proof for extraordinary rate relief, and found the Company needed rate relief to continue providing normal services to its wastewater customers, to avoid reductions in its normal maintenance and repair of its system, and to avoid

---

<sup>3</sup> The transcript designation from the Interim Relief Petition is IRTTr. By Motion during the evidentiary hearing on January 10, 2011, the OCA requested that the transcript from the Interim Relief Petition be made a part of the record of the proceedings at Docket Nos. R-2010-2194499 and R-2010-2194577. That Motion was granted.

substantially reducing its employees. *Interim Relief Order* at 13. The [\*7] Commission found it significant that the Company provided clear and supportable evidence that the Company's expenses exceeded revenues. *Id.* at 12.

However, the Commission also concluded that the level of relief necessary to sustain normal wastewater operations was not as much as requested by DHS, because the supported expenses were not as high as claimed by the Company. The Commission found that DHS provided substantial evidence of \$ 1,826 in monthly expenses, or an annual expense level of \$ 21,912 (12 x \$ 1,826 = \$ 21,912). Thus, the Commission granted an annual revenue increase of \$ 10,872,<sup>4</sup> to go into effect with at least one day's notice. *Id.* at 20.

On December 14, 2010, a public input hearing was held as scheduled at the Promised Land Volunteer Fire & Ambulance Department. Seventeen people testified under oath. All of the testimony concerned poor service and [\*8] the majority of testimony concerned poor water service quality. All testimony concerned residential service. All testimony opposed the proposed rate increase for water and wastewater service.<sup>5</sup> The public input hearing generated a transcript from page 66 through to page 191 of transcribed testimony.

On January 10, 2011, an evidentiary hearing was held in Harrisburg, as scheduled, with ALJ Jones presiding. The Company presented one witness, Mr. Shahar. The OTS presented two witnesses, Ms. Debra Backer and Mr. Michael Gruber. The OCA presented two witnesses, Mr. Terry Fought and Ms. Marilyn Kraus. HOA presented two witnesses, Mr. Marshack and Ms. Jennifer Cottone. The evidentiary hearing generated 108 pages of transcribed testimony.<sup>6</sup>

[\*9]

---

<sup>4</sup> 12 months x \$ 20/month x 46 customers = \$ 11,040 annual revenues from the current rate for wastewater service. \$ 21,912 - \$ 11,040 = \$ 10,872.

<sup>5</sup> The public input concerned both water and wastewater services supplied by Deer Haven.

<sup>6</sup> Transcript pages from 192 to 300.

The OCA, the OTS, and HOA filed Main Briefs on February 2, 2011, in compliance with the procedural schedule. DHS had some delivery problems due to a snowstorm that occurred when the Main Brief was due. On February 2, 2011, by electronic mail, counsel for DHS requested that she be given a one-day extension for filing the Main Brief with a one-day extension for the Reply Brief. Counsel for DHS also volunteered to postpone the effective date of the proposed rate increase from May 18, 2011, to June 10, 2011. On February 3, 2011, counsel for DHS filed with the Commission Tariff Supplement No. 3 for DHS wastewater services, which has an effective date of June 10, 2011.

By Order dated February 10, 2011, ALJ Jones acknowledged the modified suspension date and granted the change in due date for the Reply Brief, which was February 15, 2011.

ALJ Jones's Recommended Decision was issued on March 16, 2011. In her Recommended Decision, the ALJ found, *inter alia*, that the Company should not place into effect the rates contained in Supplement No. 1 to Tariff Wastewater -- Pa. P.U.C. No. 1, and Supplement No. 3 to Tariff SEWER -- Pa. P.U.C. No. 1, which have been found to be unjust and unreasonable [\*10] and, therefore, unlawful. R.D. at 44. The ALJ further found that, based upon the adjusted revenue and expense analysis contained in the Recommended Decision, the Company has current revenue of \$ 11,670 and current expenses of \$ 25,715. She also determined that total allowable annual revenue should equal total allowable expenses, which is \$ 25,715. The result of calculations yields the total allowable monthly service charge at \$ 46.60 per month ( $\$ 25,715/\text{year} \times 1 \text{ year}/12 \text{ month} \times \text{service}/46 \text{ customers} = \$ 46.60/\text{month}/\text{customer}$ ) for all customers. Since the current rate for wastewater service is \$ 20 per month for residential customers, the ALJ concluded that the total allowable increase in rates would come to an additional \$ 26.60 per residential customer per month ( $\$ 46.60 - \$ 20.00 = \$ 26.60$ ). The ALJ also recommended that the Commission commence discussions with the management of DHS, pursuant to 66 Pa. C.S. § 529(b), regarding alternatives to a Commission-ordered acquisition of the Company. R.D. at 42. Accordingly, the ALJ concluded that, in the interim, while the Commission's Law Bureau is discussing alternatives to mandatory acquisition with [\*11] the

Company, the Company be directed to annually recover revenues in the amount no greater than \$ 25,715. *Id.* at 42-43.

Exceptions and Reply Exceptions to the Recommended Decision were filed as above noted. As duly noted in our determinations herein, we are modifying the ALJ's Recommended Decision, consistent with this Opinion and Order.

## II. Discussion

Initially, we are reminded that we are not required to consider expressly or at great length each and every contention raised by a party to our proceedings. *University of Pennsylvania, et al. v. Pa. PUC, 485 A.2d 1217, 1222 (Pa. Cmwlth. 1984)*. Any exception or argument that is not specifically addressed herein shall be deemed to have been duly considered and denied without further discussion.

In her Recommended Decision, ALJ Jones reached forty-four Findings of Fact, R.D. at 7-12, and four Conclusions of Law. *Id.* at 43. We shall adopt and incorporate herein by reference the ALJ's Findings of Fact and Conclusions of Law unless they are either expressly or by necessary implication overruled or modified by this Opinion and Order.

### A. Burden of Proof

The burden of proof to establish the justness [\*12] and reasonableness of every element of the Company's rate increase rests solely upon the public utility:

**§ 315(a) - Reasonableness of rates.** In any proceeding upon the motion of the Commission, involving any proposed or existing rate of any public utility, or in any proceeding 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.

66 Pa. C.S. § 315(a).

The Commonwealth Court, in reviewing Section 315(a), interpreted the utility's burden of proof in rate proceedings as follows:

Section 315(a) of the Public Utility Code, 66 Pa. C.S. § 315(a), places the burden of proving the justness and reasonableness of a proposed rate hike squarely on the public utility. It is well established that the evidence adduced by a utility to meet this burden must be substantial.

Lower Frederick Twp. v. Pa. PUC, 409 A.2d 505, 507 (Pa. Cmwlth. 1980). See also, Brockway Glass v. Pa. PUC, 437 A.2d 1067 (Pa. Cmwlth. 1981). In rate proceedings, it is well established that the burden of [\*13] proof does not shift to the parties challenging a rate increase. The utility's burden of establishing the justness and reasonableness of every component of its rate request is an affirmative one. The burden remains with the public utility throughout the rate proceeding.

Thus, the standard in this proceeding is evidence more persuasive by even the slightest amount for the proponent utility to prevail. Milkie v. Pa. PUC, 768 A.2d 1217 (Pa. Cmwlth. 2001); Morrissey v. Commonwealth of Pennsylvania, 424 Pa. 87, 225 A.2d 895 (1986); Burleson v. Pa. PUC, 501 Pa. 433, 641 A.2d 1234 (1983).

## **B. Company's Claims**

It is noted that DHS failed to claim any rate base, return on equity, or overall rate of return in this proceeding. The major portion of this proceeding concerns the expenses claimed by DHS and whether the quality of service provided by DHS was adequate and reasonable. Therefore, ALJ Jones noted that no rate base, return on equity or overall rate of return will be set through this proceeding. R.D. at 14.

### **1. Expenses**

#### **a. Purchased Power**

##### **i. Positions [\*14] of the Parties**

The OCA adjusted DHS's claim for purchased power expenses from \$ 13,405 to \$ 16,029. The OCA adjusted DHS's claim for purchased power to more accurately reflect the amount DHS pays for electric power. The OCA arrived at the adjusted level by annualizing DHS's purchased power from four months of actual expenses in 2010. OCA M.B. at 26-27. DHS agreed with the OCA's recommended adjustment for purchased power. DHS M.B. at 18.

## **ii. ALJ's Recommendation**

The ALJ recommended that, for the purposes of calculating rates, DHS's annual expense for purchased power should be \$ 16,029. R.D. at 16.

## **iii. Exceptions and Replies**

In its Reply Exceptions, DHS submits that it supported its claim for purchased power expenses and the ALJ properly recommended that the Commission adopt this expense claim as modified by the OCA. Exc. at 5.

## **iv. Disposition**

We agree with the OCA's adjustment, and, therefore, we will adopt the ALJ's recommendation that DHS's annual expense for purchased power expenses for the purposes of calculating DHS's rates should be \$ 16,029.

## **b. Testing Expense**

### **i. Positions of the Parties**

The OCA recommended that DHS's annual testing expense be reduced **[\*15]** from \$ 2,400 to \$ 1,200. The OCA argued that the record evidence indicated an expense of \$ 200 per month, for both water and sewer. Accordingly, the expense of DHS should only be half the total expense, or \$ 100 per month. OCA M.B. at 27.

DHS contended that the calculation for the testing expense should be done in the same manner as the OCA's recommendation for purchased power -- that being to extrapolate the annual

expense based on four months of data in 2010. DHS stated that it had actual testing expenses of \$ 2,150, based on seven months of expenses in 2010. Annualizing the seven months of actual testing expenses results in annual testing expenses of \$ 3,684 ( $\$ 2,150/7 \text{ months} \times 12 \text{ months} = \$ 3,684$ ). DHS M.B. at 20.

The OCA disputed DHS's claimed amount of \$ 3,684 for testing, stating that it is more than the amount sought in DHS's amended rate increase filing, which was \$ 2,400 for both water and wastewater. The OCA argued that the record does not support DHS's claimed amount of \$ 3,684 for testing expenses. OCA R.B. at 12-13.

### **ii. ALJ's Recommendation**

The ALJ pointed out in her recommendation that DHS agreed to the OCA's adjustment to reduce DHS's testing expense from \$ 2,400 [\*16] to \$ 1,200 annually, based on monthly invoices of \$ 200 for both water and wastewater. DHS St. 1R at 10. The ALJ noted that the Company cannot now argue that it erred in agreeing to the OCA's adjustment. The ALJ pointed out that DHS should have made its argument in its rebuttal testimony. Furthermore, the ALJ noted that, while OCA St. 2, Appendix II, subdivision 12 (OCA Set II-8), does provide data from the seven invoices, there is evidence of itemization of services rendered attributable to wastewater and water. The ALJ recommended that DHS's testing expense should be at the OCA recommended level of \$ 1,200 annually. R.D. at 17.

### **iii. Exceptions and Replies**

In Reply Exceptions, DHS concedes that it accepted the OCA's proposed reduction in its testing expenses and that the ALJ properly recommended that the Commission adopt the Company's claim, as modified by the OCA. Exc. at 6.

### **iv. Disposition**

We agree with the ALJ that the testing expenses should be reduced to the OCA recommended level of \$ 1,200. The Company agreed to the OCA-recommended adjustment to reduce testing

expenses to \$ 1,200, and only in its briefs indicated that it erred in agreeing to the lesser amount. Therefore, [\*17] we shall adopt the ALJ's recommendation to permit DHS to recover in rates \$ 1,200 in testing expenses, as proposed by the OCA.

### **c. Chemical Expense**

#### **i. Positions of the Parties**

The OCA accepted DHS's claim of \$ 3,000 per year for chemical expenses. OCA M.B. at 27. DHS did not further amend the chemical expense claim.

#### **ii. ALJ's Recommendation**

The ALJ recommended adopting the Company's claim of \$ 3,000 for chemical expenses. R.D. at 18.

#### **iii. Exceptions and Replies**

DHS submits that the ALJ properly recommended that the Commission adopt the Company's chemical expense claim of \$ 3,000. Exc. at 6.

#### **iv. Disposition**

Since DHS's \$ 3,000 chemical expense claim appears reasonable and since no Party opposed it, we shall adopt the ALJ's recommendation on this item.

### **d. Miscellaneous Expenses**

#### **i. Positions of the Parties**

The OCA contended that the Company provided supportive evidence for the following miscellaneous expenses: heating oil, communications and security. The OCA suggested that DHS provided evidence to support a level of \$ 2,371 for these miscellaneous expenses. OCA St. 2 at 10. The OCA recommended allocating half these expenses, or \$ 1,185 (due to rounding), to [\*18] DHS since the total expenses were for both the water and sewer companies. In addition,

the OCA acknowledged that DHS had a high speed internet expense of approximately \$ 600 for both its water and sewer services. The OCA recommended that DHS be allocated half of the internet expense, or \$ 300 annually. Thus, the OCA recommends that DHS should be permitted to recover a total miscellaneous expense of \$ 1,485 (\$ 1,185 + \$ 300). OCA St. 2 at 10; OCA M.B. at 27-28.

DHS argued that its miscellaneous expenses totaled \$ 3,993. DHS claimed this total included the following miscellaneous expenses which the OCA did not include in its calculations: real estate taxes, office utilities, supplies and postage. DHS M.B. at 20.

## **ii. ALJ's Recommendation**

The ALJ recommended that the OCA's annual miscellaneous expense level of \$ 1,485 be adopted. The ALJ noted that DHS stated in its Reply Brief that "[t]he Commission should grant the Company's rates in this proceeding that are sufficient to cover its miscellaneous expenses at the annual level of \$ 1,485." DHS R.B. at 8.

## **iii. Exceptions and Replies**

DHS submits that the \$ 1,485 for miscellaneous expenses recommended by the ALJ does not include any [\*19] amounts for real estate taxes. However, DHS suggests that the ALJ properly recommended that the Commission adopt the Company's annual miscellaneous expense claim, as modified by the OCA. R. Exc. at 6.

## **iv. Disposition**

We agree with the ALJ that the annual miscellaneous expenses supported by the record evidence in this rate proceeding are \$ 1,485 and, therefore, we shall adopt the ALJ's recommendation for this item.

## **e. Maintenance Labor Expenses**

### **i. Positions of the Parties**

DHS claimed \$ 700 per month (\$ 8,400 annually) for a DEP-certified operator in its amended filing. Exh. DHS-1 at Schedule D; OCA St. 2 at Appendix II, subdivision 4 (OCA II-5). The OCA made a downward adjustment to this claim since the certified operator currently accepts \$ 334 per month (\$ 4,000 annually) . OCA St. 2 at 8. The OCA noted that DHS failed to provide a written agreement with the certified operator for payment higher than \$ 4,000 per year.

DHS contended that, although the certified operator agreed to a salary of \$ 334 per month, DHS still owes the certified operator the unpaid portion of the salary at the higher amount of \$ 700 per month. DHS M.B. at 19.

## **ii. ALJ's Recommendation**

The ALJ [\*20] pointed out that DHS stated in its Reply Brief, "DHS requests that the Commission grant rates . . . to cover the Company's expenses for employment of a DEP operator . . . at the annual level of \$ 4,000." DHS R.B. at 8. The ALJ noted that DHS has conceded that the adjusted annual maintenance labor expense of \$ 4,000 is appropriate and, as a result, the ALJ recommended that DHS be permitted to recover \$ 4,000 annually for maintenance labor.

## **iii. Exceptions and Replies**

HOA argues that the Company failed to substantiate its annual claim of \$ 4,000 for the DEP-certified operator. HOA submits that the Company failed to provide a contract, invoices or cancelled checks to support its claim and, therefore, that claim should be rejected. HOA Exc. at 7.

DHS avers that the ALJ properly recommended that the Commission adopt the Company's claim, as modified by the OCA. R. Exc. at 7.

## **iv. Disposition**

We agree with the ALJ that a maintenance labor level of expense of \$ 4,000 is appropriate based on the record. Accordingly, we shall deny HOA's Exception on this issue and adopt the ALJ's recommendation that DHS be allowed to recover \$ 4,000 annually for this expense.

**f. Operating Labor Expenses [\*21]**

**i. Positions of the Parties**

DHS claimed annual operating labor expenses of \$ 36,000. Included in this amount is \$ 1,000 per month (\$ 12,000 annually) for bookkeeping expenses and \$ 2,000 per month (\$ 24,000 annually) for daily operating services. These expenses were paid to Summit Holdings. OCA St. 2 at 4, Appendix II, subdivision 4 (OCA II-5). DHS admitted that this expense was reduced to \$ 1,166 per month (\$ 13,992 annually) . *Id.* at 4-5.

According to the OCA, it appears there is a relationship between DHS and Summit Holdings. The OCA pointed out that DHS does not have a written contract with Summit Holdings, only an oral contract, and that the Company did not provide an accounting of the actual services performed by Summit Holdings and the hours it devoted to the sewer company. OCA M.B. at 28, citing OCA St. 2 at 5. Similarly, the OTS asserted that DHS failed to substantiate these expenses. OTS St. 1 at 3. The OCA recommended that DHS's operating labor expenses be limited to no more than \$ 13,000. OCA M.B. at 31.

**ii. ALJ's Recommendation**

The ALJ concluded that DHS failed to provide any argument to substantiate its claim for operating labor expense. The ALJ noted that [\*22] DHS advocated in its Reply Brief a total expense claim of \$ 25,714. DHS R.B. at 6. The ALJ noted the following breakdown of DHS's expense claim of \$ 25,714:

- (1) \$ 16,029 for purchased power expense;
  - (2) \$ 1,200 for testing expense;
  - (3) \$ 3,000 for chemical expense;
  - (4) \$ 1,485 for miscellaneous expense; and
  - (5) \$ 4,000 for maintenance labor expense
- \$ 25,714 Grand total for expenses

The ALJ agreed with the OCA and the OTS that DHS failed to provide substantial evidence to support the expense for operating labor and, therefore, recommended that this expense item be denied in its entirety. R.D. at 21.

**iii. Exceptions and Replies**

No Exceptions or Replies addressed this issue.

**iv. Disposition**

We agree with the ALJ that DHS failed to provide any support for operating labor expenses and, therefore, we conclude that DHS's claim for this item should be denied.

**g. Additional Expense -- Sludge Removal & Piping**

**i. Positions of the Parties**

DHS claimed through testimony that it pays PPL Electric Utilities \$ 120 per month (\$ 1,440 annually) for piping across its property and \$ 100 per month (\$ 1,200 annually) for sludge removal. DHS St. 1 at 8-9. The OCA argued that those expenses [\*23] should be denied because DHS failed to provide any evidence to support them. R.D. at 21; OCA M.B. at 32.

**ii. ALJ's Recommendation**

The ALJ agreed with the OCA that DHS's expenses for sludge removal and PPL piping are not substantiated in the record. As a result of the failure by DHS to support sludge removal and PPL piping expenses, the ALJ recommended that those expenses be denied.

**iii. Exceptions and Replies**

No Exceptions or Replies addressed this expense item.

**iv. Disposition**

On review, we agree with the ALJ that DHS failed to support its claim for this expense item. Accordingly, this item will be denied.

## **2. Accurate Amount of Current Revenue**

### **a. Positions of the Parties**

DHS claimed present operating revenues of \$ 11,040<sup>7</sup> to the increase in rates that went into effect on December 6, 2010, in compliance with the *Interim Relief Order*. DHS's present revenues are based on forty-five residential customers and one commercial customer. Subsequent to the *Interim Relief Order*, DHS's revenues increased to \$ 21,912 per year, based on a monthly rate of \$ 39.70. DHS contended that even with this increase, the total revenues do not cover DHS's total expenses. Furthermore, [\*24] DHS claimed that it spent over \$ 300,000 making wastewater system improvements since July 2004, and that it has not been able to recover that expense. DHS M.B. at 16-17.

The OCA challenged DHS's present operating claim on the basis that DHS was not charging its one commercial customer the same rate as its residential customers. Rather, avers the OCA, DHS's commercial customer was being charged \$ 125 per month. As a result, the OCA claimed that DHS's current revenue should be increased to a level of \$ 12,300 ((45 residential customers x \$ 20 per month x 12 months per year) + (1 commercial customer x \$ 125 per month x 12 months per year) = \$ 12,300).

OCA M.B. at 25.

### **b. ALJ's Recommendation**

The ALJ recommended a present revenue level for DHS of \$ 11,670. This revenue level is based on record evidence indicating that DHS's one commercial customer actually paid \$ 60 per quarter for the first two quarters of 2010, and \$ 125 per month for the last two quarters [\*25] of 2010, which resulted in total annual revenues of \$ 870. The ALJ, accordingly, concluded that DHS's

---

<sup>7</sup> 46 customers x \$ 20 per month x 12 months per year = \$ 11,040.

total annual revenue consisted of \$ 870 from the one commercial customer and \$ 10,800 from its 45 residential customers, or a total of \$ 11,670 (\$ 870 + \$ 10,800). R.D. at 22.

**c. Exceptions and Replies**

No Exceptions or Replies were filed with regard to DHS's current revenue amount.

**d. Disposition**

We agree with the ALJ that DHS's total present revenue is \$ 11,670. Accordingly, the ALJ's recommendation on this issue will be adopted.

**3. Rate Structure -- Availability Fee**

**a. Positions of the Parties**

OCA witness Marilyn Kraus suggested that DHS should be directed to establish an availability fee "to accommodate any future availability customers . . . associated with the costs to be ready to serve . . . customers." OCA M.B. at 36, citing OCA St. 2 at 12.

The OCA pointed out that availability fees may be permitted by the Commission per Section 1305 of the Code, which states as follows:

§ 1305. Advance payment of rates; interest on deposits

No public utility shall require the payment of rates in advance, or the making of minimum payments, ready to serve charges, or deposits [\*26] to secure future payments of rates, except as the commission, by regulation or order, may permit...

66 Pa. C.S. § 1305. The OCA also noted that the Commission has approved availability fees per lot where the water system has been installed to serve all lots, regardless of whether a structure has been built on the lot to improve it. OCA M.B. at 36.

The OCA suggested that DHS should establish a tariff for an availability fee, based on the possibility of the development of property which Pocono Lakefront LLC purchased from DHS. That

property is located at the site of DHS's sewer plant and the property has the capacity to serve 125 customers. R.D. at 24. The OCA recommended that the availability fee be initially set at zero and that it be increased once the lines are ready for use by additional units. OCA M.B. at 37-38.

DHS responded that it would be more practical to develop the availability fee when the improvements are actually constructed on the property that DHS serves. DHS contended that the recommendation of establishing an availability fee set at zero at this time is unreasonable, inefficient and imprudent. M.B. at 38.

#### **b. ALJ's Recommendation**

The ALJ found DHS's argument [\*27] on this issue persuasive. The ALJ stated that, to direct the Company to establish the availability fee, on the speculation that Pocono Lakefront LLC is going to improve the property upon which DHS's sewer plant is located, would be to direct the Company to put forth time, energy and money -- all of which are resources that are limited and at a premium. The ALJ believed that the more practical course of action would be to establish said availability fees once Pocono Lakefront LLC affirmatively takes steps for construction of a new development on the property. R.D. at 24-25.

#### **c. Exceptions and Replies**

HOA submits that the ALJ erred in not requiring DHS to institute an availability fee as a result of this proceeding. An availability fee, contends HOA, is appropriate considering the uncontroverted evidence that Deer Haven owns thirteen of fifteen vacant lots in White Beauty View Estates. HOA Exc. at 10-11; HOA St. No. 2 at 5. HOA also argues that it would be more prudent to include the creation of an availability fee as part of this proceeding, because it is almost certain that some sort of compliance filing will be required before this case is closed. HOA Exc. at 11-12.

DHS responds [\*28] that establishing an availability fee as a result of this proceeding is not warranted. Rather, DHS argues that a fee should be established when improvements are constructed that will serve its customers. DHS avers that HOA's Exception regarding this issue

should be denied and the Commission should adopt the ALJ's recommendation that establishment of an availability fee at this time is not warranted. DHS R. Exc. at 13-15.

#### **d. Disposition**

We agree with the ALJ that establishing an availability fee is not practical at this time, and, therefore, we shall not require DHS to do so. As pointed out by the ALJ, to direct DHS to establish an availability fee at this time would be to direct DHS to expend time, energy and money that are limited and are all needed more urgently for other matters. DHS may consider the establishment of availability fees once Pocono Lakefront LLC affirmatively takes steps for construction of a new development on the property. Accordingly, HOA's Exception on this issue is denied.

### **4. Rate Design -- Rate for Commercial Customers**

#### **a. Positions of the Parties**

DHS currently has one commercial customer, which it charges \$ 125 per month for wastewater services. [\*29] This commercial customer was paying the same rate as DHS's residential customers, that is, \$ 20 per month, until January 1, 2010, when the commercial customer agreed to pay \$ 60 per quarter from January through June, 2010. DHS's current tariff provides for a flat rate of \$ 550 per month for a commercial customer. OCA St. 2 at 11.

The OCA argued as follows: "[t]he Company's actions in arbitrarily setting rates for its one commercial customer violate Section 1303 of the Code. 66 Pa. C.S. § 1303." That provision states as follows:

No public utility . . . shall demand or receive from any person, corporation, or municipal corporation a greater or less rate for any service rendered or to be rendered by such public utility than that specified in the tariffs of such applicable thereto. The rates specified in such tariffs shall be the lawful rates of such public utility until changed . . . .

The OCA contended that a rate of \$ 550 per month, or even \$ 125 per month, compared to the proposed residential rate of \$ 95 per month, does not appear justified because the commercial

customer is unlikely to have higher usage than the residential customer. In [\*30] addition, the OCA recommended that the Company should be directed to amend its tariff so that its commercial customers are charged the same rate as its residential customers. In this connection, the OCA notes that Section 1304 of the Code prohibits public utilities from establishing any unreasonable difference of rates between customer classes. The OCA noted that DHS did not challenge this recommendation. OCA M.B. at 39-40.

DHS did not rebut the OCA's recommendation in rebuttal or rejoinder testimony and failed to argue this issue in its Main and Reply Briefs.

#### **b. ALJ's Recommendation**

The ALJ recommended that the Commission adopt the OCA's recommendation that DHS be directed to revise its tariff so that commercial customers be required to pay the same rate that residential customers pay.

#### **c. Exceptions and Replies**

No Exceptions or Replies were filed addressing the issue of rate design for commercial customers.

#### **d. Disposition**

We note that DHS cannot arbitrarily change rates for customers because to do so would violate the Code. 66 Pa. C.S. § 1303. We agree with the OCA's position that DHS's commercial customers should be charged the same [\*31] rate for wastewater service as its residential customers, since it seems unlikely that DHS's only commercial customer has a higher wastewater usage than DHS's residential customers. Therefore, we shall adopt the ALJ's recommendation on this issue and direct DHS to file tariffs that require its commercial customers to pay the same rate that residential customers pay.

### **C. Quality of Service**

#### **1. Legal Standard**

Section 1501 of the Code, 66 Pa. C.S. § 1501, in pertinent part, requires as follows:

Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and shall make all such repairs, changes, alterations, substitutions, extensions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public. Such service also shall be reasonably continuous and without unreasonable interruptions or delay. Such service and facilities shall be in conformity with the regulations and orders of the commission.

In exchange for being paid for the service rendered to the customers, the public [\*32] utility is obligated to provide safe, reasonable and adequate service. Pa. PUC v. Pennsylvania Gas & Water Co., 61 Pa. P.U.C. 409 (1986) (PG&W 1986); Pa. PUC v. Pennsylvania Gas & Water Co., 68 Pa. P.U.C. 191 (1988) (PG&W 1988).

Section 523 of the Code, 66 Pa. C.S. § 523 states as follows:

The commission shall consider, in addition to all other relevant evidence of record, the efficiency, effectiveness and adequacy of service of each utility when determining just and reasonable rates under this title. On the basis of the commission's consideration of such evidence, it shall give effect to this section by making such adjustments to specific components of the utility's claimed cost of service as it may determine to be proper and appropriate. Any adjustment made under this section shall be made on the basis of specific findings upon evidence of record, which findings shall be set forth explicitly, together with their underlying rationale, in the final order of the commission.

When considering a utility's rate claims, the Commission is required to review whether the service rendered [\*33] by the utility is efficient, effective and adequate. If, after an evidentiary hearing, the Commission determines that the service rendered is inadequate, it has the discretion to deny, in whole or in part, a proposed rate increase. 66 Pa. C.S. § 526(a). In this proceeding, the

Commission has previously recognized its discretion to deny the proposed rate increase if it were to find that the service rendered by the Company is inadequate. *Interim Relief Order* at 13.

Furthermore, the Commission has the discretion to initiate action if it is proved, by substantial evidence, that a utility has failed to provide adequate and reasonable service. Specifically, Section 529(a)-(c) of the Code, 66 Pa. C.S. § 529(a)-(c), outlines the action the Commission is empowered to take with regard to acquisition, as follows:

**§ 529 - Power of commission to order acquisition of small water and sewer utilities**

(a) GENERAL RULE. - The commission may order a capable public utility to acquire a small water or sewer utility if the commission, after notice and an opportunity to be heard, determines:

(1) that the small water [\*34] or sewer utility is in violation of statutory or regulatory standards, including, but not limited to, the act of June 22, 1937 (P.L. 1987, No. 394), known as The Clean Streams Law, the act of January 24, 1966 (1965 P.L. 1535, No. 537), known as the Pennsylvania Sewage Facilities Act, and the act of May 1, 1984 (P.L. 206, No. 43), known as the Pennsylvania Safe Drinking Water Act, and the regulations adopted thereunder, which affect the safety, adequacy, efficiency or reasonableness of the service provided by the small water or sewer utility;

(2) that the small water or sewer utility has failed to comply, within a reasonable period of time, with any order of the Department of Environmental Resources<sup>8</sup> or the commission concerning the safety, adequacy, efficiency or reasonableness of service, including, but not limited to, the availability of water, the potability of water, the palatability of water or the provision of water at adequate volume and pressure;

(3) that the small water or sewer utility cannot reasonably be expected to furnish and maintain adequate, efficient, safe and reasonable service and facilities in the future;

---

<sup>8</sup> Now known as the Department of Environmental Protection.

(4) that alternatives [\*35] to acquisition have been considered in accordance with subsection (b) and have been determined by the commission to be impractical or not economically feasible;

(5) that the acquiring capable public utility is financially, managerially and technically capable of acquiring and operating the small water or sewer utility in compliance with applicable statutory and regulatory standards; and

(6) that the rates charged by the acquiring capable public utility to its pre-acquisition customers will not increase unreasonably because of the acquisition.

(b) ALTERNATIVES TO ACQUISITION. - Before the commission may order the acquisition of a small water or sewer utility in accordance with subsection (a), the commission shall discuss with the small water or sewer utility, and shall give such utility a reasonable opportunity to investigate, alternatives to acquisition, including, but not limited to:

(1) The reorganization of the small water or sewer utility under new management.

(2) The entering of a contract with another public utility or a management or service company to operate the small water or sewer utility.

(3) The appointment of a receiver to assure the provision of adequate, [\*36] efficient, safe and reasonable service and facilities to the public.

(4) The merger of the small water or sewer utility with one or more other public utilities.

(5) The acquisition of the small water or sewer utility by a municipality, a municipal authority or a cooperative.

(c) FACTORS TO BE CONSIDERED. - In making a determination pursuant to subsection (a), the commission shall consider:

(1) The financial, managerial and technical ability of the small water or sewer utility.

(2) The financial, managerial and technical ability of all proximate public utilities providing the same type of service.

- (3) The expenditures which may be necessary to make improvements to the small water or sewer utility to assure compliance with applicable statutory and regulatory standards concerning the adequacy, efficiency, safety or reasonableness of utility service.
- (4) The expansion of the franchise area of the acquiring capable public utility so as to include the service area of the small water or sewer utility to be acquired.
- (5) The opinion and advice, if any, of the Department of Environmental Resources as to what steps may be necessary to assure compliance with applicable statutory [\*37] or regulatory standards concerning the adequacy, efficiency, safety or reasonableness of utility service.
- (6) Any other matters which may be relevant.

We note that the statute lists some specific violations of service standards to be considered by the Commission prior to the Commission directing acquisition of a public utility. However, the statute also notes that said violations are not exclusive but only illustrative. Thus, the Commission, at its discretion, may require the takeover of a small water or wastewater utility when the service the utility provides is inadequate. However, the statute also provides that certain factors are to be considered by the Commission before the acquisition of a small utility can be ordered.

## **2. Public Input Testimony**

The public input hearing convened on December 14, 2010, as scheduled, and it encompassed the proceedings on both water service and wastewater service, Docket Nos. R-2010-2194499 and R-2010-2194577, respectively. [\*38] All testimony was against the proposed rate increase for water and wastewater service and most of the testimony concerned the water service. However, Mr. Joseph Dotter testified specifically about wastewater service.

Mr. Dotter is a White Beauty resident in the service territory of DHS since 1979. He assisted in maintaining a well and monitoring the pump and tank until 2007 so that White Beauty would have water service. Tr. at 109, 118. Mr. Dotter stated that, when it rains hard, the wastewater plant becomes flooded with surface water, due to the broken pipes in the plant. Tr. at 112.

Mr. Joseph Ruffallo also testified as a White Beauty resident and questioned whether Deer Haven is "qualified to run a water and [wastewater] system." Tr. 164. Mr. Ruffallo questioned the technical fitness of the Company. He was of the opinion that the Commission might, in this proceeding, question whether the Company's Certificate, granted in March of 2010, was erroneously approved. Tr. at 166.

Mr. Raymond Lahey testified as a White Pines summer and weekend resident. Mr. Lahey stated that the White Pines development recently paid \$ 18,000 for new pumps for the wastewater system. Tr. at 180-81. Mr. Lahey [\*39] also stated that eighteen to twenty of the residents in White Pines are similar to vacation home residents, present predominantly in the summer season and on certain weekends. Mr. Lahey also pointed out that, therefore, the water and wastewater systems are not being taxed by homes that are occupied every day. Accordingly, he was of the opinion that the operating and maintenance costs of DHS should be directly proportional to a system used sparingly. Yet, he noted, the billing for service is structured as if the residents are occupying the homes fifty-two weeks of the year. Tr. at 181-82.

### **3. DHS's Position**

DHS argued that it is misleading to state that National Pollutant Discharge Elimination System (NPDES) permit violations occurred in nineteen of forty-six months from January, 2007, through October, 2010, because, in some of these instances, just one effluent limit was not met. DHS M.B. at 21. DHS stated as follows:

- (i) DHS was out of compliance with more than one NPDES limit in only five [months] of the 46 month [period]...;
  - (ii) the effluent limits for Total Dissolved Solids, pH, Fecal Coliform, Dissolved Oxygen and Residual Chlorine were met in all 46 ... months [of [\*40] the period];
  - (iii) the level of CBODs exceeded the maximum allowable amount [just once in the period];
- and

(iv) the only two contaminants that did not meet the permit limits on multiple occasions were Total Nitrogen and Total Phosphorus.

DHS M.B. at 22. DHS also contended that no customer complaints were made with regard to wastewater service and no fines were issued against the Company regarding the NPDES permit violations cited on the record. *Id.* Furthermore, no DHS customers testified that they had wastewater back-up into their residence. *Id.* DHS was of the opinion that its request for increased rates should not be denied based on the quality of service and these NPDES permit violations. *Id.*

#### **4. Positions of other Parties**

##### **a. Technical Fitness Challenged**

###### **i. The OCA's Position**

The OCA averred that the definition of a wastewater public utility is to function safely and adequately to collect, clean, and properly discharge the effluent. OCA M.B. at 11. The OCA asserted that, if the facilities are not properly functioning, then there should be ratemaking implications. *Id.*

The OCA pointed to specific evidence of improperly functioning facilities. For [\*41] example, from January, 2007, to October, 2010, the effluent of DHS's treatment plant exceeded NPDES permit limitations during nineteen months. *Id.*, citing OCA St. 1 at 3; OCA Exh. TLF-1S. Over the same period, DHS's discharge monitoring reports (DMR) did not contain valid laboratory analysis of effluent for six months. OCA Exh. TLF-1S. DHS received a Notice of Violation (NOV) from DEP in October, 2010, for effluent that exceeded permit limits in May, June and July 2010, with additional NOVs issued in October, 2009, April, 2009, and March, 2007, for effluent exceeding permit limits. OCA M.B. at 12 citing OCA St. 1 at 2.

Furthermore, the OCA pointed out that the Company was directed in April or May 2010, to add a coagulant at the wastewater treatment plant to improve performance, but the record does not support that the performance of the treatment plant improved because the effluent violations

continued in May, June and July, 2010, for CBOD5 and Phosphorus. *Id.* Thus, the OCA concluded that DHS's facilities have not been functioning properly for a significant period of time.

Moreover, the OCA pointed to record evidence that DHS does not deny these malfunctions, but instead suggested [\*42] a possible source of improved finances through a verbal agreement of a loan from Pocono Lakefront, LLC, to purchase chemicals to remedy the Company's treatment process. OCA M.B. at 13. The OCA also stated that actions taken by DHS, such as using only a portion of the treatment plant capacity, terminating unused mains and laterals, and curtailing additional sources of surface water that enters the collection system through facilities that are not being used, have not achieved compliance with permit requirements. *Id.* at 13-14.

The OCA also contended that DHS has failed to rebut evidence of service inadequacy and, therefore, the Company is not in compliance with Section 1501 of the Code. 66 Pa. C.S. § 1501. The OCA averred that: "[R]atepayers should not be required to provide funds to a utility so that the utility may, at some future time, provide adequate service." OCA M.B. at 15. The OCA recommended that the Commission deny DHS's proposed rate increase in its entirety, because of the inadequacy of its service, pursuant to Sections 523 and 526 of the Code. 66 Pa. C.S. §§ 523, 526 [\*43] .

## ii. The OTS' Position

The OTS noted that DHS acknowledged thirteen months of violations between January, 2007, and October, 2010, but disputed six additional months of violations in the same period. OTS M.B. at 24, citing DHS St. 1-R at 3. The OTS stated that DHS failed to provide documents to show that the effluent limits were not exceeded in the nineteen months over the January, 2007, to October, 2010, period. The OTS argued that DHS only offered assertions that remedies will be instituted in the future. The OTS opined that such assertions are insufficient to negate that violations occurred. OTS M.B. at 25. Furthermore, the OTS asserted that DHS's pattern of behavior renders any future intentions that the Company may profess not to be believable. *Id.* Finally, the OTS argued that

DHS, facing these operational challenges, "cannot be expected to protect the interest of ratepayers [by] restoring the [wastewater] system to operational compliance." *Id.*

### iii. HOA's Position

HOA argued that, according to the record evidence, DEP has issued NOVs regarding DHS's NPDES permit over the past three to four years. HOA M.B. at 10, citing OCA St. 1 at 2-3. HOA emphasized that, between [\*44] the period of January, 2007, and October, 2010, the effluent limit from the treatment plant exceeded permit requirements during at least nineteen months. HOA M.B. at 11, citing Exh. TLF-1. HOA stated that, fundamentally: "DHS has shown that it is not adequately conforming to its NPDES standards." *Id.*

HOA averred that it is also troubled by the lack of expertise exhibited by the General Manager of DHS, Mr. Shahar. HOA asserted that Mr. Shahar conceded on at least two occasions that he lacks the technical background to run a wastewater company. Tr. at 77, 240. HOA acknowledged that the Company employs a DEP-certified operator to compensate for the general manager's lack of expertise. HOA, however, pointed to the frequency of the Company's receipt of NOVs and its failure to comply with NPDES standards as evidence that the service provided by the Company is unsafe and substandard. HOA M.B. at 11, 16.

Lastly, the HOA contended it is undisputed that Haven Development planned in 2004 to construct over 300 townhomes and, in concert with DHS, to construct new facilities for a wastewater system. Those plans are no longer operative. OCA St. 1 at 14, citing DHS St. 1 from Docket No. P-2010-2204818. [\*45] It is undisputed that DHS began operating in 2004 with more than 100 customers. Tr. at 86; WP/WB St. 1 at 4-5. It is also undisputed that, since 2005, DHS has had approximately forty customers. Tr. at 86-87; WP/WB St. 1 at 4-5. HOA witness, Mr. Marshack, testified that Haven Development purchased significant acreage (about ninety acres) to build townhomes which would yield customers and revenue for the wastewater service. Consequently, Haven Development planned to build new wastewater facilities to serve those anticipated customers.

Several trailer parks and a hotel were located on the purchased property. However, subsequently, Haven Development evicted the tenants of the hotel and demolished it, and refused to renew the leases of the residents in the trailer park once the leases expired. HOA M.B. at 12-13 citing WP/WB St. 1 at 4-5. Mr. Marshack stated that he learned this information from Mr. Shahar. IRTr. at 149-50. When questioned about this issue, Mr. Shahar averred that Haven Development advised the people that lived in the hotel to find another place to live. IRTr. at 121. HOA argued that the result was the same whether the hotel tenants were evicted or told to find another [\*46] place to live, which result is that the number of customers served by DHS was significantly cut. As such, HOA contended that it is unreasonable to expect the remnant of current customers to shoulder the burden of a rate increase when it was DHS or its affiliate Haven Development which diminished its own revenues by cutting its customer base. HOA M.B. at 13-14; Tr. at 86, 150-51, 170-71.

## **b. Managerial Fitness Challenged**

### **i. HOA's Position**

It is not disputed that Deer Haven obtained its Certificate for the operation of both DHS and DHW. HOA contended that the actions taken by Deer Haven, as revealed in this proceeding, raised the issue of whether DHS should have its Certificate revoked. HOA M.B. at 15.

HOA cites the following shortcomings exposed in this proceeding on the record: (1) net operating losses of Deer Haven since 2004; (2) nonexistent recordkeeping; (3) inability to comply with filed tariff; (4) negative customer service. *Id.*, citing OTS St. 1 at 5; OCA St. 2 at 13-14. HOA also asserted that Mr. Shahar admitted that DHW is not currently operated by Deer Haven, due to lack of money, and conspicuously failed to identify what entity is maintaining the water system. [\*47] HOA M.B. at 16, citing Tr. at 240-42. While these admissions may not be germane to the wastewater services at issue in this proceeding, they indicate a "clear disregard for both the Code and Commission regulations" on the part of Deer Haven, which is the holder of the Certificate for DHS. HOA M.B. at 16.

HOA speculated that, if DHS is denied a further rate increase, Deer Haven may abandon wastewater service after the Commission issues an order denying the increase. *Id.* Finally, HOA contended that, because Deer Haven is not competent in the operation of DHS, the Commission "should take action as deemed necessary in order to ensure safe, reliable and adequate service to DHS's customers." HOA M.B. at 17.

## ii. The OTS' Position

The OTS examined the pattern of behavior demonstrated by Deer Haven before the Commission and cited the following failures:

- (1) DHS's failure to submit a timely filing in compliance with 52 Pa. Code § 53.52(b)(2) (the base rate case was not filed within 180 days following the end of the test year, 2009);
- (2) DHS's failure to abide by the expressed direction of the ALJ's Order by appearing without counsel at [\*48] the prehearing conference (the Prehearing Conference Order emphasized that the Company needed to be represented by counsel);
- (3) DHS's inability to abide by the Commission's procedural rules in this proceeding and other recent filings before the Commission (e.g., DHS failed to give notice to customers of its Interim Rate Relief filing and it also failed to serve parties of record with supportive testimony). Tr. at 10, 34, 38; and
- (4) DHS's disregard of Commission procedure during its application proceeding at Docket No. A-210069F2000.

OTS M.B. at 15-17. <sup>9</sup> The OTS argued that, collectively, the above examples demonstrate a pattern of disregard for Commission rules and procedures and also reflect poor managerial ability.

The OTS pointed out a contradiction by DHS witness, Mr. Shahar, which caused it to question [\*49] the witness's credibility. Mr. Shahar attested in discovery that the Company did

---

<sup>9</sup>The OTS also cited the failure of DHS to send a company representative to the Public Input Hearing on December 14, 2010. The OTS noted, however, that this is not required by Commission rule or regulation.

not have customer complaint records. OCA St. 2, Appendix II, subdivision 17(OTS-QS-3). However, at the evidentiary hearing on January 10, 2011, Mr. Shahar stated that the Company does retain records of all customer complaints. Tr. at 234. The OTS contended that, based on this contradiction, either Mr. Shahar lacked knowledge of the utility's operations or he failed to provide accurate testimony or discovery responses. In either case, according to the OTS, the contradictory testimony reflects unfavorably upon the managerial capacity of DHS. OTS M.B. at 20-21.

The OTS also contended that DHS has demonstrated unreasonable and imprudent business practices in the following instances:

- (1) by failing to maintain records of capital assets and accrued depreciation of plant, fundamentals of public utility management, OTS St. 2 at 2-3;
- (2) by retaining contractors through informal, undocumented agreements, OTS St. 1 at 4, OTS Exhibit 1, Schedules 1-3; and
- (3) by failing to document contractor hours of work, OCA St. 2, Appendix II, subdivision 6(OTS RE-25(c)).

OTS M.B. at 18-19. The OTS argued that these [\*50] business practices raise concerns regarding the Company's managerial capabilities. *Id.* at 19.

The OTS noted that DHS has the same General Manager as DHW, Mr. Shahar. The OTS referred to the testimony proffered at the public input hearing on inadequate service. In the public input hearings, the customers testified that they received dirty water and that they experienced low water pressure and poor customer service. OTS M.B. at 21-24. The OTS concluded that the DHS's management has shown "a lack of care and diligence that merits removal from any role as a public utility owner or manager." *Id.* at 24.

The OTS concluded that the Commission should consider the performance of DHS management, in its responsibilities to provide water service to DHW ratepayers, as evidence of DHS's failure to provide adequate and reasonable wastewater service. *Id.* Furthermore, based on Deer Haven's

pattern of behavior, the OTS contended that the Commission should exercise its authority under Section 529 of the Code to obtain new management for the wastewater system. OTS M.B. at 18.

### iii. The OCA's Position

The OCA stated that it appeared that DHS failed to keep complaint records in the normal [\*51] course of its business, as is required by regulation, and that this failure impeded the Commission's ability to review and monitor quality of service. OCA M.B. at 15, citing 52 Pa. Code §§ 56.202 and 65.3. The OCA averred that, when Haven Development Corporation transferred title to the land upon which the wastewater plant is located to Pocono Lakefront, LLC, it had not received prior approval from the Commission. According to the OCA, therefore, Haven Development would be in violation of Section 1102 of the Code if the property is used and useful in the public service. OCA M.B. at 16-17, Tr. at 221-22 and 226.

The OCA also questioned the managerial fitness of DHS due to the following factors: (1) the Company had customers pay for wastewater service to the bank account of an affiliate, Summit Holdings; (2) DMR records may not be accurate and may have been submitted to DEP without the knowledge of a certified operator; (3) it was not reasonable to sell the land upon which the wastewater plant is built; and (4) DHS's decision to delay disconnecting lines from Sky Top Trailer Park for over three years [\*52] may have contributed to the ongoing effluent exceedances. OCA M.B. at 19-21.

The OCA concluded that all of the above factors demonstrated that DHS provided inadequate wastewater service and that, therefore, the Commission should reject the Company's proposed rate increase, pursuant to Section 526 of the Code, 66 Pa. C.S. § 526(a). OCA M.B. at 22. The OCA suggested that the Commission direct that wastewater rates be set at \$ 20 per month, the level that existed prior to the *Interim Relief Order*. *Id.* at 23.

### 5. ALJ's Recommendation

The ALJ noted initially that DHS did not argue that it had no violations. Rather, DHS attempted to mitigate the seriousness of its violations and to contend that it will take action in the future to remedy any further violations. The ALJ considered that the Company's strategy was insufficient to counteract the fact that violations occurred with significant frequency over a considerable period of time. The ALJ found it significant that the record affirmatively established, pursuant to 66 Pa .C.S. § 529(a)(1), that a violation of a DEP regulation did occur. However, the ALJ also stated that she disagreed with **[\*53]** the OCA's position that that fact is sufficient to set rates back to \$ 20 per month, which was the level in effect prior to the *Interim Relief Order*. R.D. at 40.

The ALJ pointed out that revenues are needed to provide quality service, and when revenues are diminished and the rate base of customers is constant, then increased rates are needed to increase revenue or quality of service will suffer. The ALJ, however, also pointed to the testimony from Mr. Gray Bossi, as follows:

I feel there should . . . not be a sewer [rate] hike on our utility bills. Deer Haven Water and Sewer Company, with Mr. Sam Shahar, created a customer base shortage. When Mr. Shahar took over the utilities, he had 145 customers. In his transactions to develop new townhouses, Mr. Shahar cut his customer base down so he would have sewer permits available for new townhouse construction. The bottom fell out of the townhouse market, and new construction did not sell. Mr. Shahar has only 45 customers left for sewer and water utilities. He has created this customer base shortage. But he wants the 45 customers to bail him out. It is not fair to penalize the remaining customer for [his] bad business decision.

**[\*54]**

Tr. at 170-71. The ALJ also recounted the testimony of Mr. George Martynuk, as follows:

It is fundamentally wrong that a speculative developer like Sam Shahar, who had all those grandiose ideas of coming up and putting in a hundred more units . . . has now decided that he can't do it . . . All right. So he can't, but that's what speculation is about. It's about you try, and you win [or] lose. Well, he lost. Rather than having 125 houses to divide all the costs for sewer and water and so on, he's got something like 43. And he wants [the 43 customers] to

pick up his shortfall. I don't think we should pick up his shortfall . . . . [Speculation was Sam's] game. He lost.

Tr. at 150-51.

The ALJ acknowledged that actions by Mr. Shahar and the change in the market worked toward his detriment in the wastewater business. DHS failed to rebut this premise. Consequently, the ALJ was of the opinion that DHS bears some of the burden for its precarious situation. Furthermore, DHS attempted to rebut the criticisms of its customer service by stating that "the Commission should at least acknowledge the Company's attempts" to improve the workings of the wastewater system. DHS R.B. at 10. The [\*55] ALJ opined that it is not enough to have intentions without achieving results to provide a sufficient standard of service, when the Company is given the privilege to have the exclusive right to provide wastewater service within a specific territory. Moreover, she agreed with the OCA's position that DHS's deficiencies cannot be all cured by granting the Company more revenue through increased wastewater service rates. OCA R.B. at 9. However, the need to offer acceptable wastewater service still exists.

The ALJ expressed the concern that, if rates do not cover expenses to operate, then service may get worse. The ALJ noted that homeowners in under water mortgages have been known to take their belongings and walk away. The ALJ expressed concern for DHS customers if DHS management decides to leave the Commonwealth after the Commission rules on this issue. R.D. at 41.

The ALJ pointed to the following characteristics of management in this case, which are of grave concern: (1) lack of credibility; (2) failure to comply with procedural regulations and statutes; and (3) failure to act responsibly in business conduct (failing to have written contracts, changing rates to customers without notice [\*56] or proper procedures, failing to keep books or record of other business transactions). The ALJ opined that such conduct should not be afforded the protections and privileges granted to be the sole supplier of wastewater service within DHS's service territory. The ALJ opined that this evidence is detrimental to DHS, pursuant to Section 529(c)(1) of the

Code, as a factor to consider in ordering the acquisition of the Company. See, 66 Pa. C.S. § 529(c)(1).

The ALJ concluded that, although she was aware of the Company's managerial incompetence, she could not recommend initiating mandatory acquisition proceedings of DHS by a capable public utility, as the OTS suggested, because the record does not support that alternatives to acquisition under Section 529(b) have been pursued by the Commission. See, 66 Pa. C.S. § 529(b). R.D. at 42.

The ALJ therefore recommended that the Commission immediately commence discussions, pursuant to 66 Pa. C.S. § 529(b), with the management of DHS over the course of a finite timeframe to be determined by the Commission. The ALJ also stated that, [\*57] possibly, the Commission's Law Bureau or Bureau of Fixed Utility Services (FUS), or both, could pursue alternatives to mandatory acquisition of the Company within a finite timeframe. After the finite timeframe has ended, added the ALJ, the Commission's Law Bureau may determine that the filing of a petition for mandatory acquisition of DHS may be the prudent course of action, pursuant to 66 Pa. C.S. § 529(c). *Id.*

The ALJ stated that, based on the adjusted revenue and expenses analysis, DHS has current revenue of \$ 11,670 and current expenses of \$ 25,715. Total allowable annual revenue should equal total allowable expenses, which are \$ 25,715. The result of calculations yields the total allowable monthly service charge at \$ 46.60 for all customers.<sup>10</sup> The current rate for wastewater service is \$ 20 per month for residential customers. Thus, the total allowable increase in wastewater rates is \$ 26.60 per month ( $\$ 46.60 - 20.00 = \$ 26.60$ ) for residential customers. The ALJ added that, in the interim, while the Commission's Law Bureau is discussing alternatives to acquisition with DHS, it is recommended that DHS be directed to annually recover [\*58] revenues in the amount no greater than \$ 25,715, as justified by the analysis of revenues and expenses adjusted as discussed above. R.D. at 42-43.

---

<sup>10</sup>  $\$ 25,715 / \text{year} \times 1 \text{ year} / 12 \text{ month} \times \text{service} / 46 \text{ customers} = \$ 46.60 / \text{month} / \text{customer}.$

## 6. Exceptions and Replies

In its Exceptions, the OCA points to Section 523 of the Code, 66 Pa. C.S. § 523, which requires the Commission to "consider . . . the efficiency, effectiveness and adequacy of service of each utility when determining just and reasonable rates." OCA M.B. at 9. The OCA avers that, in exchange for customers paying tariffed rates for service, a public utility is obligated to provide safe, adequate and reasonable service. *PG&W 1986, supra; PG&W 1988, supra*. The OCA also points to Section 1501 of the Code, 66 Pa. C.S. § 1501, which mandates, *inter alia*, that every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities.

Accordingly, [\*59] reasons the OCA, the General Assembly has given the Commission discretionary authority to deny a proposed rate increase, in whole or in part, if the Commission finds "that the service rendered by the public utility is inadequate." 66 Pa. C.S. § 526(a). The OCA notes that, in the *Interim Relief Order*, the Commission recognized this authority and directed the Parties to investigate and present service issues in the instant proceeding, the base rate proceeding. *Interim Relief Order* at 13. Therefore, avers the OCA, the Commission, having fully investigated and received evidence that DHS is technically and managerially unfit and is providing inadequate service, should establish rates that reflect DHS's inadequate service by denying any rate increase. OCA M.B. at 11-12; OCA Exc. at 6-7.

The OCA contends that, accordingly, the ALJ erred in her recommendation that DHS be allowed to recover the ALJ's calculated revenue requirement of \$ 25,715 without any adjustment to reflect inadequate service. R.D. at 42-43. The OCA contends that DHS should be held to the "regulatory bargain," whereby a utility may charge its ratepayers reasonable rates in exchange [\*60] for the provision of adequate service. Conversely, reasons the OCA, if DHS fails to provide adequate service, as the record herein demonstrates that it has, it is not entitled to charge rates that might, otherwise, be reasonable. OCA Exc. at 8-9.

The OCA concludes that DHS's ratepayers should not be required to provide funds to a utility so that the utility may, in the future, provide adequate service. OCA M.B. at 15, 22-23. In this connection, the OCA points out that the ALJ recognized that granting DHS more revenue will not make it a viable utility. R.D. at 41. Under Section 1501 of the Code, the utility has the obligation to make all improvements that may be necessary to provide adequate, efficient, safe and reasonable service. Thus, the OCA reasons, it is only after those improvements are used and useful in providing utility service that the ratepayers incur the obligation to pay for the improvements. *PG&W 1986, supra; PG&W 1988, supra*. To the extent that the Commission does not adopt the OCA's recommendation and allows more than a \$ 0 increase, the OCA recommends that the increase be tied to a demonstrable improvement in the quality of DHS's service. OCA Exc. at 8-13.

HOA [\*61] also files an Exception on this point, arguing that the ALJ erred in not recommending either a downward adjustment or a complete denial of the Company's base rate increase due to its inadequate service, pursuant to Section 526(a) of the Code. HOA avers that the evidence in this case shows that, between January, 2007, and October, 2010, DHS received a total of six notices of violation (NOVs) from DEP, indicating that effluent from DHS's plant exceeded its NPDES Permit limitations during nineteen months. HOA M.B. at 10-11; HOA R.B. at 13. The frequency of the NOVs demonstrates the Company's consistent non-compliance with its NPDES Permit effluent limits, as well as its general disregard for its customers.

HOA contends that the evidence herein demonstrates that DHS lacks the requisite fitness to operate any public utility in Pennsylvania. Since DHS is providing inadequate service to its customers, it should not be rewarded with an additional rate increase. If the Commission were to award the increase in rates suggested by the ALJ herein, it would be opening the floodgates for frivolous and unsubstantiated claims by underperforming utilities seeking additional annual revenue. Accordingly, [\*62] the Commission should exercise its authority under Section 526 of the Code to reject DHS's rate request in its entirety. HOA Exc. at 9-10.

The Company responds to the OCA's and HOA's arguments, averring that it would be unreasonable and counterproductive for the Commission to deny it additional annual revenue that is acutely needed to operate and maintain the wastewater system on the basis that the Company is not providing adequate service.

The Company notes that it does not dispute that Section 1501 requires it to provide its customers with "adequate, efficient, safe and reasonable" service. The Company also recognizes that the Commission has the discretion to deny all or any part of a requested rate increase if the utility is not providing service consistent with the statutory requirements. What the Company disputes is that this is a proper case in which the Commission should exercise that discretion.

The Company also notes that the ALJ concluded that, regardless of its performance, DHS is entitled to rates that cover its operating expenses. R.D. at 41-43. The problem with the course of action advocated by the OCA and HOA is that the Company has been, and will continue to be, unable [\*63] to make any improvements necessary so that the quality of its service is adequate if it is without adequate revenue to do so.

The Company continues that, as a result of receiving insufficient revenue, it experienced net losses for the operation of the wastewater system totaling \$ 297,386 and total taxable losses totaling \$ 2,132,987, between 2004 and 2009. OCA St. No. 2 at 13, Appendix II (OTS-RE-10). Whatever the genesis of those losses, contends the Company, it cannot continue to experience losses of that magnitude while, at the same time, operating and maintaining the wastewater system. Additionally, the enhanced revenues the Company will receive if the Commission adopts the ALJ's recommendation herein will make possible the improvements necessary to bring the system into compliance with Section 1501. Accordingly, the Commission should acknowledge the possible outcome if no additional rate increase is granted and should accept the ALJ's recommendation, even if it concludes that the Company has provided inadequate and unreasonable service. Company R. Exc. at 8-12.

## **7. Disposition**

On review, we find the Exceptions of the OCA and HOA not to be meritorious, and they will be denied. [\*64] We reach this conclusion because we are of the opinion that the ALJ has proposed a reasonable solution to the crucial issue presented herein in her recommendation that the Company be granted a rate increase of a level to cover its total allowable expenses. As stated by the ALJ, "Based on the adjusted revenue and expense analysis above, DHS has current revenue of \$ 11,670 and current expenses of \$ 25,715. Total allowable annual revenue should equal total allowable expenses, which is \$ 25,715." R.D. at 42.

We agree with the ALJ that the evidence of record demonstrates that the Company has violated Section 1501 of the Code. Nevertheless, we have no difficulty denying HOA's request that we revoke DHS's certificate of public convenience in this rate proceeding as a result of that violation. We will, however, consider this violation in determining just and reasonable rates. 66 Pa. C.S. § 523(a). In doing so, we may, but are not required to, reject the requested increase in whole or in part. 66 Pa. C.S. § 526(a).

In this case, we will exercise our discretion by allowing the requested increase, consistent with this [\*65] Opinion and Order. It is noted that DHS failed to claim any rate base, return on equity, or overall rate of return in this proceeding. The only rate increase granted here concerns expenses claimed by DHS. We believe it would be unduly harsh to deny any or all of these expenses, based on the record here. Furthermore, we agree with the ALJ that "the need to offer wastewater service still exists with expenses to offer it safely." R.D. at 41. Granting the requested rate increase will not make the Company a viable utility, but it should enable the Company to continue operations while alternatives are considered.

Finally, we agree with the ALJ that Section 529(b) of the Code requires the Commission to discuss with the small water or sewer utility, and give it a reasonable opportunity to investigate alternatives to acquisition, before the Commission may consider ordering the acquisition of the utility pursuant to Section 529(a). There is no indication in the record that these discussions have taken place. The ALJ recommended that our Law Bureau, or our Bureau of Fixed Utility Services, or both, be

directed to immediately commence discussions with DHS's management on alternatives to mandatory [\*66] acquisition, and that those discussions be limited to a finite timeframe. R.D. at 42. Considering Lyness v. State Board of Medicine, 529 Pa. 535, 605 A.2d 1204 (1992), we will simply direct the Law Bureau, in consultation with the Bureau of Fixed Utility Services, to investigate the inadequate service issues discussed herein, and take whatever further action may be warranted.

### III. Conclusion

We have reviewed the record as developed in this proceeding, including the ALJ's Recommended Decision and the Exceptions and Reply Exceptions filed thereto. The Company requested an overall rate increase of \$ 40,314 per year. The increase would affect a residential customer in billed service per month from \$ 20.00 to \$ 95.00, or an increase of 375%. The ALJ recommended that, while alternatives to acquisition, pursuant to Section 529(b) of the Code, are being pursued, the Company should be allowed to recoup in revenues its current expenses, in the amount of \$ 25,715. The result of calculations yields the total allowable monthly service charge at \$ 46.60 for the Company's ratepayers. This results in an increase in the amount of \$ 26.60 for the Company's [\*67] residential ratepayers. R.D. at 42-43. The ALJ further recommended that the Company be authorized to file a tariff or tariff supplement containing these rates to become effective for service on one day's notice, following the entry of the instant Opinion and Order. R.D. at 44.

Based on our review, evaluation and analysis of the record evidence, we shall modify the ALJ's recommendation, consistent with this Opinion and Order; **THEREFORE;**

### IT IS ORDERED:

1. That the Exceptions filed by White Pines on the Lake Homeowners' Association and White Beauty View Estates Homeowners' Association on April 5, 2011, to the Recommended Decision of Administrative Law Judge Angela T. Jones are denied.

2. That the Exceptions filed by the Office of Consumer Advocate on April 5, 2011, to the Recommended Decision of Administrative Law Judge Angela T. Jones are denied.
3. That the Recommended Decision of Administrative Law Judge Angela T. Jones, issued on March 16, 2011, is modified, consistent with this Opinion and Order.
4. That Deer Haven, LLC d/b/a Deer Haven Sewer Company, shall not place into effect the rates contained in Supplement No. 1 to Tariff Wastewater -- Pa. P.U.C. No. 1, and Supplement [\*68] No. 3 to Tariff SEWER -- Pa. P.U.C. No. 1, which have been found to be unjust and unreasonable, and therefore, unlawful.
5. That Deer Haven, LLC d/b/a Deer Haven Sewer Company, may file tariffs, tariff supplements, or tariff revisions containing rates, provisions, rules and regulations which are consistent with the discussion contained herein.
6. That Deer Haven, LLC d/b/a Deer Haven Sewer Company's tariff, tariff supplements, or tariff revisions may be filed upon less than statutory notice, and pursuant to the provisions of 52 Pa. Code §§ 53.31 and 53.101, may be filed to become effective for service on one day's notice, following the entry of the instant Opinion and Order.
7. That the Formal Complaint filed by the Office of Consumer Advocate at Docket No. C-2010-2201891 is dismissed.
8. That the Formal Complaint filed by White Pines on the Lake Homeowners Association at Docket No. C-2010-2202859 is dismissed.
9. That the Formal Complaint filed by White Beauty View Estates Homeowners Association at Docket No. C-2010-2204514 is dismissed.
10. That the Law Bureau is directed to investigate the inadequate [\*69] service issues discussed herein and take whatever further action may be warranted

11. That after acceptance and approval by the Commission of the tariffs, tariff supplements, or tariff revisions filed by Deer Haven, LLC d/b/a Deer Haven Sewer Company, the Secretary's Bureau shall mark the records at Docket Nos. R-2010-2194577, C-2010-2201891, C-2010-2202859 and C-2010-2204514 as closed and the investigation terminated.

**BY THE COMMISSION**

ORDER ADOPTED: May 19, 2011

ORDER ENTERED: May 19, 2011

PA Public Utility Commission Decisions

---

End of Document