

**IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT**

9 MAP 2023

THE BOROUGH OF WEST CHESTER, APPELLANT
v.
PENNSYLVANIA STATE SYSTEM OF HIGHER EDUCATION AND
WEST CHESTER UNIVERSITY OF PENNSYLVANIA OF THE STATE
SYSTEM OF HIGHER EDUCATION, APPELLEES

**BRIEF OF *AMICUS CURIAE*
THE PITTSBURGH WATER AND SEWER AUTHORITY**

Appeal from the Order of the Commonwealth Court of Pennsylvania,
dated January 4, 2023, No. 260 MD 2018

Louis A. DePaul, Esquire (ID No. 93823)
Renardo L. Hicks, Esquire (ID No. 40404)
Lauren M. Burge, Esquire (ID No. 311570)
Eckert Seamans Cherin & Mellott, LLC
600 Grant Street, 44th Floor
Pittsburgh, PA 15219
(412) 566-6000 (phone)
(412) 566-6099 (fax)

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Attorneys for
The Pittsburgh Water and Sewer Authority

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Pittsburgh Water and Sewer Authority (“PWSA” or “Authority”) provides water, wastewater, and stormwater services in portions of Allegheny County, including, primarily, the City of Pittsburgh. PWSA is distinctly situated as both a municipal authority and regulated entity. PWSA’s ability to charge for its stormwater service is vitally important to stormwater management in PWSA’s service region as it enables PWSA to meet the increasing community, economic, and environmental challenges associated with stormwater management and comply with expanding Federal and State environmental regulations.

Like many other similar entities in this Commonwealth with express statutory authority to collect a charge in exchange for its stormwater service, PWSA’s stormwater charge is *not* a tax. Should the Court issue an overly broad decision in this matter, it could have wide-reaching repercussions across the Commonwealth, particularly regarding entities like PWSA that provide similar services but operate under different statutory and regulatory authority than, for instance, the Borough of West Chester (“Borough”), the Appellant in this action. PWSA submits this *amicus curiae* brief to illustrate the importance of its stormwater charge and that there are expressly

permissible and approved stormwater charges in the Commonwealth that are just, reasonable, non-discriminatory, and should not be disturbed.

PWSA has clear statutory authority to implement stormwater charges under the Pennsylvania Municipality Authorities Act (“MAA”) (53 Pa. C.S. § 5607) and the Public Utility Code (66 Pa. C.S. § 3201 *et seq.*). PWSA is unique because it is a municipal authority whose stormwater service is also regulated by the Pennsylvania Public Utility Commission (“Commission” or “PUC”).¹

After a comprehensive and adversarial review process conducted as part of a base rate case before the PUC, PWSA’s rates were approved by the PUC.² As of January 12, 2022, PWSA implemented rates for stormwater

¹ The Public Utility Code defines the PUC as an “independent administrative commission.” 66 Pa. C.S. § 301(a). “The commission shall have general administrative power and authority to supervise and regulate all public utilities doing business within this Commonwealth....” 66 Pa. C.S. § 501(b). “Every rate made, demanded, or received by any public utility...shall be just and reasonable, and in conformity with regulations or orders of the [PUC].” 66 Pa. C.S. § 1301.

² A base rate case is a proceeding before the PUC whereby a regulated utility proposes changes to its rates, rules, and/or regulations for providing utility service. The PUC and interested parties engage in an investigation into the utility’s existing and proposed rates, rules, and regulations to determine if they are just, reasonable, and in the public interest. This involves extensive discovery, the exchange of direct, rebuttal, and surrebuttal written expert witness testimony, public input hearings held in the utility’s service territory, evidentiary hearings and/or settlement negotiations. A PUC Administrative Law Judge presides over this process and issues a Recommended Decision regarding the rate request. The PUC then issues a final Order, which may affirm, deny, or modify the Recommended Decision. See 66 Pa. C.S. § 1308; see also J. Cawley and N. Kennard, *A Guide to Utility Ratemaking* (2018 Edition), https://www.puc.pa.gov/General/publications_reports/pdf/Ratemaking_Guide2018.pdf.

service pursuant to its PUC-approved stormwater tariff, which sets forth the rates for stormwater service and all applicable rules and regulations.³

As mandated by the United States Environmental Protection Agency (“EPA”) and the Pennsylvania Department of Environmental Protection (“PA DEP”), PWSA must collect stormwater runoff from densely developed urban areas. Stormwater management is critical as stormwater runoff can cause, *inter alia*, flooding, property damage, and water quality issues. The PUC-approved stormwater tariff enables PWSA to effectively address stormwater runoff by providing funds to remediate its aging infrastructure, accommodate increased development, minimize the impact of increasing wet weather, and meet the more stringent environmental requirements of the EPA and PA DEP.

The PUC-approved stormwater charge is the most effective and equitable means for PWSA to meet the financial obligations associated with stormwater management in PWSA’s service region. Without the ability to

³ A utility’s tariff is a legal document that includes “[a]ll schedules of rates, all rules, regulations, practices, or contracts involving any rate or rates...” 66 Pa. C.S. § 102. The Public Utility Code requires that “...every public utility shall file with the commission...tariffs showing all rates established by it and collected or enforced, or to be collected or enforced, within the jurisdiction of the commission...” 66 Pa. C.S. § 1302. Utilities are legally obligated to adhere to the terms of their tariff(s), and “[t]he rates specified in such tariffs shall be the lawful rates of the public utility until changed...” 66 Pa. C.S. § 1303. PWSA’s current stormwater tariff is available at <https://www.pgh2o.com/about-us/rules-regulations> (“PWSA Tariff Storm Water – Pa. P.U.C. No. 1”).

charge the stormwater rate, PWSA would lose the most operative and just means necessary to address stormwater management.

The PUC-approved stormwater tariff permits PWSA to charge for stormwater service in an equitable way whereby property owners are charged based on impervious area on a parcel, which is proportionate to the demand on PWSA's stormwater system, and the stormwater charges are commensurate with the cost to provide the related service.⁴ Any other method of creating the revenue needed to address stormwater would be wholly disconnected from the property (and property owner) generating the stormwater.

If this Honorable Court holds that all stormwater charges are taxes, it will not only incorrectly group a statutorily regulated entity like PWSA with dissimilar entities, it will also constrain all utility providers' ability to fairly charge for stormwater service, making stormwater management more difficult and inequitable throughout the Commonwealth. This *amicus curiae* brief is submitted pursuant to Pa.R.A.P. 531 to bring to the Court's attention relevant matters that may be of assistance, make the Court aware of the

⁴ See *Pa. Public Utility Commission v. PWSA*, Docket Nos. R-2021-3024773, R-2021-3024774, and R-2021-3024779, Recommended Decision (Oct. 6, 2021) at 55, <https://www.puc.pa.gov/pcdocs/1722040.pdf> (subsequently adopted without modification by Order entered Nov. 18, 2021) (hereinafter "2021 Recommended Decision").

potential state-wide implications of its decision in this matter, and illustrate that there are approved stormwater charges in the Commonwealth that are expressly permitted by statute, that are just, reasonable, non-discriminatory, and in conformity with regulations and/or orders of the PUC that should not be disturbed.

Pursuant to Pa.R.A.P. 531(b)(2), PWSA submits that no person or entity other than PWSA or its counsel have paid in whole or in part for the preparation of this *amicus curiae* brief or authored this brief in whole or in part. This brief is timely filed on or before the date on which the Appellant files its brief. *Id.* at 531(b)(4).

SUMMARY OF THE ARGUMENT

This Honorable Court's adjudication of this appeal could have serious, wide-ranging implications for entities with express authority to issue a charge in exchange for stormwater service. An overly broad decision, potentially applicable to all municipal authorities and/or regulated entities, like PWSA, would negatively impact stormwater management across the Commonwealth. Like many other municipal authorities and/or utility providers across the Commonwealth, PWSA's ability to charge for its stormwater service is critically important, particularly considering PWSA's aging infrastructure, expanding development in the City of Pittsburgh, changing weather conditions, and increasing environmental and regulatory requirements imposed by the EPA and PA DEP. If PWSA is improperly grouped together with dissimilar entities, like the Borough, and/or its stormwater rate is incorrectly deemed a "tax," it would eliminate the most effective and equitable tool used by PWSA to address stormwater management in PWSA's service region.

The Appellant in this matter, the Borough, passed an ordinance under the Home Rule Charter to implement its stormwater fee; the Borough argues that its stormwater management fee should not be disturbed. *The Borough of West Chester v. Pennsylvania State System of Higher Education and West*

Chester Univ. of Pennsylvania of the State System of Higher Educ., 291 A.3d 455 (Pa. Commw. Ct. 2023). PWSA likewise submits that its stormwater charge should not be disturbed through an overly broad ruling in this matter because PWSA's stormwater management charge is expressly authorized by statute, is regulated and approved by the PUC, is not a "tax," and is the most fair and non-discriminatory method to collect the revenue necessary to conduct stormwater management.

First, PWSA's stormwater rates are implemented under specific statutory authority and have been determined to be just, reasonable, non-discriminatory, and in the public interest.⁵ PWSA, like other similar municipal authorities, is authorized by statute to charge for stormwater service. This specific authorization is found in the MAA (53 Pa. C.S. § 5607).

PWSA is also a PUC-regulated stormwater utility. Uniquely, PWSA is authorized to issue its stormwater charge under Chapter 32 of the Public Utility Code (66 Pa. C.S. § 3201 *et seq.*) and through the PUC's approval of PWSA's stormwater rates.⁶ The PUC determined that PWSA's stormwater rates are just and reasonable and, accordingly, approved the stormwater

⁵ See Section III.B and D, *infra*.

⁶ See *also* Implementation of Chapter 32 of the Public Utility Code Re Pittsburgh Water and Sewer Authority, Final Implementation Order (entered Mar. 15, 2018), Docket Nos. M-2018-2640802 (water) and M-2018-2640803 (wastewater), at 31 ("FIO").

tariff and rates.⁷ As part of that approval process, PWSA submitted detailed financial information and expert witness testimony demonstrating that the stormwater rates are based on the cost of providing service to various customer classes.⁸ This demonstrates that PWSA's stormwater charges were carefully contemplated, supported by detailed data and expert analysis in an established administrative process, and found to be just, reasonable, and not discriminatory.⁹

Second, PWSA's stormwater charge is *not* a tax, it is a rate charged for utility service.¹⁰ PWSA's stormwater customers receive direct benefits in exchange for the charge.¹¹ Unlike tax revenue, the revenue from the

⁷ *Id.*

⁸ *2021 Recommended Decision* at 55-56, 64.

⁹ *Id.*

¹⁰ See the discussion in Section III.C, *infra*.

¹¹ See Implementation of Chapter 32 of the Public Utility Code RE: Pittsburgh Water and Sewer Authority, Docket Nos. M-2018-2640802 and M-2018-2640803, PWSA's Second Revised Stage 2 Stormwater Compliance Plan (Oct. 24, 2022), at 9 (stating that "[a]ll properties receive precipitation in the form of rain or snow. Accordingly, all properties produce stormwater runoff that must be managed. Even if a property has never flooded and there is no nearby stormwater infrastructure, the stormwater that flows off of a property must be managed so that it does not contribute to pollution and flooding downstream."), <https://www.puc.pa.gov/pcdocs/1762186.pdf> (subsequently approved by Secretarial Letter dated Jan. 20, 2023) (hereinafter "*Stormwater Compliance Plan*").

stormwater charge is used to fund stormwater projects and maintain PWSA's infrastructure and is not contributed to a general fund.¹²

PWSA's stormwater charge is also fair because it is based on impervious area on a property, which is proportionate to the demand on PWSA's stormwater system.¹³ The level of the charge corresponds to the cost of providing service, as established by PWSA before the PUC.¹⁴ PWSA also offers a credit program that allows customers to reduce stormwater bills by taking steps to capture runoff, thus reducing the demand placed on the system.¹⁵

The matters currently before the Court in this case may not be analogous under a corresponding analysis regarding the rates charged by PUC-regulated PWSA, or other similar municipal entities in this Commonwealth. PWSA submits this *amicus curiae* brief to request that the Court not disturb PWSA's approved stormwater charge through an overly broad ruling in this matter, to bring to the Court's attention relevant matters that may be of considerable help to the Court, illustrate the importance of

¹² See *Stormwater Compliance Plan* at 11, 17.

¹³ *2021 Recommended Decision* at 55, 64.

¹⁴ *Id.*

¹⁵ PWSA Tariff Storm Water – Pa. P.U.C. No. 1 at 9-11.

stormwater charges in this Commonwealth, and demonstrate that approved stormwater charges exist in the Commonwealth that are just, reasonable, non-discriminatory, legally justified, and that should not be disturbed.

ARGUMENT

Like other similarly situated authorities throughout the Commonwealth, PWSA's ability to charge for its service is imperative to the implementation of proper and effective stormwater management. Since PWSA has express statutory and regulatory authority to issue a stormwater charge and PWSA's stormwater charge is *not* a tax, PWSA respectfully requests that the Court refrain from issuing an opinion in this matter that could be interpreted as prohibiting PWSA from issuing its stormwater management charge, which is just, reasonable, and non-discriminatory.

PWSA provides water, wastewater, and stormwater service within its service territory, including in the City of Pittsburgh.¹⁶ Stormwater service is provided by PWSA through (1) PWSA's combined sewer system, in which wastewater and stormwater are conveyed in the same pipe, accounting for approximately seventy-five percent (75%) of PWSA's wastewater conveyance system; and (2) the municipal separate storm sewer system ("MS4"), which conveys stormwater separately from the sanitary sewer system, making-up the remaining 25% of the wastewater conveyance system.¹⁷ Stormwater in the combined system is conveyed by PWSA to the

¹⁶ PWSA Tariff Storm Water – Pa. P.U.C. No. 1 at 6.

¹⁷ *Stormwater Compliance Plan* at 10.

Allegheny County Sanitary Authority (“ALCOSAN”) for treatment, while stormwater in the MS4 is discharged at one of approximately 200 known stormwater discharge points, or “outfalls.”¹⁸

I. **PWSA’s Ability to Charge for Stormwater Service is Critically Important**

A. There is an Increased Need for Stormwater Management

Stormwater charges have increased importance in many regions throughout the Commonwealth due to aging infrastructure, expanding development, changing weather conditions, increasing costs, and escalating EPA and PA DEP mandates. This is the case in PWSA’s region.¹⁹

Development can lead to greater impervious area and greater stormwater runoff that PWSA must manage. When precipitation falls on undeveloped areas, it is primarily absorbed into the ground or slowly runs off into streams, rivers, or other water bodies.²⁰ However, developed areas that are impervious, such as rooftops and paved areas, prevent water from being

¹⁸ *Id.* at 9. PWSA notes, however, that portions of the MS4 eventually reconnect to the combined system. *Id.* at 9, note 16. Thus, some of the stormwater collected in the MS4 is ultimately sent back into the combined system and to ALCOSAN for treatment. *Id.*

¹⁹ See Implementation of Chapter 32 of the Public Utility Code RE: Pittsburgh Water and Sewer Authority, Docket Nos. M-2018-2640802 and M-2018-2640803, Compliance Plan (Stage 1) (April 27, 2020) at 11, <https://www.puc.pa.gov/pcdocs/1661499.pdf> (recognizing PWSA’s goal to make necessary investments to renew its “aging/failing infrastructure”) (hereinafter, “*Stage 1 Compliance Plan*”).

²⁰ *Id.* at 8-9.

absorbed and create a faster rate of runoff.²¹ Those impervious surfaces often cause localized flooding or other water quantity or quality issues.²² PWSA's service territory has densely developed areas with large quantities of impervious surfaces, and stormwater creates significant issues that PWSA must manage.²³

Precipitation amounts and rainfall event frequency have also increased, creating an even greater need to adequately manage stormwater.²⁴ Stormwater can carry harmful pollutants (such as such as oil, dirt, chemicals, and lawn fertilizers) that adversely affect water quality.²⁵ Stormwater can also cause flooding, erode topsoil and stream banks, and destroy habitats.²⁶

²¹ *Id.*

²² *Id.*

²³ See PWSA, *PWSA Completes Initial Implementation of the Saw Mill Run Integrated Watershed Management Plan* (Jan. 11, 2022), <https://www.pgh2o.com/news-events/news/press-release/2022-01-12-pwsa-completes-initial-implementation-saw-mill-run>.

²⁴ 2018 was the wettest year on record for Pittsburgh, with a total of 57.83 inches of rain. Similarly, 2019 was the third wettest year on record with a total of 52.46 inches of rain. By comparison, the 30-year mean rainfall for Pittsburgh is about 39.5 inches of rain. National Weather Service, *NWS Pittsburgh Records Climate Data*, https://www.weather.gov/pbz/pit_records.

²⁵ *Id.*

²⁶ *Id.*

There is increased expense associated with stormwater management due to inflation, rising costs, and additional regulatory requirements imposed by, *inter alia*, the EPA and PA DEP. The stormwater charge is vital to ensuring PWSA has the funding necessary to meet its stormwater management obligations, which in turn benefits both PWSA's service region at large and individual ratepayers, and is critically important to meet the obligations imposed by the EPA and PA DEP.

B. Effect of the Disposition in this Appeal

If this Honorable Court makes a broad holding that all stormwater charges, even if issued pursuant to express statutory and/or regulatory authority like PWSA's stormwater charge, are taxes, it will not only incorrectly group a PUC-regulated entity like PWSA with dissimilar entities, it will also negatively affect PWSA's ability to charge for stormwater service, jeopardizing the ability of PWSA to receive cost recovery for necessary stormwater management in PWSA's region. Further, not only is PWSA's stormwater charge the most effective and equitable tool to address stormwater management in PWSA's region, it is also the only mechanism that went through the rigorous process to obtain approval by the PUC.

Importantly, if all stormwater charges are considered a "tax" regardless of the regulated status of the entity providing the service, this could

potentially exempt public universities, government properties, and/or large non-profits from paying their fair share for stormwater service. In Pittsburgh, a particularly high percentage of properties are owned by such entities. It is an issue of fundamental fairness; it would be unfair for these properties to be exempt from the application of PWSA's PUC-approved stormwater tariff. This is not hypothetical — a group of cemeteries, purported non-profit entities, have already initiated an action in the Allegheny County Court of Common Pleas, at Case No. GD 23-5017, challenging the application of PWSA's PUC-approved stormwater charge.

II. PWSA is Authorized by Statute to Charge for Stormwater Service

PWSA is specifically authorized to charge for stormwater service pursuant to the MAA, and as a regulated entity.²⁷ 53 Pa. C.S. § 5607; 66 Pa. C.S. § 3201 *et seq.* The PUC determined that its regulatory authority extends to stormwater and has approved PWSA's stormwater tariff and rates.²⁸

These authorizations, among other facts, differentiate PWSA from non-regulated entities like the Appellant, the Borough. Appellant is neither a

²⁷ See also *FIO* at 31.

²⁸ *Id.*

municipal authority nor an entity regulated by the PUC. The Borough levied its stormwater charge under its Home Rule Charter (*West Chester*, 291 A.3d at 457 nn.2 & 4), and the Borough Code does not include any provision authorizing the assessment of a stormwater rate or fee.

Unlike the Borough, since PWSA is a municipal authority and a PUC-regulated utility providing PUC-regulated stormwater service pursuant to a PUC-approved tariff, its stormwater rates are supported by statutory and regulatory schemes. 53 Pa. C.S. § 5607; 66 Pa. C.S. § 3201 *et seq.*²⁹

A. The Municipality Authorities Act Specifically Authorizes PWSA to Charge for Stormwater Service.

PWSA is a body corporate and politic organized and existing under the MAA, 53 Pa. C.S. § 5601, *et seq.* The MAA provides PWSA with clear authorization to implement rates for stormwater service. Regarding the scope of projects permitted, Section 5607(a) of the MAA provides authorization to engage in:

(18) Storm water planning, management and implementation as defined in the articles of incorporation by the governing body. Authorities, existing as of the effective date of this paragraph, already operating storm water controls as part of a combined sewer system, sanitary sewer system or flood control project may continue to operate those projects.

²⁹ See also *FIO* at 31.

53 Pa. C.S. § 5607(a)(18) (emphasis added). Even though PWSA was already operating stormwater controls as part of a combined sewer system, PWSA's Articles of Amendment were approved, and a Certificate of Amendment was issued by the Pennsylvania Department of State on March 19, 2020, to expressly include the operation of stormwater systems.³⁰

Section 5607(d) of the MAA further provides:

Every authority may exercise all powers necessary or convenient for the carrying out of the purposes set forth in this section, including, but without limiting the generality of the foregoing, the following rights and powers ...

...

(9) To fix, alter, charge and collect rates and other charges in the area served by its facilities at reasonable and uniform rates to be determined exclusively by it for the purpose of providing **for the payment of the expenses of the authority, the construction, improvement, repair, maintenance and operation of its facilities and properties**

...

(34) In the case of an authority that performs storm water planning, management and implementation, reasonable and uniform rates may be based in whole or in part on property characteristics, which may include installation and maintenance of best management practices approved and inspected by the authority.

³⁰ PWSA's Amended Articles of Incorporation (Mar. 19, 2020), <https://file.dos.pa.gov/search/business>.

53 Pa. C.S. § 5607(d)(9), (34) (emphasis added).

Authorities are limited to the revenues generated by their projects through charges and special assessments. 53 Pa. C.S. § 5607(d)(22), (27). The MAA does not delegate the power to tax to any municipal authority. See *City of Phila. v. Pa. PUC*, 676 A.2d 1298 (Pa. Commw. Ct. 1996) (stating that a tax is a legislative function). The MAA does, on the other hand, give municipal authorities, like PWSA, the specific ability to charge for stormwater service. See *Appeal of Best Homes DDJ, LLC*, 239-40 C.D. 2020 (Pa. Commw. Ct. Dec. 23, 2021) (City of Chester Stormwater Authority did not violate the MAA in instituting a stormwater charge).

B. PUC Regulation and Tariff Approval Provides Further Authority for PWSA's Stormwater Charge

PWSA is unique because in addition to being a municipal authority it is also regulated by the PUC. PWSA came under PUC jurisdiction as of April 1, 2018, pursuant to Chapter 32 of the Public Utility Code. 66 Pa. C.S. § 3201 *et seq.* The Public Utility Code now applies to PWSA in the same manner as any other public utility. 66 Pa. C.S. § 3202(a)(1). As a result, the PUC regulates PWSA's rate making, operating effectiveness, debt

issuances, and other aspects of PWSA's business similar to how the PUC regulates investor-owned utilities.³¹

On or about March 15, 2018, the PUC issued a Final Implementation Order determining that PWSA's provision of stormwater service is subject to regulation by the PUC and directing PWSA to file a stormwater tariff.³² The stormwater tariff and rates were approved by the PUC as a result of PWSA's 2021 base rate case, and became effective on January 12, 2022.³³ PWSA's stormwater tariff covers both stormwater in the Authority's combined sewer system as well as stormwater in the MS4 portion of PWSA's system.³⁴

Once approved by the PUC, public utility tariffs have the force and effect of law and are legally binding and enforceable regarding both the customer as well as the utility. *See, e.g., Pennsylvania Electric Co. v. PUC*, 663 A.2d 281, 284 (Pa. Commw. Ct. 1995). Tariff provisions approved by the PUC are *prima facie* reasonable. *See, e.g., Brockway Glass Co. v. PUC*, 437 A.2d 1067, 1070-71 (Pa. Commw. Ct. 1981); *Zucker v. PUC*, 401 A.2d

³¹ *Id.* Examples of regulated investor-owned water and/or wastewater utilities include Pennsylvania American Water Company and Aqua Pennsylvania, Inc.

³² *FIO* at 31.

³³ *See 2021 Rate Case*, Order entered Nov. 18, 2021.

³⁴ *Id.*; *see also* PWSA Tariff Storm Water – Pa. P.U.C. No. 1 at 18 and 18a (definitions of Authority Collection Main and Authority Storm Water Sewers).

1377, 1380 (Pa. Commw. Ct. 1979); *U.S. Steel Corp. v. PUC*, 390 A.2d 865, 872 (Pa. Commw. Ct. 1978); *Deitch Co. v. PUC*, 203 A.2d 515, 518 (Pa. Super. Ct. 1964).

Under the Public Utility Code, PWSA's stormwater charge is a "rate" for utility service, which broadly includes "[e]very individual, or joint fare, toll, charge, rental, or other compensation whatsoever of any public utility...made, demanded, or received for any service...offered, rendered or furnished by such public utility..." 66 Pa. C.S. § 102. Utility "service" is also defined broadly, and:

Used in its broadest and most inclusive sense, includes any and all acts done, rendered, or performed, and any and all things furnished or supplied, and any and all facilities used, furnished, or supplied by public utilities...in the performance of their duties under this part to their patrons, employees, other public utilities, and the public...

Id. There is no provision in the Public Utility Code that would authorize the PUC to approve a "tax." Rather, charges approved by the PUC are rates charged by utilities for public utility service. *Id.*

The process for gaining approval of a stormwater charge as a PUC-regulated utility is significantly different from the way a borough, like the Appellant, would set a stormwater fee. PWSA's stormwater rates are based on the cost of providing stormwater service, which was calculated and

supported by detailed financial information and expert analysis. PWSA's proposal went through a lengthy, comprehensive review process, and the PUC ultimately determined that PWSA's stormwater rates are just, reasonable, and non-discriminatory pursuant to Section 1301 of the Public Utility Code. 66 Pa. C.S. § 1301.

C. The PUC Reviewed and Approved PWSA's Stormwater Rates

The PUC procedure for approving PWSA's stormwater rates is a rigorous process involving numerous stakeholders. Through this process, it has been established that the PWSA's stormwater rates are just, reasonable, and not discriminatory as required by Section 1301 of the Public Utility Code. 66 Pa. C.S. § 1301.

To obtain approval of its stormwater tariff and rates, PWSA underwent an in-depth review process as part of a base rate case. On April 13, 2021, PWSA filed a combined water, wastewater, and stormwater base rate case (the "2021 Rate Case"). The *2021 Rate Case* addressed a broad range of issues related to PWSA's stormwater service, including establishing the initial tariff, examining the proposed rate structure, and setting the rates themselves.

PWSA's rate filing provided detailed financial information and expert witness testimony in support of the proposed stormwater rates, including a

Class Cost of Service Study (“CCOSS”), the purpose of which was to allocate PWSA’s costs of providing service to each utility service — including stormwater — and customer rate class.³⁵ This analysis helps to ensure that rates are recovered from customers in a way that reflects the demands that each class places on the system.³⁶ As demonstrated by the detailed financial and rate design analysis provided through the 2021 Rate Case process, PWSA’s stormwater rates are based on the cost of providing service, and the rates are reasonably related to PWSA’s services and/or projects.³⁷

There was robust participation by a number of parties in the *2021 Rate Case*.³⁸ PWSA responded to voluminous discovery requests from the parties and directed questions from the PUC’s Bureau of Technical Utility Services (“TUS”). The parties submitted direct, rebuttal, sur-rebuttal, and rejoinder testimonies, and subsequently reached a settlement agreement addressing all aspects of the rate case.

On November 18, 2021, the PUC approved a full settlement of the *2021 Rate Case*, including approval of PWSA’s initial stormwater tariff, rates,

³⁵ *2021 Recommended Decision* at 44.

³⁶ *Id.* at 64.

³⁷ *Id.* at 55.

³⁸ *Id.* at 2-4.

credit program, and other items related to stormwater service, which it determined to be just and reasonable.³⁹ PWSA's stormwater rate went into effect as of January 12, 2022.⁴⁰

D. The PUC Reviewed and Approved of PWSA's Stormwater Compliance Plan

As a regulated entity, PWSA's stormwater operations were also subject to an additional layer of review. PWSA was directed to file a Stormwater Compliance Plan to describe PWSA's stormwater operations and establish that those operations comply with applicable PUC regulations.⁴¹ PWSA filed a Stormwater Compliance Plan with supporting expert witness testimony and responded to directed questions from TUS, and interrogatories from the Office of Consumer Advocate, the Office of Small Business Advocate, the PUC's Bureau of Investigation and Enforcement, the City of Pittsburgh, and Pittsburgh United.⁴² The parties reached a full settlement agreement, effectively addressing the concerns of the interested parties while continuing

³⁹ *Id.*

⁴⁰ PWSA Tariff Storm Water – Pa. P.U.C. No. 1.

⁴¹ PUC Docket Nos. M-2018-2640802 and M-2018-2640803.

⁴² Pittsburgh United is a coalition of community, labor, faith, and environmental organizations.

to permit the stormwater operations that the PUC approved without modification.⁴³

The detailed filings by PWSA and the rigorous PUC review and approval process demonstrate that the nature of PWSA's stormwater charges were carefully contemplated and supported by data and expert analysis. While PWSA may continue to adjust its rates and other aspects of the stormwater tariff, these proceedings establish that PWSA's current rates and overall stormwater program are just, reasonable, non-discriminatory, and designed to fairly recover from appropriate customers the costs of services provided and system demand.

Accordingly, PWSA is distinguishable from the Borough in this case, which passed an ordinance under the Home Rule Charter to effectuate its stormwater fee. See *West Chester*, 291 A.3d at 457 n.4. That process did not involve detailed review by a regulator, like the PUC, or the participation of various interested parties including statutory advocates. Therefore, PWSA should be specifically excluded from any determination that the Borough's stormwater fee is a "tax," as a holding in this case that is not

⁴³ See *Stormwater Compliance Plan* at 4-5.

narrowly tailored could potentially undermine the PUC's regulatory scheme on this issue.

III. PWSA's Stormwater Charge is a Rate Charged for Utility Services, Not a Tax.

The Commonwealth Court determined below in this matter that the Borough's stormwater charge was a tax. *Id.* at 12. The Commonwealth Court has also held that:

[I]n determining whether a levy under a municipal ordinance is a tax or a true [] fee, "[t]he common distinction is that taxes are revenue-producing measures authorized under the taxing power of government; while [] fees are regulatory measures intended to cover the cost of administering a regulatory scheme authorized under the police power of government."

Rizzo v. City of Phila., 668 A.2d 236, 237 (Pa. Commw. Ct. 1995) (quoting *City of Phila. v. Se. Pa. Transp. Auth.*, 303 A.2d 247, 251 (Pa. Commw. Ct. 1973)).

"Taxes" have been described as follows:

- "Taxes are the annual compensation paid to government for annual protection and for the current support of government, and are generally an expense and not an investment." *Alabama Power Co. v. Federal Power Commission*, 134 F.2d 602, 608 (5th Cir. 1943).
- "The classic tax is 'imposed by a legislature upon many, or all citizens . . . raises money, contributed to a general fund, and spent for the benefit of the entire community.'" *City of Phila. v. Pa. PUC*, 676 A.2d at 1307 (Pa. Commw. Ct. 1996), quoting *San Juan Cellular Telephone Co. v. Public Service Commission of Puerto Rico*, 967 F.2d 683 (1st Cir. 1992).

- “A tax is an ‘enforced contribution to provide for the support of government.’” *City of Phila. v. Pa. PUC*, 676 A.2d at 1307, *citing United States v. LaFranca*, 282 U.S. 568 (1931).

The Court below suggested that a monetary assessment is a tax if it is not voluntary and does not provide a specific benefit to the payor of the assessment. *West Chester*, 291 A.3d at 465-66. This is not the case regarding PWSA's stormwater charge.

PWSA's stormwater charge clearly does not qualify as a tax. Under the MAA and the Public Utility Code, and as established through PWSA's *2021 Rate Case*, PWSA's stormwater charges are rates charged for utility services that PWSA provides and are not a tax. PWSA's stormwater charges are not charged to everyone, but only to those who own property with more than 400 square feet of impervious area, consistent with its PUC-approved stormwater tariff.⁴⁴ Revenues from the stormwater charge are not contributed to a general fund, but rather are used by PWSA to recover costs related to its infrastructure and stormwater management efforts pursuant to a regulatory scheme.⁴⁵

PWSA's charge does not generically provide for the support of government, as it is specifically used to recover the costs of stormwater

⁴⁴ PWSA Tariff Storm Water – Pa. P.U.C. No. 1 at 7-8, 20.

⁴⁵ See *Stormwater Compliance Plan* at 11, 17.

management, and the level of the charge is directly related to the cost of providing service to the various customer classes.⁴⁶ The charge is not authorized by the taxing power of the government – indeed, PWSA does not have taxing authority – but instead is authorized by the MAA and the Public Utility Code as a rate to be charged for services provided.⁴⁷ By placing PWSA under PUC jurisdiction, the General Assembly has subjected PWSA to a “regulatory scheme,” and the Courts have found that costs to administer a regulatory scheme are not taxes.⁴⁸

Further, customers receive a tangible benefit from stormwater services provided by PWSA.⁴⁹ The charge provides a discrete benefit, not only a benefit to the public at large.⁵⁰ PWSA’s system must be available to collect

⁴⁶ *Id.*; see also *2021 Recommended Decision* at 55-56, 64.

⁴⁷ 53 Pa. C.S. § 5607; 66 Pa. C.S. § 3201 *et seq.*; *FIO* at 31; 66 Pa. C.S. § 102 (defining a “rate”).

⁴⁸ [I]n determining whether a levy under a municipal ordinance is a tax or a true [] fee, “[t]he common distinction is that taxes are revenue-producing measures authorized under the taxing power of government; while [] fees are regulatory measures intended to cover the cost of administering a regulatory scheme authorized under the police power of government.” *Rizzo v. City of Phila.*, 668 A.2d 236, 237 (Pa. Commw. Ct. 1995) (*quoting City of Phila. v. Se. Pa. Transp. Auth.*, 303 A.2d 247, 251 (Pa. Commw. Ct. 1973)).

⁴⁹ See *Stormwater Compliance Plan* at 9 (“[a]ll properties receive precipitation in the form of rain or snow. Accordingly, all properties produce stormwater runoff that must be managed. Even if a property has never flooded and there is no nearby stormwater infrastructure, the stormwater that flows off of a property must be managed so that it does not contribute to pollution and flooding downstream.”).

⁵⁰ *Id.*

and convey stormwater generated from properties in its service area. Any property with impervious area contributes to stormwater runoff that must be managed and thus it is appropriate for such property owners to pay their fair share for stormwater service.

Since PWSA's stormwater service provides a discrete benefit to customers, it aligns with how other regulated costs are handled. Bills for PWSA's utility services help fund system or infrastructure improvements throughout its system and provide discrete benefits to individual customers.⁵¹

Tellingly, PWSA's stormwater rates only apply to those in PWSA's service area who: (1) own property in PWSA's service territory, and (2) whose property has at least 400 square feet of impervious area.⁵² PWSA's stormwater remediation efforts provide benefits to these customers by managing and/or conveying stormwater runoff from the property that may otherwise contribute to, *inter alia*, flooding, property damage, and/or water quality issues.⁵³

⁵¹ See, e.g., *Final Investigatory Order on CAPs: Funding Levels and Cost Recovery Mechanisms*, Docket No. M-00051923 (Dec. 18, 2006), at 6-7 (stating that the PUC balances the interests of customers who benefit from low-income customer assistance programs with the interests of other customers who pay for such programs).

⁵² *Id.* at 7-8, 20.

⁵³ *Stormwater Compliance Plan* at 9.

PWSA is also the entity best suited to provide stormwater service. PWSA is responsible for maintaining and operating the combined sewer system and MS4 and has significant expertise in the effective management of stormwater. As of April 2023, PWSA has constructed (or partnered with) twenty-six stormwater infrastructure projects in the City of Pittsburgh, with nine additional projects currently in various stages of planning and design.⁵⁴ PWSA is also developing its Stormwater Strategic Plan, which will be used to design and implement specific projects that meet a determined level of service to manage stormwater at a rate that PWSA customers can afford.⁵⁵

IV. PWSA's Stormwater Management Service Charge is Reasonable

PWSA's stormwater rates are calculated to charge customers based on the amount of stormwater runoff the customer's property creates and, thus, the demand placed on PWSA's stormwater system. The volume of stormwater that a property generates is a function of hard surface, or impervious area, on that property.⁵⁶ Impervious surfaces, like sidewalks,

⁵⁴ For additional examples of PWSA's ongoing stormwater projects, see PWSA, Current & Future Projects, <https://pgh2ostormwater.com/current-future-projects>.

⁵⁵ See PWSA, *Stormwater Strategic Plan*, <https://www.pgh2o.com/your-water/stormwater/stormwater-plans/stormwater-strategic-plan>; see also *2021 Recommended Decision* at 20.

⁵⁶ *Id.*

rooftops, and driveways impede water's ability to infiltrate into the ground.⁵⁷ The more impervious area on a property, the more runoff the property generates and the greater the demand for PWSA's stormwater conveyance, flood control, and water quality management services.⁵⁸ Impervious area is the most common measure used across the United States to charge for stormwater service.⁵⁹

A. Calculation of Stormwater Charges

Pursuant to its PUC-approved tariff, PWSA's stormwater charges are based on the impervious area found on a typical residential property in the service area. This is referred to as an Equivalent Residential Unit, or "ERU" of impervious area. One ERU in PWSA's service territory is equivalent to 1,650 square feet of impervious area, and PWSA's tariff sets the rate per ERU for stormwater service.⁶⁰

⁵⁷ Courts have frequently determined that impervious area is an appropriate basis for a stormwater charge. See, e.g., *Norfolk Southern v. City of Roanoke*, 916 F.3d 315 (4th Cir. 2019) (finding that the City of Roanoke's stormwater charge was a fee, not a tax, as it was based on a property's impervious area and thus its contribution to stormwater runoff, and the charge was implemented as part of a comprehensive regulatory scheme); *Homewood Village, LLC v. Unified Gov't of Athens Clarke County*, 132 F.Supp.3d 1376 (M.D. Ga. 2015) (stormwater charge based on impervious area, i.e., the amount of stormwater runoff a property contributes, is a fee, not a tax).

⁵⁸ *Stormwater Compliance Plan* at 8-9.

⁵⁹ *Id.* at 16; Appendix 1 at 5-6.

⁶⁰ PWSA Tariff Storm Water – Pa. P.U.C. No. 1 at 7-8, 21.

PWSA has two categories of stormwater customers: single family residential and non-single family residential.⁶¹ Single family residential (“SFR”) customers are charged one of three flat rates, or “tiers.” A customer’s tier is based on the impervious surface area found on the residential lot. Customers in Tier 1 are charged for one-half of an ERU; customers in Tier 2 are charged for one ERU; and customers in Tier 3 are charged for two ERUs.⁶² Under PWSA’s rate structure, approximately 70% of SFR properties fall within Tier 2.⁶³ Using tiers instead of one flat rate allows PWSA to differentiate among SFR ratepayers and maintain a balanced approach across the various types of development and homes.⁶⁴

Non-single family residential (“NSFR”) properties are other properties that do not qualify as SFR. The stormwater charge for a NSFR property is calculated by dividing the impervious area on the property (in square feet) by the ERU value of 1,650 square feet.⁶⁵ This number is then rounded up to the nearest whole number to provide the property’s total ERUs. To calculate

⁶¹ *Id.* at 7-8.

⁶² *Id.* at 7.

⁶³ *Stormwater Compliance Plan*, Appendix 2 at 5.

⁶⁴ *Id.*

⁶⁵ PWSA Tariff Storm Water – Pa. P.U.C. No. 1 at 8.

the monthly charge, the property's total ERUs are multiplied by the per ERU rate, resulting in the monthly stormwater charge.⁶⁶ This rate structure was specifically reviewed and approved by the PUC.⁶⁷

B. Stormwater Credit Program

PWSA also offers a PUC-approved credit program that allows customers to reduce their stormwater bill by taking specific actions to reduce their demand for stormwater service.⁶⁸ For NSFR customers, PWSA offers a credit for properties with functioning structural stormwater controls that meet either the 2019 City of Pittsburgh stormwater standards (up to 60% credit) or the 2016 City of Pittsburgh stormwater standards (up to 45% credit).⁶⁹ Similarly, single family residential customers can earn credits for downspout disconnection (i.e., preventing downspouts from draining directly into the sewer system), rerouting roof drainage to street planters, or otherwise capturing and slowly releasing the runoff from 3/4-inch of rain from the impervious surfaces on the property.⁷⁰ This residential credit offering

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ PWSA Tariff Storm Water – Pa. P.U.C. No. 1 at 9-11.

⁶⁹ *Id.*

⁷⁰ *Id.*

recognizes customers who meaningfully reduced their demand for stormwater service. In addition, customers can simply remove impervious area from their property to potentially lower their stormwater bills.⁷¹

PWSA has proposed additional credits in its currently pending base rate case which, if approved, would allow for non-residential properties to receive the 45% and 60% credits through passive management of stormwater via the property's green space, and for residential customers to receive a one-time credit for installing rain barrels that capture and retain roof runoff from a single-family residential property.⁷² Stormwater rates are calculated to reflect the demand a customer places on PWSA's stormwater system; likewise, credits are designed to reflect actions customers take to reduce such demand.

As discussed in detail *supra*, the amount of the PWSA's stormwater charge is just, reasonable, non-discriminatory, and commensurate with the cost of providing service. PWSA respectfully requests that this Court

⁷¹ *Id.* at 7-8 (in that reducing impervious area may reduce the number of ERUs or result in a residential customer being in a lower tier, and thus reducing the stormwater charge).

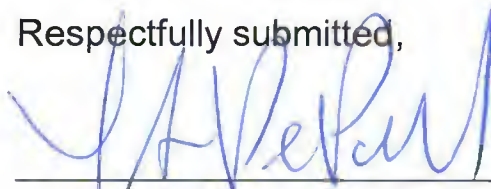
⁷² This proposal recognizes properties like cemeteries that have large green spaces which may absorb runoff and place less demand on PWSA's system.

recognize that there are approved stormwater charges in the Commonwealth that are reasonable and legally justified, and which should not be disturbed.

CONCLUSION

PWSA's stormwater management charge is expressly authorized by statute under the MAA (53 Pa. C.S. § 5607), is regulated and approved by the PUC, is not a "tax," and is the most just, reasonable, and non-discriminatory method to collect the revenue necessary to conduct stormwater management in its region. PWSA respectfully requests that this Honorable Court find in favor of the Appellant, or in the alternative, limit the scope of its ruling such that stormwater charges made pursuant to statutory and/or regulatory schemes, like PWSA's, are not inappropriately jeopardized.

Respectfully submitted,



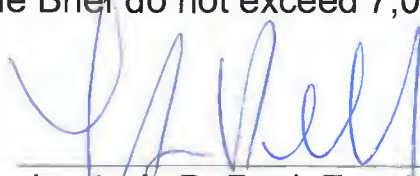
Louis A. DePaul, Esq. (ID No. 93823)
Renardo L. Hicks, Esq. (ID No. 40404)
Lauren M. Burge, Esq. (ID No. 311570)
Eckert Seamans Cherin & Mellott, LLC
600 Grant Street, 44th Floor
Pittsburgh, PA 15219
(412) 566-6000 (phone)
(412) 566-6099 (fax)

Dated: July 12, 2023

Attorneys for
The Pittsburgh Water and Sewer
Authority

CERTIFICATION OF LENGTH

Pursuant to Pa. R.A.P. 531((b)(3), I certify that this *Amicus Curiae* Brief complies with the word-count limit set forth in Rule 1531(b)(3). Based on the word-count function on the word processing system used to prepare the Brief, the substantive portions of the Brief do not exceed 7,000 words.



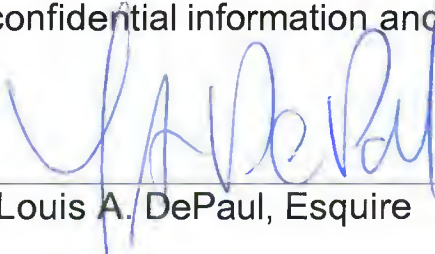
Louis A. DePaul, Esquire

*Attorney for Amicus Curiae
The Pittsburgh Water and Sewer Authority*

Date: July 12, 2023

CERTIFICATE OF COMPLIANCE

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



Louis A. DePaul, Esquire

*Attorney for Amicus Curiae
The Pittsburgh Water and Sewer Authority*

Date: July 12, 2023

CERTIFICATE OF SERVICE

I hereby certify that on July 12, 2023, I filed the foregoing BRIEF OF AMICUS CURIAE THE PITTSBURGH WATER AND SEWER AUTHORITY with the Deputy Prothonotary for the Pennsylvania Supreme Court using the PACFile system.

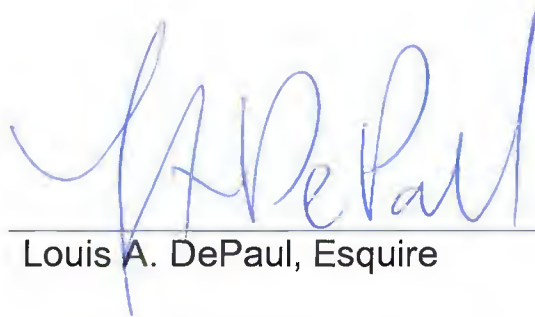
I hereby certify that on July 12, 2023, I served the foregoing BRIEF OF AMICUS CURIAE THE PITTSBURGH WATER AND SEWER AUTHORITY on the following counsel via PACFile and via first class United States Postal Service Mail, which satisfies the requirements of Pennsylvania Rule of Appellate Procedure 121(c).

Michael S. Gill
Kristin S. Camp
Warren E. Kampf
Alexandra Y. Roberts
Buckley Brion McGuire & Morris LLP
118 W Market St Ste 300
West Chester, PA 19382-2902
Phone No: (610) 436-4400
Counsel for Appellant

Stephen R. Kovatis
Claudia M. Tesoro
Pennsylvania Office of Attorney General
1600 Arch Street
Philadelphia, PA 19103
Phone No: (215) 560-2940
Counsel for Appellee

Karen M. Romano
Pennsylvania Office of Attorney General
Strawberry Sq Fl 15
Harrisburg, PA 17120
Phone No: (717) 787-2717
Counsel for Appellee

Jeffrey Mozdziock
Pennsylvania State System of Higher Education
1600 Arch Street
Philadelphia, PA 19103
Phone No: (267) 438-1351
Counsel for Appellee



Louis A. DePaul, Esquire

*Attorney for Amicus Curiae
The Pittsburgh Water and Sewer Authority*

Date: July 12, 2023