

Prepared Testimony of
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before the

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Introduction

Good morning Chairman Godshall, Chairman Caltagirone, and members of the House Consumer Affairs Committee. I am Gladys Brown, Chairman of the Public Utility Commission (Commission). I am here today, on behalf of the Commission, to offer testimony concerning House Bill 798 (HB 798). HB 798 would bring municipal corporations (which the Commission understands the intent to mean municipal authorities) owning or operating water or wastewater facilities used to provide service to the public for compensation under the Commission's jurisdiction.

This legislation raises a compelling public policy question regarding how to best enhance the service quality and infrastructure condition of water and wastewater authorities serving millions of Pennsylvanians. HB 798 would also result in one of the most profound expansions of Commission responsibility since its creation in 1937. Given the potential magnitude of this expanded authority, there are a variety of legal, financial, and operational factors that must be prudently deliberated.

Background on Commission Municipal Corporation Jurisdiction

Municipal utilities are formed and managed by officials elected to run a municipal jurisdiction, or by persons under their control. An authority, on the other hand, is a distinct special-purpose entity created and owned by one or more municipalities but managed by a board of officers that may be separate from the elected officials of the municipality(s) that created it. Both municipal utilities and authorities are included in the statutory definition of municipal corporations under Section 102 of the Public Utility Code, which defines municipal corporations in the context of Commission utility regulation. This section states:

All cities, boroughs, towns, townships, or counties of this Commonwealth, and also any public corporation, authority, or body whatsoever created or organized under any law of this Commonwealth for the purpose of rendering any service similar to that of a public utility.¹

Commission jurisdiction over municipal corporations is initiated only if a municipal corporation provides utility service outside of its political boundaries. Section 1102 of the Code establishes this jurisdictional criterion, stating it shall be lawful for any

¹ 66 Pa. C.S. § 102

municipal corporation to provide public utility service beyond its corporate limits so long as it obtains a certificate of public convenience from the Commission.² In these instances, the Commission maintains jurisdiction over the rates and services only for those customers outside of the municipal corporation boundaries. Logically, this was enacted to provide these “extra-territorial” customers recourse and due process they would otherwise not be availed due to their residence outside of the political boundary. In turn, this instills oversight and accountability on a municipal corporation’s provision of service to these “extra-territorial” customers.

Importantly though, this Commission’s jurisdiction presently does not extend to authorities, but rather, only to municipalities. This is the case due to the enactment of the Municipal Authorities Act of 1945 (MAA), which declared that the courts of common pleas hold exclusive jurisdiction over authorities. The MAA states:

Any person questioning the reasonableness or uniformity of a rate fixed by an authority or the adequacy, safety and reasonableness of the authority’s services, including extensions thereof, may bring suit against the authority in the court of common pleas of the county where the project is located or, if the project is located in more than one county, in the court of common pleas of the county where the principal office of the project is located. The court of common pleas shall have exclusive jurisdiction to determine questions involving rates or service.³

This distinction in exclusive jurisdiction between municipal utilities and authorities operating beyond their political boundaries has been further supported by case law. The Pennsylvania Supreme Court determined that the MAA provides an exclusive remedy for passing upon the reasonableness of the rates or service of an authority because it provides exclusive jurisdiction to the courts of common pleas.⁴

Existing Commission Water & Wastewater Jurisdiction

The Commission presently regulates a total of 134 water and wastewater utilities; 82 of which are water and 52 of which are wastewater. These utilities serve approximately 1.3 million customers. The majority of customers are served by a few large investor-owned utilities. For example, Pennsylvania American Water serves

² 66 Pa. C.S. § 1102

³ 53 Pa. C.S. § 5607.

⁴ *Calabrese v. Collier Twp. Mun. Auth.*, 240 A.2d 544, 548 (1968); *Elizabeth Twp. v. Mun. Auth. of McKeesport*, 447 A.2d 245, 246 (1982).

650,000 water customers and approximately 31,000 wastewater customers, and Aqua Pennsylvania serves 430,000 water and 14,000 wastewater customers. Municipalities operating outside their boundaries make up a small component of the Commission's 134 jurisdictional water/wastewater utilities, with 22 municipal water and five municipal wastewater utilities serving customers outside their boundaries.

The Commission's overall 2016 fiscal year water/wastewater budget was \$4,931,756. This budget supports all direct and indirect costs associated with regulation of the 134 jurisdictional water and wastewater utilities. Such costs include technical, legal, administrative, and consumer service staff, along with associated overhead. On a daily basis, the Commission's operations touch the regulated water industry through the processing of customer complaints, the auditing of company revenues and expenses, the auditing of company management, the review and establishment of rates, review of territorial expansions, the review of tariff supplements, the inspection of facilities, review of long-term infrastructure improvement plans, and various other critical proceedings.

The existing body of Commission-related law works effectively to balance the needs of water utilities with customer protections. Water companies under Commission jurisdiction must continually apprise us of the status of their systems and file rate cases which objectively design rates on the cost of service to maintain and upgrade facilities. The companies may utilize progressive revenue recovery tools to foster infrastructure investment such as the distribution system improvement charge⁵ and the fully projected future test year,⁶ and ultimately are held accountable to their quality of service via the consumer complaint process and Commission audit or inspection. These provisions, amongst others, have facilitated demonstrable success for Commission regulated water utilities in establishing rates and operations that provide for needed infrastructure investment and ultimately have improved service quality over the past three decades.

House Bill 798

HB 798 declares that municipal corporations delivering water or wastewater service are regulated public utilities subject to the requirements of the Code. While the language of HB 798 would capture all municipal corporations, the Commission understands that the intention of the bill is to only cover entities created under the

⁵ 66 Pa. C.S. § 1353.

⁶ 66 Pa. C.S. § 315(e).

MAA (i.e. authorities).⁷ This distinction is vitally important. There are over 2,000 municipal corporations operating as water and wastewater utilities in Pennsylvania. This includes 1,245 total authorities; consisting of 566 water authorities serving 1.55 million customers and 679 wastewater authorities serving 2.2 million customers. Therefore, the bill, as currently written, covers over 2,000 utilities while the understood intent of the bill covers approximately 1,200 utilities.

Establishing Commission jurisdiction over all of Pennsylvania's 1,245 water and wastewater authorities would subject these entities to the totality of applicable statute, regulation, and policy of the Commission. This includes, but is not limited to, Section 1301 of the Code, which establishes that every rate made, demanded, or received by any public utility shall be just and reasonable⁸ and Section 1501 which mandates that every public utility furnish and maintain adequate, efficient, safe, and reasonable service and facilities. Further, enactment of this bill would provide customers of these water authorities the opportunity to utilize the Commission's complaint process under Section 701 of the Code.⁹ This process is an integral component of Commission oversight, as it provides a transparent means of potential recourse for all customers with concerns about the operations and service quality of Commission jurisdictional utilities.

Commission Position

The Commission's position on HB 798 is neutral. We acknowledge that Commission regulation of water and wastewater authorities may satisfy a policy goal of the Pennsylvania General Assembly to improve such entities' quality of service and infrastructure condition. This is not the first instance where the General Assembly has considered having the Commission regulate authorities. In a 2007 Performance Audit of the Commission, conducted by the Legislative Budget and Finance Committee (LBFC), the LBFC recommended that the General Assembly amend the MAA to return jurisdiction of authorities to the Commission, consistent with the Public Utility Code.¹⁰ Similarly, earlier this legislative session House Bill 1490 (HB 1490) was introduced which would place the Pittsburgh Water and Sewer Authority

⁷ *Co-Sponsorship Memo of Representative Tina M. Davis*. Posted January 31, 2017.

⁸ 66 Pa. C.S. § 1301.

⁹ 66 Pa. C.S. § 701.

¹⁰ Performance Audit of the Pennsylvania Public Utility Commission, conducted pursuant to House Resolution 695 of 2006, released January 2007.

(PWSA) under the Commission's jurisdiction.¹¹ In a co-sponsorship memo for HB 1490 Speaker Turzai states that "...regulatory oversight is needed to fix this deteriorating system and restore the confidence of PWSA's customers."¹²

Nonetheless, the Commission must convey the fact that increasing the total number of water utilities it oversees from 134 to 1,245 is an increase of unprecedented magnitude in both responsibility and workload. This represents an 800% increase in the number of water utilities the Commission regulates and an approximately 290% increase in the number of water and wastewater customers the Commission regulates.¹³ Also, while the Commission cannot speak to the management and operations conditions of each of these 1,245 authorities, it would be reasonable to assume that a portion are "troubled." In support of this claim, The American Society of Civil Engineers has given most Pennsylvania water and wastewater systems not regulated by the Commission, including municipal corporation systems, a grade of "D" and "D-" respectively.¹⁴ Therefore, not only does HB 798 substantially increase the sheer number of regulated water utilities on a nominal scale, but, it also tasks the Commission with the responsibility of steering many of these utilities out of a "troubled" status. The Commission has extensive experience working with "troubled" water and wastewater utilities, and such experience has proven that rehabilitation of "troubled" systems consume Commission resources grossly out of proportion to the relative customer population served. Therefore, HB 798 would vest the Commission with the herculean task of rehabilitating a large populous of potentially "troubled" water authorities.

It is challenging to precisely gauge the magnitude of increased resources the Commission would require to effectively implement HB 798. Nonetheless, the Commission can say with confidence that HB 798 will require a tremendous employee complement, budget, and resource increase. A preliminary review of HB 798 by Commission Staff and Management estimates a required increase of upwards of 100 additional full-time staff. This represents an approximately 20% increase in the Commission's existing complement of 503 employees. Assuming a corresponding 20% expansion of the Commission's general assessment budget would result in an increase of approximately \$10 million.¹⁵

¹¹ The Commission is also neutral on HB 1490, while noting the responsibilities entailed under the bill would manifest an increase in workload at the Commission requiring additional funding.

¹² Co-Sponsorship Memo of Representative Mike Turzai, House Speaker, Posted May 24, 2017.

¹³ 1.3 million customer accounts presently regulated would be increased by 3.75 million customers to reach a total of approximately 5.05 million customers.

¹⁴ American Society of Civil Engineers Report Card for Pennsylvania's Infrastructure released 2014.

¹⁵ The Commission's 2016 general assessment budget was \$53,017,548.

Section 510(a) of the Public Utility Code caps the Commission's overall budget at 3/10th of one percent of gross operating revenues for utilities.¹⁶ Therefore, any prospective budget increase reasonably necessary to support regulatory operations under HB 798 runs the likely risk of placing the Commission's budget above its statutory cap. This is particularly the case since regulating "troubled" water utilities requires the expenditure of more resources than these utilities revenues provide to the Commission's budget under the Section 510 calculation. The Commission's 2017-2018 total fiscal year budget was approximately \$10 million under this statutory cap. Consequently, this budget cap issue is a concern that must be addressed if HB 798 is to move forward.

Additionally, from an implementation standpoint, HB 798 in its present form offers little flexibility for the Commission. It would be logistically difficult for the Commission to take over jurisdiction of 1,200 plus water authorities in "one bite." Not only would the sheer volume of work be arguably insurmountable, but the Commission's oversight would be constrained by the speed at which we could construct the employee and resource infrastructure necessary to manage these new responsibilities. As such, we would respectfully request that the General Assembly consider empowering the Commission with flexibility to design an implementation path forward, via regulation or order, that can achieve the goals of HB 798 while providing the Commission an achievable timeframe to ensure adequate staff and resources to effectively manage this additional workload. For instance, it may be practical for the Commission to assimilate authorities under the Public Utility Code in groups over time. This process could be based on several variables, including but not limited to size, geography, condition, history of regulatory non-compliance, or any combination of the above. Succinctly, the Commission submits that implementation of the policy goals intended by HB 798 must be done incrementally over a reasonable amount of time.

Additionally, from a legal standpoint, HB 798 alone may be insufficient to achieve its desired result. The current iteration of the Public Utility Code already provides for Commission jurisdiction over municipalities and authorities vis-à-vis "extra-territorial" customers, noting the conflicting law for authorities under the Municipal Authorities Act. To achieve the policy goals proposed by HB 798, additional statutory modifications are likely required. This could be done by repealing or concurrently modifying conflicting language in the Public Utility Code and the Municipal Authorities Act.

¹⁶ 66 Pa. C.S. § 510(a).

Closing

In closing, I submit that HB 798 may be the most profound enumeration of additional responsibility placed on the Commission in its 80-year history. I can affirmatively state that I have never viewed a bill that manifests such a substantial increase in Commission jurisdiction during my personal 22-year career at the Pennsylvania capitol. This is not an indictment on the merits of designing a statute to place water and wastewater authorities under Commission jurisdiction, but rather, an indication of the historic nature of this undertaking. As I have stated, the Commission is well versed in working to rehabilitate “troubled” water utilities for the public good. This Commission is willing and capable to undertake the responsibilities concomitant with HB 798 so long as we are provided with the commensurate resources and procedural flexibility to implement our mission as effective regulators for each of the 1,245 water authorities over a reasonable time-period.

Understanding the magnitude of change proposed by HB 798, the Commission respectfully asks that the General Assembly continue to use an iterative process to deliberate the intent and ramifications of this bill. We commend this Committee for starting this process with the hearing today, as we believe this is a vital and valuable step in considering legislation that touches as many stakeholders as HB 798. The Commission is committed to constructively participating in this process moving forward. We are at your service and happy to answer any questions members of the General Assembly may have.