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November 13, 2006

**BY HAND**

James J. McNulty, Secretary  
Secretary's Bureau  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
2nd Floor, Room-N201  
400 North Street  
P.O. Box 3265  
Harrisburg, PA 17120

Re: In Re: Proposed Rulemaking for Revision to  
Chapter 67 of Title 52 of the PA Code  
Pertaining to Service Outages  
PUC Docket No. L-00060177  
IRRC Regulation ID #57-249 (#2570)  
**Comments by PAWC**

INDEPENDENT REGULATORY  
REVENUE COMMISSION

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Dear Secretary McNulty:

Enclosed for filing please find the original and fifteen (15) copies of the Comments of Pennsylvania-American Water Company (PAWC) on the above-mentioned Rulemaking by the Pennsylvania Public Utility Commission. One copy of a diskette containing the Comments in electronic format is also enclosed.

Please time-stamp and return the additional copies of this filing. If you have any questions or concerns, please contact me. Thank you.

Sincerely,

*Michael D. Klein*  
Michael D. Klein

Enclosures

cc: Velma A. Redmond, Esquire  
Persons on Certificate of Service (without diskette)

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## Certificate of Service

I hereby certify that I have this 13th day of November, 2006, served a true and correct copy of the foregoing document (without diskette) upon the persons, listed below, and addressed as follows:

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**Before the  
Pennsylvania Public Utility Commission**

In Re: Proposed Rulemaking for  
Revision to Chapter 67 of Title 52 of the  
PA Code Pertaining to Service Outages

Docket No. L-00060177

INDEPENDENT REGULATORY  
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**Comments of  
Pennsylvania-American Water Company**

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Pennsylvania-American Water Company ("PAWC") respectfully submits these comments in response to the Pennsylvania Public Utility Commission's ("PUC" or "Commission") proposed rulemaking regarding revisions to Chapter 67 of Title 52 of the Pennsylvania Code pertaining to service outages.

**I. Introduction**

On March 10, 2006, the Commission adopted the Final Investigation Order and Release of Staff Report at Docket No. I-00050109 regarding the December 2005 fluoride release incident at PAWC's Yellow Breeches Water Treatment Plant in Fairview Township, Cumberland County.

During the investigation into the incident, PAWC contended that the term "service interruption" was not clearly defined in the Commission's regulation at 52 Pa. Code § 67.1. While it did not agree with PAWC's contention that the regulation lacked a clear definition, the Commission decided to take steps to more clearly define that term. Pursuant to the March 10, 2006 Order, the Commission formally commenced this rulemaking to amend its regulations to clarify what the Commission means by the phrase "service interruption" under 52 Pa. Code § 67.1.

On May 4, 2006, the Commission voted 5-0 to clarify the definition of “service interruption” in Section 67.1. The Commission published the proposed revision to its regulations in the Pennsylvania Bulletin, 36 Pa. Bull. 6303, on October 14, 2006.

Section 67.1 addresses the issue of notice to the Commission regarding service outages, 52 Pa. Code § 67.1. The Commission’s regulations provide that a utility shall notify the Commission by telephone within one hour after a preliminary assessment of conditions reasonably indicates that there is an unscheduled service interruption affecting 2,500 or 5%, whichever is less, of a utility’s total customers in a single incident of six or more projected consecutive hours. 52 Pa. Code § 67.1(b).

Section 67.1 uses the phrase “service interruption,” but the phrase is not defined. The proposed rulemaking would add the following definition to Section 67.1(a):

“Service interruption,” regarding water service provided by any water utility under the Commission’s jurisdiction, covers any interruption of service affecting the quantity or quality of water delivered to the customers.

It would **not** add a definition for “service interruptions” for electric, gas or telephone utilities, which are also subject to the notice requirements of Section 67.1.

## **II. Need for Harmonization with DEP**

The Pennsylvania Safe Drinking Water Act<sup>1</sup> (the “SDWA”), gives the Pennsylvania Department of Environmental Protection (“Department” or “DEP”) primary - but not exclusive - jurisdiction to regulate the quality of water supplied to the public in Pennsylvania.

The Commission also regulates the quality of water provided by a utility to its ratepayers because the “water” supplied to the ratepayers is part of the “service and facilities” of a public utility.<sup>2</sup>

The current rulemaking presents an opportunity for harmonization between the Commission and the DEP. This process, in the past, has been undertaken by the Commission with other state agencies such as the Pennsylvania Emergency Management Agency, Pennsylvania Department of Community and Economic Development, Pennsylvania Infrastructure Investment Authority and DEP. For example, DEP and the Commission mutually entered into a Memorandum of Understanding with regard to the viability of small drinking water systems.<sup>3</sup> While the matter before the Commission today is a proposed rulemaking rather than a Memorandum of Understanding, the subject of the rulemaking lends itself to harmonization between the two state agencies as both agencies are interested in serving the public interest.

The Commission should consider harmonizing the situations that would trigger a 1 hour notice to the Commission with the situations that trigger a 1 hour notice to DEP. This would create one unified set of situations that may require a 1 hour notice. Harmonization into a uniform set of situations would minimize the number of decisions that would need to be made by water utilities in these situations.

Harmonization could take the following form:

“Service interruption,” regarding water service provided by any water utility under the Commission’s jurisdiction, means any situation requiring notice within 1 hour by the water utility to the Pennsylvania Department of Environmental Protection under 25 Pa. Code Chapter 109, relating to safe drinking water.

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<sup>1</sup> 35 Pa. Stat. §§ 721.1 to 721.17.

<sup>2</sup> See 66 Pa. C.S. § 102.

<sup>3</sup> See Policy Statement Re: Small Drinking Water Systems Viability and Memorandum of Understanding Between Department of Environmental Resources and Pennsylvania Public Utility Commission, 1993 Pa. PUC LEXIS 147 (November 16, 1993).

Harmonization of the situations would provide notice to the Commission of situations with the potential to have serious affects on the public. Certain water emergencies<sup>4</sup> and situations with the potential for serious adverse health effects<sup>5</sup> must be reported to DEP within 1 hour.<sup>6</sup> This would cover all Tier 1 situations, Tier 2 situations and water emergencies (such as waterborne disease outbreaks, failures in key water treatment processes, natural disasters, chemical spills, and water outages).<sup>7</sup> In emergencies or situations with the potential for serious adverse health effects, the public must be notified as soon as possible.<sup>8</sup> The “window” for notifying the public remains open for a maximum of (a) 24 hours for Tier 1 situations;<sup>9</sup> (b) 30 days for Tier 2 situations.<sup>10</sup>

Other situations do not involve serious adverse health effects.<sup>11</sup> These situations still impact water quantity or water quality, but they must be reported to DEP within 10 days following the month in which the result is received or the first 10 days following the end of the

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<sup>4</sup> Water emergencies requiring notice to DEP within 1 hour are listed in 25 Pa. Code § 109.701(a)(3).

<sup>5</sup> Situations with the significant potential to have serious adverse effects on human health as a result of short-term exposure are classified as a “Tier 1” situation. See 25 Pa. Code §§ 109.407(b)(1), 109.408. Other situations with the potential to have serious adverse effects on human health are classified as “Tier 2” situations. See 25 Pa. Code §§ 109.407(b)(2), 109.409.

<sup>6</sup> 25 Pa. Code §§ 109.408(b)(2) (notification to DEP of Tier 1 situation), 109.409(b)(2)(notification to DEP of Tier 2 situation).

<sup>7</sup> 25 Pa. Code §§ 109.407(a), 109.408(a), 109.409(a), 109.701(a)(3).

<sup>8</sup> See footnotes 9 and 10, *infra*.

<sup>9</sup> 25 Pa. Code §§ 109.408(b)(timing for a Tier 1 public notice); 40 C.F.R. § 141.202 (Tier 1 notice requirements)

<sup>10</sup> 25 Pa. Code §§ 109.409(b)(timing for a Tier 2 public notice); 40 C.F.R. § 141.203 (Tier 2 notice requirements).

<sup>11</sup> A “Tier 3” situation involves all other violations and situations that are not included in Tier 1 and Tier 2 situations. 25 Pa. Code § 109.407(b)(3).

required monitoring period as stipulated by the Department, whichever is shorter.<sup>12</sup> The public receives notice of these situations in the annual Customer Confidence Report.<sup>13</sup>

Unlike the requirements for notifying DEP, the Commission's proposed rulemaking is more stringent and gives the same treatment to each and every situation affecting water quality or quantity. It is important, and appropriate, for the Commission to be notified within 1 hour when DEP is receiving a 1 hour notice (e.g., Tier 1 situations, Tier 2 situations and water emergencies). The rulemaking, however, is broad in scope and includes, without limitation, all other situations that affect water quality or water quantity. This means that the Commission would require notice within 1 hour for any Tier 3 situation (if over the Commission's customer threshold) – even though DEP, and the public, need not learn of this situation until much later.

The scope of situations covered by the proposed definition is broader than necessary. The need to notify the Commission every time anything (such as a Tier 3 situation) occurs that affects 2,500 or 5.0% (whichever is less) of the utility's total customers would create an excessive and burdensome requirement on all water utilities and an inefficient use of the Commission's resources. Since these situations do not have the potential for serious adverse health effects, they should not necessitate the Commission being informed faster than DEP. Immediate attention to these situations is not required by DEP or by the public. Requiring notice to the Commission within 1 hour for these situations is not necessary.

The Commission can effectively regulate the adequacy, efficiency, safety and reasonableness of the water supplied by a water utility without receiving notice in 1 hour of every situation affecting the quantity or quality of water delivered to customers. The

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<sup>12</sup> 25 Pa. Code § 109.701(a)(1) (reporting and recordkeeping).

<sup>13</sup> 25 Pa. Code § 109.410(d).

Commission seeks to ensure that it receives notice in 1 hour (a) when there is an outage, (b) low (or negative pressure) or (c) when consumers cannot drink the water delivered. These concerns are satisfied by harmonization with the situations for notifying DEP within 1 hour. Rather than seeking to independently monitor every change in water quantity or quality (i.e., Tier 1, Tier 2 and Tier 3 situations and water emergencies), the Commission would be better served by harmonizing the situations that may trigger notice to the Commission within 1 hour with the situations that trigger notice to the DEP within 1 hour (i.e., Tier 1 and Tier 2 situations and water emergencies). Importantly, the customer threshold in Section 67.1(b) should remain in place so that the Commission would only receive notice within 1 hour of the more serious or significant adverse events.

It should be noted that this harmonization proposal would only achieve a partial harmonization between the Commission and DEP. It would harmonize the situations that may trigger a 1 hour notice. "Full" harmonization would occur if anytime a utility needed to notify DEP within 1 hour, it automatically knew that it would also need to notify the Commission within 1 hour. To achieve full harmonization, the Commission would need to consider eliminating the customer threshold under Section 67.1(b), which limits notice to situations affecting more than 2,500 or 5.0% (whichever is less) of the utility's total customers, for water utilities.

However, full harmonization should only occur if a customer threshold is added to DEP regulations (which are the subject of a current rulemaking by DEP). The customer threshold ensures that notices are only necessary for the more serious or significant adverse events. Notice of every main break, no matter how small, and all other situations affecting water quality or quantity could easily stretch the limited time, money and personnel of the DEP and the PUC. Receiving a notice for every problem or leak situation could quickly lead to a scenario



where an serious notice from one water supplier is “lost” in the influx of notices for “less serious” situations (involving less significant events) from other water suppliers. Instead of forcing utilities to report each and every situation affecting water quality or quantity, efforts should be made to ensure that DEP and the PUC receive notice within 1 hour only for the more serious or significant adverse events.

### **III. Comments on the Proposed Definition**

Should the Commission elect not to harmonize its requirements with the requirements for notifying DEP, then PAWC offers the following comments on the proposed definition set forth in the rulemaking.

PAWC agrees that clarification is needed for the definition of “service interruption” under Section 67.1. However, PAWC submits that the proposed definition would **not** clarify the issue of notice to the Commission, and would create excessive and burdensome requirements on itself and all water utilities.

#### **A. “Interruption of Service”**

The Commission’s proposed definition of “service interruption” is unworkable. The meaning of a “service interruption” is very important to the proposed definition. It is only when such an “interruption” occurs do we get to the next parts of the proposed definition. If all parts of the proposed definition are satisfied, a public notice may be triggered if the customer threshold under Section 67.1(b) is satisfied.

##### **1. Circular Definition**

The Commission’s proposed definition of “service interruption” uses the phrase “interruption of service.” Using the term to be defined as part of the definition creates a “circular

definition.” The proposed definition does *not* add clarity to the definition, and could be challenged on constitutional grounds.<sup>14</sup>

## 2. **Lack of Clarification**

The proposed definition does *not* clarify the meaning of an “interruption” for water utilities. Broadly speaking, an “interruption” is defined as an event or situation that breaks the uniformity or continuity of service.<sup>15</sup> “Service” is defined by the Code as including “any and all acts done, rendered or performed and any and all things furnished, or supplied by public utilities.” 66 Pa. C.S. § 102.

The proposed definition provides no examples or illustrations of an “interruption.” From the context of Section 67.1, an interruption includes outages, supply cut-offs, or a complete cessation of service. In March 2006, the Commission stated that service is also “interrupted” when consumers cannot drink the water delivered.

The proposed language reaches beyond the above-mentioned situations. The proposed definition includes other situations that would not normally be considered an “interruption.” For example, changes in water pressure can affect the quantity or quality of water delivered to the customers. Water pressure can fluctuate within operational standards. Thus, the proposed definition could be construed as requiring notice within 1 hour of every change in water pressure (affecting 2,500 or 5%, whichever is less, of the utility’s total customers) – *even if the utility is operating within the range of normal operating pressures set forth in 52 Pa. Code § 65.6(a).*

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<sup>14</sup> See *Goldy v. Beal*, 429 F.Supp. 640 (E.D.Pa.1976), which declared the basic commitment section of the Pennsylvania Mental Health and Mental Retardation Act of 1966, 50 P.S. § 4406, to be unconstitutionally vague due to its circular definition of mental illness.

<sup>15</sup> See Merriam-Webster Online Dictionary, < <http://www.m-w.com/dictionary/interruption> >.

The proposed definition also raises other questions. Drought conditions may affect the quantity of water available to customers. Are drought conditions considered an “interruption” within the meaning of the proposed definition?

To avoid such questions, the Commission should explicitly indicate its intent on what situations are covered. It is recommended that the Commission cover (a) outages and (b) situations with the potential for serious adverse health effects.

3. **Unscheduled Interruptions Only**

The Commission’s proposed definition of interruption is not explicitly limited to unscheduled interruptions. Scheduled interruptions are discussed in 52 Pa. Code § 65.5(b). Unscheduled interruptions are discussed in 52 Pa. Code § 67.1.

The context of Section 67.1 limits the notice requirements to unscheduled “interruptions.” See the first sentence of 25 Pa. Code § 67.1(a) and the first sentence of 25 Pa. Code § 67.1(b). However, no such limitation appears in the proposed definition. Because the Commission uses two classifications of “interruptions,” the use of the phrase “any interruption” could be construed as including both scheduled (i.e., controlled) and unscheduled interruptions within the meaning of the proposed definition.

To avoid ambiguity, the Commission should explicitly indicate its intent on what interruptions are covered by the proposed definition. It is recommended that the Commission use the word “unscheduled” in the proposed definition. Use of this word would clarify the intent to limit interruptions to unscheduled interruptions. Alternatively, the Commission could avoid using the term “interruption” as part of the definition.

## **B. “Affecting”**

The proposed definition uses the word “affecting.” As a verb, affect means to influence or to have an effect on.<sup>16</sup> “Affects” can be positive or negative. Without any limitations, both positive and negative influences are included within the proposed definition.

To avoid ambiguity, the Commission should explicitly indicate its intent on what interruptions are covered by the proposed definition. It is recommended that the Commission use the words “seriously and adversely” in the proposed definition. Use of these words would clarify the Commission’s intent. Alternatively, the Commission could avoid using the term “affecting” as part of the definition.

## **C. “Quantity or Quality of Water”**

The proposed definition requires notice if there is a change in the “quantity or quality of water delivered to customers.” However, it does not link the “quantity or quality of water” to violations of Drinking Water Standards under the SDWA, *or even the potability of the drinking water*. So, any change in quantity or quality will trigger a notice to the Commission.

This language conflicts with the Commission’s stated intent. In March 2006, the Commission stated that service is also “interrupted” when consumers cannot drink the water delivered. The proposed definition does not stop at the potability of water delivered to customers or even violations of the SDWA. Rather, it seeks to include every change in the quantity or quality of water delivered to customers. By doing so, it would require a 1 hour notice to the Commission even if the water is drinkable and there is no violation of the SDWA.

For example, a heavy rainfall could increase turbidity. Increased turbidity would affect the water quality.<sup>17</sup> But, the water could still be drinkable by the customer and the

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<sup>16</sup> See Merriam-Webster Online Dictionary, < <http://www.m-w.com/dictionary/affecting> >.

increased turbidity could still meet the Drinking Water Standards under the SDWA. Such a situation would not deprive the public of drinkable water or have the potential for a serious adverse health effects. Yet, the Commission would require notice within 1 hour.

The Commission should explicitly indicate its intent on what situations are covered. It is recommended that the Commission cover (a) outages, (b) water pressure below the standards set in 52 Pa. Code § 65.6 (relating to pressures) and (c) situations with the potential for serious adverse health effects.

#### **D. Use of Suggested Revisions**

Based on the foregoing comments, the proposed definition could be revised as follows:

“Service interruption,” regarding water service provided by any water utility under the Commission’s jurisdiction, means any unscheduled outages, or situations where the utility knows or has reasonable cause to believe that water pressure is below the standards set in 52 Pa. Code § 65.6 (relating to pressures) or situations with the potential for serious adverse health effects.

This suggested revision should satisfy the Commission’s concerns that it receive notice in 1 hour of events over the customer threshold (a) when there is a lack of water (by outage or low pressure) or (b) when consumers cannot drink the water delivered. The situations where consumer cannot drink the water are situations with the potential for serious adverse health effects (i.e., Tier 1 and Tier 2 situations).

It would also (1) avoid use of the term “interruption” as part of the definition, which resolves our comments in Section III A(1) and A(3); (2) avoid use of the term “affecting” as part of the definition, which resolves our comments in Section III B; and (3) provide

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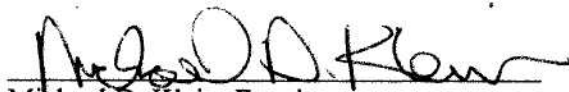
<sup>17</sup> “Water quality” is part of the “service” provided by a water utility because water is the thing furnished or supplied by the utility to its customers. See 66 Pa. C.S. § 102.

clarification on the situations covered (i.e., outages and situations with the potential for serious adverse health effects), which resolves our comments in Section III A(2) and C.

#### **IV. Conclusion**

PAWC appreciates the opportunity to present comments on the proposed rulemaking regarding revisions to Chapter 67 of Title 52 of the Pennsylvania Code pertaining to service outages, and requests that the Commission consider its comments on the issues.

Respectfully submitted,



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