



April 18, 2016

**VIA E-FILE**

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Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street, 2nd Floor North  
P.O. Box 3265  
Harrisburg, PA 17105-3265

**Re: Petition of Delaware Sewer Company for an Investigation Into Whether the Public Utility Commission Should Order a Capable Public Utility to Acquire Delaware Sewer Company; Docket No. I-2016-2526085**

**PENNSYLVANIA-AMERICAN WATER COMPANY'S ANSWER IN OPPOSITION TO THE MOTION OF THE OFFICE OF CONSUMER ADVOCATE TO JOIN PENNSYLVANIA-AMERICAN WATER COMPANY**

Dear Secretary Chiavetta:

Enclosed for filing with the Pennsylvania Public Utility Commission, please find Pennsylvania-American Water Company's Answer in Opposition to the above-referenced motion. A copy of this document has been served in accordance with the attached Certificate of Service.

If you have any questions regarding this filing, please direct them to me. Thank you for your attention to this matter.

Sincerely,

COZEN O'CONNOR

By: David P. Zambito  
Counsel for *Pennsylvania-American Water Company*

DPZ/kmg  
Enclosure

cc: Per Certificate of Service

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**CERTIFICATE OF SERVICE  
Docket No. I-2016-2526085**

I hereby certify that I have this day served a true copy of Pennsylvania-American Water Company's Answer In Opposition to the Motion of the Office of Consumer Advocate to Join Pennsylvania-American Water Company, upon the parties, listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

**VIA E-MAIL AND FIRST CLASS MAIL:**

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DATED: April 18, 2016

  
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David P. Zambito, Esquire  
Counsel for  
*Pennsylvania-American Water Company*

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Petition of Delaware Sewer Company for an :  
Investigation Into Whether the Public Utility : Docket No. I-2016-2526085  
Commission Should Order a Capable Public Utility :  
to Acquire Delaware Sewer Company :

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**PENNSYLVANIA-AMERICAN WATER COMPANY'S  
ANSWER IN OPPOSITION TO THE MOTION OF THE  
OFFICE OF CONSUMER ADVOCATE TO JOIN  
PENNSYLVANIA-AMERICAN WATER COMPANY**

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NOW COMES Pennsylvania-American Water Company ("PAWC"), by and through its counsel, Cozen O'Connor, and pursuant to Section 5.103(c) of the Rules of Practice and Procedure of the Pennsylvania Public Utility Commission ("Commission"), 52 Pa. Code § 5.103, files this answer in opposition to the motion of the Office of Consumer Advocate ("OCA") to join PAWC as an indispensable party to the above-referenced investigation ("OCA Motion"), and in support thereof, avers as follows:

1. OCA misconstrues the current status of the "I-docket" investigation that is being conducted by the Commission's Bureau of Investigation & Enforcement ("I&E"). OCA is treating the investigation as if an actual Section 529 proceeding, which may result in a Commission order directing a capable public utility to acquire the Delaware Sewer Company ("DSC"), has already been initiated. It has not. At its current stage, the investigation is simply a fact-finding investigation by I&E. I&E will then evaluate its findings and take whatever action it – in its independent prosecutory discretion – determines to be appropriate. Until a formal Section 529 proceeding is properly initiated, PAWC is not an indispensable party to the investigation and

should not be formally joined to the investigation.<sup>1</sup> I&E, under its general investigative powers,<sup>2</sup> already has the ability to issue data requests to PAWC and PAWC has a duty to respond (which it has). OCA's attempt to supplant itself in the role of I&E should be rejected. The OCA Motion is without merit and, for the reasons explained more fully below, should be denied in its entirety.

2. PAWC provides the following relevant background to assist in the resolution of the OCA Motion:

a. In an unusual attempt to start a proceeding under Section 529 of the Pennsylvania Public Utility Code (66 Pa. C.S. § 529) against itself, DSC filed a petition for the "Opening of an Investigation into Whether The Public Utility Commission Should Order a Capable Public Utility to Acquire [DSC] Pursuant to 66 Pa. C.S. § 529" at Docket No. P-2014-2404341 ("Petition").

b. The Petition requested that the Commission open an investigation and that PAWC be the capable public utility ordered by the Commission to acquire DSC.

c. The Petition was served on PAWC, the Commission's Law Bureau, and the public advocates, but was not served on any other public utilities or any municipality or municipal authorities providing the same type of service as DSC.

d. The Petition was litigated with DSC, OCA, PAWC, and I&E all participating as active parties. DSC and OCA supported the Petition, while I&E and PAWC opposed it. I&E and PAWC opposed the Petition on the grounds that, *inter alia*, all of the required elements of Section 529 for a forced acquisition could not reasonably be met.

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<sup>1</sup> Formal joinder of PAWC would prematurely expose PAWC to discovery from other parties who have voluntarily chosen to intervene in the investigation at this early stage (such as OCA).

<sup>2</sup> See, e.g., 66 Pa. C.S. §§ 331 (regarding "Power of commission"); 501 (regarding "General powers").

e. By Secretarial Letter issued July 10, 2015, the Recommended Decision (“R.D.”) of Administrative Law Judge Ember Jandebaur dated June 26, 2015, in the Petition proceeding was served. *Petition of Delaware Sewer Company for the Opening of an Investigation into Whether the Public Utility Commission Should Order a Capable Public Utility to Acquire the Company Pursuant to 66 Pa. C.S. § 529*, Docket P-2014-2404341 (Recommended Decision dated Jun. 26, 2015). The R.D. held that “[t]here is no guarantee that a 529 investigation will result in an acquisition. It is the nature of an investigation that you don’t know the end result until the end of the investigation. If we knew the end result the investigation would not be necessary.” R.D. at 12. Accordingly, the R.D. recommended that “the Public Utility Commission open an investigation pursuant to Section 529 to determine whether a capable public utility should acquire Delaware Sewer Company.” R.D. at 15.

f. By Opinion and Order entered January 28, 2016, the Commission adopted the R.D., initiated an investigation, and directed I&E to participate in the investigation, in lieu of the Law Bureau, pursuant to Section 529(i).<sup>3</sup> *Petition of Delaware Sewer Company for the Opening of an Investigation into Whether the Public Utility Commission Should Order a Capable Public Utility to Acquire the Company Pursuant to 66 Pa. C.S. § 529*, Docket P-2014-2404341 (Opinion and Order entered Jan. 28, 2016), p. 29 (“January 28<sup>th</sup> Order”).

g. The Commission also directed that a copy of the Opinion and Order be served on the parties to the Petition.

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<sup>3</sup> Section 529(i) specifically addresses the burden of proof in proceedings under Section 529 and provides that “[t]he Law Bureau shall have the burden of establishing a prima facie case that the acquisition of the small water or sewer utility would be in the public interest and in compliance with the provisions of this section.” Through reorganizations within the Commission, those duties now belong to I&E. 66 Pa.C.S. § 529(i).

3. The Commission's January 28<sup>th</sup> Order is also noteworthy for what it did not direct. It did not direct that notice of a Section 529 proceeding be provided to other proximate public utilities or proximate municipalities or municipal authorities providing the same type of service as DSC or that DSC provide notice to its customers, as required to initiate a proceeding which could lead to the Commission's issuance of an order directing the acquisition of DSC. *See* 66 Pa. C.S. § 529(a), (h).<sup>4</sup> In other words, a formal Section 529 proceeding has yet to be initiated by the Commission. The instant investigation, at it currently stands, is merely a fact finding investigation by I&E. I&E can then use those facts to take, or refrain from taking, further action in its independent prosecutory discretion.

4. As noted above, I&E has already issued data requests to PAWC to which PAWC has voluntarily provided verified responses. In light of this fact, it is clear that I&E, as the party with the burden of proof under Section 529, already has all of the power that it needs to make a determination whether to pursue further prosecutory action. OCA cannot, under the statute, initiate a Section 529 proceeding on its own.<sup>5</sup> Likewise, neither the Commission nor OCA can direct I&E to take some form of prosecutory action under Section 529 if I&E, in its independent discretion, determines that no action is warranted.<sup>6</sup>

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<sup>4</sup> OCA concedes that the January 28<sup>th</sup> Order did not name and was not served on any other proximate public utilities, municipalities, or municipal authorities that provide the same type of service as DSC. OCA, nevertheless, fails to acknowledge that a formal Section 529 proceeding has not yet been formally initiated by the Commission. *Cf.* OCA Motion, p. 4.

<sup>5</sup> Indeed, it would set bad precedent and be contrary to clear legislative intent if the Commission were to allow a public advocate with a limited responsibility to represent consumers (*i.e.* OCA) to supplant the statutory responsibilities of the public advocate with responsibility to represent the broader public interest (*i.e.*, I&E).

<sup>6</sup> For constitutional due process reasons, the Commission must maintain a separation of its prosecutory and adjudicative functions. *See Lyness v. State Board of Medicine*, 529 Pa. 535, 605 A. 2d 1204 (1992). I&E must be permitted to make an independent determination as to whether to proceed with a prosecution of some form. It would be impermissible for the Commission to "advocate shop" and allow OCA to carry out the statutory functions of I&E; particularly where, as here, I&E has already indicated in the Petition proceeding below that it does not believe that the mandatory factors of a Section 529 forced acquisition can be satisfied.

5. The Supreme Court of Pennsylvania has explained that “the basic inquiry in determining whether a party is indispensable concerns whether justice can be done in the absence of” that party. *CRY, Inc. v. Mill Serv., Inc.*, 536 Pa. 462, 469, 640 A.2d 372, 375 (1994) (“*CRY, Inc.*”).<sup>7</sup> The Court also noted that the issue can be formulated several different ways, but the basic inquiry requires one to examine the nature of the claim and relief sought. *Id.*; see also *City of Phila. v. Cmwlth. of Pa.*, 575 Pa. 542, 567-72, 838 A.2d 566, 581-85 (2003)(denying a respondent’s claim that indispensable parties were not joined after reviewing the *CRY, Inc.* factors, noting that joinder provisions are subject to limiting principles, and finding that justice could be done in the absence of the alleged indispensable parties based upon the facts and circumstance of that case).

6. Applying the *CRY, Inc.* inquiry to the instant matter, it is clear that justice can be done at this stage of the investigation without joinder of PAWC as an indispensable party. I&E has been directed by the Commission to institute “an investigation . . . into whether the Commission [should] order a capable public utility to acquire Delaware Sewer Company . . . .” January 28<sup>th</sup> Order, Ordering ¶¶ 4, 5. I&E has done so, but has yet to determine whether to proceed with a prosecution of some form under Section 529, and OCA has no legitimate role in the fact finding investigation that is currently being conducted by I&E..

7. Despite the fact that the Commission has not yet issued or directed the notices required under subsection (h) of Section 529 (66 Pa. C.S. § 529(h)), OCA asserts that “the possibility that PAWC may be ordered to acquire and operate DSC’s system means that PAWC has a significant interest in the case, and that due process requires its involvement as a party.”

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<sup>7</sup> The *CRY, Inc.* case was also cited by the Commission in *Trucco v. PPL Elec. Util. Corp.*, 2002 Pa. P.U.C. LEXIS 21, which was cited in paragraph 6 of the OCA Motion. In the *Trucco* case, this Commission, relying on *CRY, Inc.*, denied PPL’s exceptions which argued that the City of Harrisburg should have been an indispensable party in a matter dealing with the location of a utility pole.

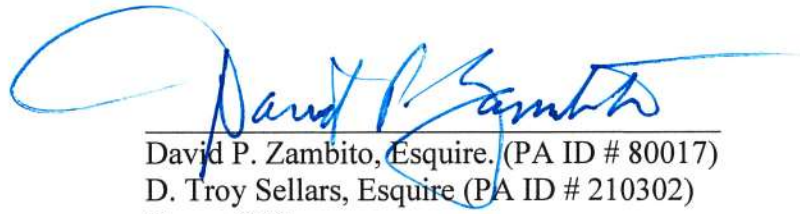
OCA Motion, p. 4. OCA's assertion is premature. PAWC acknowledges that, once a proper Section 529 is initiated pursuant to the requirements of 66 Pa. C.S. § 529(h), all noticed parties (including PAWC, other proximate utilities, municipalities, and municipal authorities) will be indispensable parties to the proceeding. Those statutorily-required notices, however, have not yet occurred; and, until they do, this investigation is little more than a fact finding exercise by I&E. Indeed, it is not the role of PAWC to inform the Commission as to when or how properly to initiate and conduct a Section 529 proceeding in compliance with the law. PAWC simply notes that a proper Section 529 proceeding has yet to be initiated and, until it is, PAWC is not an indispensable party to this investigation.

8. As the fact finding stage of this investigation can be completed by I&E via its general investigative powers, justice can be done without joining PAWC as an indispensable party at this time. OCA's Motion should accordingly be denied.



WHEREFORE, for the reasons set-forth above, Pennsylvania-American Water Company is not an indispensable party at this stage of the instant investigation and the Office of Consumer Advocate's motion to join Pennsylvania-American Water Company as an indispensable party, should be denied in its entirety.

Respectfully submitted,



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