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January 9, 2019

VIA ELECTRONIC FILING
Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17120

Re: Application of Pennsylvania-American Water Company Pursuant to Sections 507, 1102, and 1329 of the Public Utility Code for Approval of Its Acquisition of the Wastewater System Assets of Exeter Township; Docket No. A-2018-3004933

Dear Secretary Chiavetta:

Enclosed for electronic filing is the Answer of Exeter Township to the Motion of the Bureau of Investigation and Enforcement to Reject or Hold in Abeyance Pennsylvania-American Water Company's Amended Application in the above captioned matter. ***Please treat this as a corrected filing for the referenced Answer.*** Please contact me if you have any questions.

Respectfully,

Samuel W. Cortes

SWC:jcc
Enclosures

cc: Per Certificate of Service
Barnett Satinsky, Esq. (via email) (w/enclosure)

COMMONWEALTH OF PENNSYLVANIA
BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

IN RE: APPLICATION OF PENNSYLVANIA-AMERICAN WATER COMPANY PURSUANT TO SECTIONS 507, 1102, AND 1329 OF THE PUBLIC UTILITY CODE FOR APPROVAL OF ITS ACQUISITION OF THE WASTEWATER SYSTEM ASSETS OF EXETER TOWNSHIP	:	**DOCKET A-2018-3004933**

ANSWER OF EXETER TOWNSHIP TO THE MOTION OF THE BUREAU OF INVESTIGATION AND ENFORCEMENT TO REJECT OR HOLD IN ABEYANCE PENNSYLVANIA-AMERICAN WATER COMPANY'S AMENDED APPLICATION

Exeter Township ("Exeter"), by and through its counsel, Fox Rothschild LLP, files this Answer to the Motion of the Bureau of Investigation and Enforcement ("I&E") to Reject or Hold in Abeyance Pennsylvania-American Water Company's Amended Application (the "Motion").

I. BACKGROUND

The Motion concerns Exeter's Application for a Certificate of Public Convenience, *Nunc Pro Tunc* at Docket No. A-2018-3006505 (the "Section 1102 Application"), in which Exeter requests a certificate of public convenience for the provision of wastewater service to 29 customers, only, in an isolated portion of Lower Alsace Township (the "Limited Service Area"). As set forth in the Section 1102 Application, Exeter intends to convey all of the assets comprising its wastewater system (the "System") after receiving the certificate *nunc pro tunc* to Pennsylvania-American Water Company ("PAWC"). After closing on the referenced transaction, PAWC will provide service to Exeter's customers in both Exeter and the Limited Service Area. Section 1102 Application ¶ 23. The Section 1102 Application also requests that, upon closing, the Commission issue a certificate of public convenience allowing Exeter to abandon service in the Limited Service Area. Section 1102 Application ¶ 25.

Accordingly, the Section 1102 Application is inextricably intertwined with the Amended Section 1329 Application and related filings of PAWC under Sections 507, 1102(a), and 1329 of the Pennsylvania Public Utility Code, 66 Pa. C.S. §§ 507, 1102(a), 1329, in this matter for approval of its acquisition of wastewater system assets of Exeter Township, related wastewater service rights, fair market valuation ratemaking treatment, deferral of the post-acquisition improvement costs, and certain contracts with municipal corporations (the "Section 1329 Application").

A. The Section 1102 Application

On December 10, 2018, Exeter filed its Section 1102 Application, explaining that the Exeter Township Municipal Authority previously provided wastewater service in Exeter and a portion of the Limited Service Area. In 2014, the Authority was dissolved and Exeter began providing wastewater service to the Authority's former customers. Section 1102 Application ¶¶ 4-5.

Upon reviewing the Section 1329 Application, Commission personnel advised Exeter and PAWC that, in their opinion, Exeter required a certificate of public convenience for its wastewater service in Lower Alsace Township. Consequently, Commission personnel advised Exeter that the Commission would not accept the Section 1329 Application for filing until Exeter applied for a certificate of public convenience *nunc pro tunc*, for the Limited Service Area. Section 1102 Application ¶ 6. Therefore, Exeter filed its Section 1102 Application. Neither

Exeter nor PAWC agree with Commission staff that Exeter must obtain a certificate of public convenience to convey the System to PAWC.[1]

The Section 1102 Application also stated that Exeter expected to increase its rates for wastewater service to all of its customers prior to closing on the sale to PAWC. On December 10, 2018 (*i.e.*, the same day that Exeter filed its Section 1102 Application), the Exeter Supervisors adopted that rate increase at a duly noticed and advertised public meeting. That rate increase applies uniformly to Exeter's customers in Exeter, as well as to Exeter's customers in the Limited Service Area.

On December 13, 2018, the Commission confirmed receipt of the Section 1102 Application. The Commission directed Exeter to publish newspaper notice of the filing of the Application, and the Commission would publish notice in the *Pennsylvania Bulletin – i.e.*, the standard notice requirements for Section 1102 applications. Exeter complied with the Commission's directive.

On December 20, 2018, counsel for I&E entered her appearance in the case. On December 21, 2018, the Bureau of Technical Utility Services ("TUS") sent Exeter Data Requests and Exeter responded to the Data Requests on January 8, 2019.

[1] Exeter provides wastewater service to a limited class of customers for geographic efficiency purposes and, accordingly, is not providing Commission-jurisdictional service "to or for the public." *See* 66 Pa. C.S. § 102 (regarding definition of "public utility"); *see e.g., Motion of New Albany Borough for a Declaratory Order that its Provision of Water Service to an Isolated Group of Customers does not Constitute the Provision of Public Utility Service Under 66 Pa. C.S. § 102*, 2000 Pa. PUC LEXIS 34; *Lehigh Valley Cooperative Farmers v. City of Allentown*, 54 Pa. P.U.C. 495 (1980); *Joint Application of Seven Fields Development Corporati*on, A-220077 and A-210062F2000 (Final Order entered October 1, 1999). Nevertheless, PAWC and Exeter conceded to the position of Commission to move the Section 1329 Application forward expeditiously.

B. The Section 1329 Application

On September 25, 2018, PAWC filed its Section 1329 Application.[2] By Secretarial Letter dated October 1, 2018 ("October 1, 2018 Secretarial Letter"), the Commission notified PAWC that it declined to accept the Section 1329 Application for filing because it had identified "several major deficiencies with the Application including, but not limited to" the following:

- Exeter Township appears to be providing substantial unlawful *de facto* public utility service beyond its corporate limits in the bordering Townships of Alsace and Lower Alsace, and the Borough of St. Lawrence, and may lack authority to abandon and subsequently transfer these assets and customers to PAWC;

- A substantial portion of the service offered by Exeter Township both within and outside its municipal borders may be dependent on facilities and services located within the Borough of St. Lawrence and to which Exeter Township may not have a legally enforceable right of use; and

- The filing does not appear to address the relationship between the Antietam Valley Municipal Authority and Exeter Township regarding the ownership of some portions of the collection system that PAWC may seek to acquire and include in rate base through procedures applicable to Section 1329 of the Public Utility Code, 66 Pa. C.S. § 1329.

Personnel from PAWC and Exeter met with staff from the TUS and Law Bureau to clarify the reasons for the rejection, and to ensure an adequate response to the concerns of Commission staff.

On December 5, 2018, PAWC filed its Amended Application with the Commission. On December 19, 2018, the Commission issued a Secretarial Letter ("December 19, 2018 Secretarial Letter") stating that the Amended Application had been conditionally accepted for filing.

[2] On December 27, 2018, Exeter Township filed a Petition to Intervene in this proceeding.

II. GENERAL RESPONSE TO I&E MOTION

I&E failed to file its Motion until after TUS issued its December 19, 2018 Secretarial Letter declaring the Section 1329 Application administratively complete. As a result, the Motion is a thinly veiled Petition for Reconsideration pursuant to 52 Pa. Code § 5.44.

Further, I&E lacks standing to file such a Petition.[3] I&E is not aggrieved by TUS's determination that the application is administratively complete. The Section 1329 Application has been "conditionally accepted" for filing by the Commission. As the prosecutorial arm of the Commission, I&E may participate in pending proceedings – however, in this instance, there currently is no pending proceeding. The Commission should not permit this attempted expansion of authority by I&E.

With regard to the merits, TUS, acting pursuant to the authority delegated to it by the Commission, determined the Section 1329 Application to be administratively complete. That determination is correct. I&E does not identify anything missing from the Section 1329 Application. As a result, I&E fails to establish any basis for rejecting TUS's determination.[4]

The Commission has already resolved issues similar to those presented by I&E in its Tentative Implementation Order and the Final Implementation Order in *Implementation of Section 1329 of the Public Utility Code*, Docket No. M-2016-2543193. Those orders clearly contemplate a Section 1102 application proceeding concurrently with a Section 1329 application seeking Commission approval of an acquisition. Tentative Implementation Order, pp. 11-12; Final Implementation Order, pp. 28-30 (footnote 20 on page 30 specifically states that "[a]

[3] Additionally, the Motion is procedurally improper because it contains averments not of record without the verification required by 52 Pa. Code § 1.36(a).

[4] I&E has the burden of proof here. 66 Pa. C.S. § 332(a).

Section 1329 filing may be consolidated with the Section 1102 filing at the discretion of the ALJ or the Commission").

Finally, if the Motion asks the Commission to deny the consolidation of the Section 1102 Application with the Section 1329 Application, the Motion is premature. No motion for consolidation has yet been filed.

III. ANSWERS TO SPECIFIC PARAGRAPHS OF I&E MOTION

1. Denied.

2. Denied. The October 1, 2018 Secretarial Letter is a written document that speaks for itself and any characterization of it is denied.

3. Admitted. By way of further response, the Amended Section 1329 Application addressed the concerns expressed in the October 1, 2018 Secretarial Letter concerning Exeter's alleged provision of service in St. Lawrence Borough and Alsace Township.

4. Denied. The allegations of this paragraph constitute conclusions of law to which no response is required. To the extent a response is deemed necessary, these averments are specifically denied. The Commission has delegated authority to determine the administrative completeness of an application to TUS. After reviewing the Amended Section 1329 Application, TUS issued a Secretarial Letter finding the Amended Section 1329 Application administratively complete. I&E filed its Motion after TUS issued this Secretarial Letter.

5. Denied. These allegations refer to a written document, which written document speaks for itself. By way of further answer, TUS and the Secretary's Bureau accepted the Section 1102 Application for filing and TUS has issued, and Exeter has responded to, data requests to Exeter that address many of the items described by I&E. I&E has entered its

appearance in the Section 1102 Application proceeding and may address any alleged deficiencies in the Section 1102 Application proceeding.

6. Denied. The allegations of this paragraph constitute conclusions of law to which no response is required. If a response is deemed necessary, the Commission has delegated authority to TUS to determine the administrative completeness of Section 1329 application. TUS determined that PAWC's Amended Section 1329 Application is administratively complete. I&E is not aggrieved by that determination and has no legal right to participate in an administrative determination of the completeness of the Amended Section 1329 Application.

Exeter further denies that the Commission must issue a certificate of public convenience to Exeter to approve the proposed sale transaction. The Commission has the statutory authority to approve PAWC's requested service territory in Lower Alsace regardless of any prior conduct of Exeter, so long as the approval is in the public interest. Because the approval of the Section 1329 Application will cure the alleged *de facto* public utility service by Exeter, consideration and approval of the Section 1329 Application is in the public interest.

7. Denied. The allegations of this paragraph constitute conclusions of law to which no response is required. If a response is deemed necessary, rejecting the Section 1329 Application is improper because an application can be rejected for filing purposes only if it is administratively incomplete.[5] TUS correctly determined that the Amended Section 1329 Application is administratively complete and, accordingly, conditionally accepted it for filing.

[5] Commission staff arguably made a substantive determination – as opposed to an administrative completeness determination – in requiring Exeter to file a Section 1102 Application *nunc pro tunc* prior to the Commission's acceptance of PAWC's Section 1329 Application for filing. PAWC's Section 1329 Application provides a cure to the alleged *de facto* public utility service by Exeter – a cure that, in and of itself, offers an affirmative public benefit. I&E now attempts to use the substantive determination by Commission staff to argue that the cure of the alleged *de facto* public utility service should be further delayed, i.e. arguing that the Section 1102 Application must be resolved first.

If this paragraph contends that the Section 1329 Application should be held in abeyance pending the disposition of the Section 1102 Application, this contention, too, must fail. The Section 1102 Application is an application for a certificate of public convenience by Exeter to permit it to sell its wastewater system to a public utility pursuant to Section 1329. The Commission has previously addressed the procedure in situations like the situation presented here. *Implementation of Section 1329 of the Public Utility Code*, Docket No. M-2016-2543193 (Tentative Implementation Order entered July 21, 2016; Final Implementation Order entered October 27, 2016).

In the Tentative Implementation Order, pp. 11-12, the Commission states as follows:

> Importantly, the entity or its affiliate must file the Section 1329 application as an attachment to a Section 1102 application seeking public utility status. Acquisition applications filed by entities that have not yet filed a Section 1102 application for public utility status will be considered incomplete and will not be accepted until a complete Section 1102 application has been received and accepted. If a Section 1102 application is required, we strongly encourage that it be filed in advance of the Section 1329 application to the extent possible, and consolidated consideration will be given to the extent possible.

In the Final Implementation Order, pp. 29-30, the Commission stated as follows:

> …while we still encourage that the Section 1102 application be filed in advance of the Section 1329 application to the extent possible, the Section 1102 application will not be restricted to the expedited time period for applications claiming 1329 treatment. Section 1102 applications, which require the development of a record regarding the technical, financial and managerial fitness of the entity and a review of an initial tariff, must meet the legal standards under Section 1102 first, before consideration can be given to whether it meets the requirements under Section 1329.[2020] A Section 1329 filing may be consolidated with the Section 1102 filing at the discretion of the ALJ or the Commission.

Thus, the two proceedings may proceed simultaneously. Moreover, issuing a stay will cause substantial and undue prejudice to Exeter and its residents, who have invested significant time

and resources in selling the wastewater treatment plant to alleviate the substantial administrative and financial burden the management of the plant causes to Exeter, among other things.

8. Denied. The allegations of this paragraph constitute conclusions of law to which no response is required. If a response is deemed necessary, Exeter incorporates the response of PAWC to this paragraph in its Answer. By way of further response, issuing a stay will cause substantial and undue prejudice to Exeter and its residents, who have invested significant time and resources in selling the wastewater treatment plant to alleviate the substantial administrative and financial burden the management of the plant causes to Exeter, among other things.

9. Denied. The allegations of this paragraph constitute conclusions of law to which no response is required. If a response is deemed necessary, issuing a stay will adversely impact the public interest because the Legislature has determined that the Commission must issue a decision on a Section 1329 application within six months of the date the application is accepted for filing. This deadline is mandatory and not merely directory. This deadline reflects a Legislative determination that the public interest favors an expeditious resolution of Section 1329 proceedings. The Commission is a creature of the Legislature with only the authority explicitly or implicitly granted to it by the General Assembly. *Susquehanna Regional Airport Auth. v. Pa. Pub. Util. Comm'n*, 911 A.2d 612 (Pa. Cmwlth. 2006). Where, as here, a statute clearly defines the public interest, the Commission must follow that statute. Additionally, issuing a stay will cause substantial and undue prejudice to Exeter and its residents, who have invested significant time and resources in selling the wastewater treatment plant to alleviate the substantial administrative and financial burden the management of the plant causes to Exeter, among other things.

10. Denied. The allegations of this paragraph constitute conclusions of law to which no response is required. If a response is deemed necessary, I&E's legal arguments are premature because no motion for consolidation has been filed.

11. Denied. The allegations of this paragraph constitute conclusions of law to which no response is required. If a response is deemed necessary, I&E's legal arguments are premature because no motion for consolidate has been filed.

12. Admitted in part and denied in part. Exeter admits only that the Section 1102 Application proceeding will be resolved before Exeter closes on the proposed sale. This, however, does not require the Commission to grant I&E's request for an indefinite delay in the Section 1329 Application proceeding.

IV. CONCLUSION

For the foregoing reasons, the Commission should, on an expedited basis, deny I&E's Motion to Reject or Hold in Abeyance Pennsylvania-American Water Company's Amended Section 1329 Application. The Commission should permit the Amended Section 1329 Application to progress along a normal litigation path.

Respectfully submitted,

FOX ROTHSCHILD LLP

Dated: January 9, 2019

By: /s/ *Samuel W. Cortes*
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Attorney ID Nos. 15767; 91494
Attorneys for Applicant, Exeter Township

COMMONWEALTH OF PENNSYLVANIA
BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

IN RE: APPLICATION OF	:	
PENNSYLVANIA-AMERICAN	:	
WATER COMPANY PURSUANT TO	:	
SECTIONS 507, 1102, AND 1329 OF	:	**DOCKET A-2018-3004933**
THE PUBLIC UTILITY CODE FOR	:	
APPROVAL OF ITS ACQUISITION	:	
OF THE WASTEWATER SYSTEM	:	
ASSETS OF EXETER TOWNSHIP	:	
	:	

VERIFICATION

I, John Granger, Township Manager for Exeter Township, hereby state that the facts above set forth are true and correct to the best of my knowledge, information and belief, and that I expect to be able to prove the same at a hearing held in this matter. I understand that the statements herein are made subject to the penalties of 18 Pa. C.S. § 4904 (relating to unsworn falsification to authorities).

Dated: 011019

John Granger

COMMONWEALTH OF PENNSYLVANIA
BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

IN RE: APPLICATION OF PENNSYLVANIA-AMERICAN WATER COMPANY PURSUANT TO SECTIONS 507, 1102, AND 1329 OF THE PUBLIC UTILITY CODE FOR APPROVAL OF ITS ACQUISITION OF THE WASTEWATER SYSTEM ASSETS OF EXETER TOWNSHIP	:	**DOCKET A-2018-3004933**

CERTIFICATE OF SERVICE

I hereby certify that I have, on this 9th day of January, 2019, served a true copy of the Answer of Exeter Township to the Motion of the Bureau of Investigation and Enforcement to Reject or Hold in Abeyance Pennsylvania-American Water Company's Amended Application upon the participants and by the methods set forth below, in accordance with the requirements of 52 Pa. Code § 1.54, as indicated below:

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/s/ *Samuel W. Cortes*
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