



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
COMMONWEALTH KEYSTONE BUILDING
400 NORTH STREET, HARRISBURG, PA 17120

IN REPLY PLEASE
REFER TO OUR FILE

May 28, 2019

Secretary Rosemary Chiavetta
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
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
Water System Assets of Steelton Borough Authority
Docket No. A-2019-3006880
I&E Responsive Brief in Support

Dear Secretary Chiavetta:

Enclosed please find the Bureau of Investigation and Enforcement's (I&E) **Responsive Brief in Support of the Office of Consumer Advocate's Petition for Certification of a Discovery Ruling for Interlocutory Review** in the above-referenced proceeding.

Copies are being served on all active parties of record per the attached Certificate of Service. If you have any questions, please contact me at (717) 425-7593.

Sincerely,

A handwritten signature in black ink that reads "Scott B. Granger".

Scott B. Granger
Prosecutor
Bureau of Investigation and Enforcement
PA Attorney I.D. No. 63641

SBG/jfm
Enclosure

cc: Honorable Steven K. Haas (OALJ, PUC Harrisburg)
Honorable Benjamin J. Myers (OALJ, PUC Harrisburg)
Per Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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 Water System Assets :
of Steelton Borough Authority :

Docket No. A-2019-3006880

BUREAU OF INVESTIGATION AND ENFORCEMENT'S
RESPONSIVE BRIEF IN SUPPORT OF
THE OFFICE OF CONSUMER ADVOCATE'S PETITION
FOR CERTIFICATION OF A DISCOVERY RULING
FOR INTERLOCUTORY REVIEW

I. INTRODUCTION

On May 10, 2019, the Office of Consumer Advocate (“OCA”) filed an Office of Consumer Advocate’s Motion to Compel Answer to OCA Set V, Question 2 (“Motion to Compel”).¹ After review and consideration, Administrative Law Judges Steven K. Haas and Benjamin J. Myers (“ALJs”) decided against the OCA and the requested relief was denied. In response to the ALJ’s decision, the OCA filed this Petition of the Office of Consumer Advocate for Certification of a Discovery Ruling for Interlocutory Review (“Petition for Certification”) on May 20, 2019 petitioning the ALJs, pursuant to 52 Pa. Code § 5.304, for certification of the discovery question presented below for interlocutory review by the Pennsylvania Public Utility Commission (“Commission”).²

¹ See generally, OCA Motion to Compel, pp. 1-7.

² See generally, OCA Petition for Certification, pp. 1-3.

The OCA requested that the ALJs certify the following question for review by the Commission:

Should a selling utility in an acquisition proceeding filed under Sections 1102 and 1329 of the Public Utility Code be required to provide the responses to its Request(s) for Proposals for the sale of the utility assets, which have been declined or not otherwise accepted?

This issue arose during the discovery phase of this proceeding, beginning when the OCA propounded multiple sets of written interrogatories in accordance with 52 Pa. Code 5.341, *Written Interrogatories to a Party*, including OCA Interrogatory Set V, Question 2 which was served on the Steelton Borough Authority (“Authority”). OCA Set V, Question 2 stated:

Please provide a copy of all proposals received by the Borough and any accompanying exhibits with respect to the proposed sale of the water system.

In response to the above interrogatory the Authority ignored the clear instructions attached to the OCA’s Interrogatories and provided the following inadequate response:

The Borough did not issue a request for proposals for sale of the water system. The Steelton Borough Authority issued the request for proposals for the sale of the water system.

After a series of communications initiated by the OCA attempting to clarify the discovery request,³ the Authority filed a written objection to OCA Interrogatory Set V, Question 2. The OCA subsequently filed its Motion to Compel and the ALJs subsequently issued their Order⁴ denying the OCA’s Motion.

³ See, OCA Motion to Compel, pp. 1-3 and Petition Certification, pp. 1-3 for a complete review of the history of this discovery dispute.

⁴ See, Order Denying Motion to Compel, entered May 15, 2019.

The Bureau of Investigation and Enforcement (“I&E”), pursuant to 52 Pa. Code § 5.304(d), now files this timely Responsive Brief in Support of the Petition of the Office of Consumer Advocate for Certification of a Discovery Ruling (“Responsive Brief”). I&E supports the OCA’s Petition for Certification and also supports the OCA’s argument that all of the proposals received by the selling utility are relevant or reasonably calculated to lead to the discovery of evidence relevant to the investigation and review of the proposed transaction under 66 Pa. C.S. §§ 1102, 1103 and 1329 as well as being relevant to the Commission’s ability to render a fully informed decision.

II. MATERIAL QUESTION PRESENTED

Pursuant to the Commission’s regulations governing Interlocutory review,⁵ the Office of Consumer Advocate (“OCA”) is requesting that the Commission grant review of and answer the following question in the positive:

1. Should a selling utility in an acquisition proceeding filed under Sections 1102 and 1329 of the Public Utility Code be required to provide the responses to its Request(s) for Proposals for the sale of the utility assets, which have been declined or not otherwise accepted?

III. SUMMARY OF ARGUMENT

A request for certification for interlocutory review requires a showing by the petitioner that without interlocutory review some harm would result which would not be reparable through normal avenues; that the relief sought should be granted now rather

⁵ 52 Pa. Code §§ 5.301-5.306.

than later; and that granting interlocutory review would prevent substantial prejudice or expedite the proceeding.

The OCA's Set V, Question 2 requesting the proposals received by the selling utility is reasonably calculated to lead to the discovery of evidence relevant to the investigation and review of the proposed transaction under 66 Pa. C.S. §§ 1102, 1103 and 1329. Further, it is incumbent on the parties to provide the Commission with a complete record in order for the Commission to be able to properly complete its jurisdictional analysis of the proposed acquisition.

The ALJs' decision to deny the OCA's Motion to Compel is incorrect; defies existing authority to the contrary; and ignores the Commission's clear authority set forth in the Public Utility Code as well as the Commission's recognition of its authority under Section 505 as stated in the Commission's *Final Implementation Order* regarding Section 1329 proceedings. Additionally, Section 1103(b), through the Commission's authority under Section 1102, explicitly affords the Commission the right to make inquiries and investigations as it may deem necessary or proper. Sections 505, 1103 and 1329 should be interpreted as being in harmony with one another.

Furthermore, the parties have been and continue to be substantially prejudiced by the refusal of the Authority to provide the requested relevant information which will directly affect the opportunity for parties to present the Commission with a completely developed evidentiary record. The Commission's ability to evaluate any record produced will be jeopardized and irreparable harm will occur. Further, the six-month statutory

limitation on Section 1329 proceedings only compounds the harm and adds to the compelling reasons.

Finally, it is incumbent upon the statutory parties to protect the public interest and the ratepayers of both the Steelton Borough Authority and PAWC. The decision rendered in this proceeding has the potential of affecting not only this proceeding, but also, every future Section 1329 proceeding.

IV. ARGUMENT

A. Standard for Interlocutory Review

The pertinent Commission standards governing the interlocutory review of discovery matters requested here are found in Sections 5.301-5.306 of Commission regulations.⁶ The interlocutory review standard has been interpreted in *In re: Application of Knights Limousine Service, Inc.*, wherein the Commission explained that it does not routinely grant interlocutory review except upon a showing by the petitioner of extraordinary circumstances or compelling reasons.⁷ The Commission has determined that such a showing may be accomplished by a petitioner proving that without interlocutory review some harm would result which would not be reparable through normal avenues; that the relief sought should be granted now rather than later; and that granting interlocutory review would “prevent substantial prejudice or expedite the proceeding.”⁸

⁶ 52 Pa. Code §§ 5.301-5.306.

⁷ *In re: Application of Knights Limousine Service, Inc.*, 59 Pa. P.U.C. 538 (1985). *See also, Pickford v. PAWC*, 2008 Pa. PUC LEXUS 1040 (Pa. PUC Sept. 15, 2008).

⁸ *Id.*

Finally, unless otherwise directed by the Commission in exceptional situations, interlocutory review of the discovery rulings of presiding officers pursuant to 52 Pa. Code § 5.304 is not permitted absent certification by the presiding officer to the Commission that the matter involves a question of law or policy that warrants immediate resolution by the Commission.

B. Interlocutory Review of the ALJs' Denial of OCA's Motion to Compel Answer to OCA Set V, Question 2 will Prevent Substantial Prejudice that Cannot be Rectified at a Later Time and will Allow the Parties the Opportunity to Develop a Complete Record for the Commission's Consideration.

As noted in the OCA's Petition for Certification, all of the proposals received by the selling utility are relevant or reasonably calculated to lead to the discovery of evidence relevant to the investigation and review of the proposed transaction under 66 Pa. C.S. §§ 1102, 1103 and 1329.⁹ Further, the OCA has stated that it is not seeking Commission review of the bidding process.¹⁰ The OCA's discovery is tailored to the proposals received by the selling utility. The OCA is correct that all of the proposals are relevant or reasonably calculated to lead to the discovery of evidence relevant to review of the proposed transaction under Sections 1329, 1102 and 1103(a) of the Public Utility Code because they may give helpful context to the Application.¹¹ Also, in *McCloskey v. Pa. PUC*,¹² the Commonwealth Court of Pennsylvania has recently given clear instruction regarding the general principle that the Commission needs a complete record

⁹ OCA Petition for Certification, p. 1.

¹⁰ *Id.*, p. 2.

¹¹ *Id.*

¹² *McCloskey v. Pa. PUC*, 1624 C.D. 2017 (Pa. Cmwlth 2017).

in order to be able to properly complete its Section 1102 jurisdictional analysis of the proposed acquisition.¹³

Further, I&E submits that the ALJs' decision to deny the OCA's Motion to Compel is incorrect; defies existing authority to the contrary; and ignores the Commission's clear authority set forth in the Public Utility Code. Specifically, in its *Final Implementation Order* regarding Section 1329 acquisitions ("*Final Implementation Order*"),¹⁴ the Commission recognized that it does have the authority to request information beyond the scope of items enumerated in Section 1329 pursuant to the authority of Section 505 of the Public Utility Code.¹⁵ Section 505 allows the Commission to request additional information in valuing property:

Duty to furnish information to commission; cooperation in valuing property.

Every public utility shall furnish to the commission, from time to time, and as the commission may require, all accounts, inventories, appraisals, valuations, maps, profiles, reports of engineers, books, papers, records, and other documents or memoranda, or copies of any and all of them, in aid of any inspection, examination, inquiry, investigation, or hearing, or in aid of any determination of the value of its property, or any portion thereof, and shall cooperate with the commission in the work of the valuation of its property, or any portion thereof, and shall furnish any and all other information to the commission, as the commission may require, in any inspection, examination, inquiry, investigation, hearing, or determination of such value of its property, or any portion thereof.¹⁶

¹³ McCloskey, pp. 21-22.

¹⁴ *Final Implementation Order*, Docket No. M-2016-2543193 (Order entered October 27, 2016).

¹⁵ 66 Pa. C.S. § 505.

¹⁶ *Final Implementation Order*, pp. 25-26, quoting 66 Pa. C.S. § 505.

As the Commission acknowledged, Section 505 gives the Commission broad powers to conduct inquiries and investigations.

Further, regarding the scope of this proceeding, the Commission must recognize that PAWC filed its Application under not only Section 1329, but also under Section 1102 of the Code which has been affirmed generally by the Commonwealth Court in *McCloskey* as noted *supra*. Under Section 1102, PAWC's Application requests that the Commission issue an Order and Certificates of Public Convenience approving and addressing both the acquisition of the water system assets of the Steelton Borough Authority and the right of PAWC to begin providing water service in the requested territory. This approval is necessary because PAWC's certificate of public convenience does not currently allow it to provide service to the Authority's water customers or impose a tariff and collect revenue from these customers.

The procedure for obtaining certificates of public convenience, which is outlined in Section 1103, acknowledges that the Commission shall only grant a certificate of public convenience after it determines that the granting of such certificate is necessary or proper for the service, accommodation, convenience, or safety of the public. To enable the Commission to make such a determination, Section 1103 explicitly affords the Commission the right to "make such inquiries, physical examinations, valuations, and investigations, and may require such plans, specifications, and estimates of cost, as it may deem necessary or proper ..."¹⁷

¹⁷ 66 Pa. C.S. § 1103(b).

Section 1103 makes it explicitly clear that in evaluating PAWC's request for a certificate of public convenience, the Commission has the authority to conduct an investigation which, in this case, logically would include a review of the information requested in the OCA's interrogatory in question. Nothing in Section 1329 eradicates Section 505 or Section 1103; thus, the Commission's authority to investigate the underlying basis regarding PAWC's Application remains intact. Accordingly, the Authority's argument that the Commission and parties are confined to only the very limited scope of review dictated by the Authority is without merit and it should be rejected.

Additionally, I&E asserts that Section 1329, despite being a later enacted statute, is reconcilable with Sections 505 and 1103(b). Thus, consistent with 1 Pa. C.S. § 1971(c) regarding repealing statutes, we do not believe the General Assembly intended to repeal the earlier enacted provisions under Sections 505 and 1103(b) of the Code. *See also, Royal Indem. Co. v. Adams*, 455 A.2d 135, 141 (Pa. Super. 1983) ("When interpreting statutes, they should be interpreted as being in harmony with each other and construed as a component of the whole statutory structure.")¹⁸ Accordingly, I&E asserts that Section 1329, consistent with Sections 505, 1102 and 1103, permits the Commission and the parties to develop a full and complete record pertaining to the review and analysis of the

¹⁸ I&E also notes tangentially, the Commission has authority, in rare circumstances involving clear evidence of fraud, illegality or bad faith, to inquire whether the fair market value of the appraisals are valid and reliable. I&E recognizes that arguably the appraisals are presumptively valid and reasonable. However, it is unclear how any such bad faith actions would be uncovered without the ability of the Commission to conduct a full investigation of the application requesting the Section 1329 acquisition.

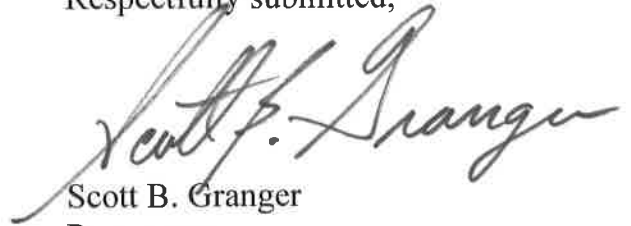
proposed acquisition of the Authority's water assets by PAWC.¹⁹ In short, I&E requests that the Commission answer the Authority's challenge to the scope of the Commission's investigative authority now in order to ensure that parties are not deprived of the opportunity to provide the Commission with a full and complete record that is consistent with the Commission's authority in this case and in future Section 1329 cases.

Finally, it is clear that the parties have been and continue to be substantially prejudiced by the refusal of the Authority to provide the requested relevant information which will directly affect the opportunity for parties to present the Commission with a complete and developed evidentiary record. The Commission's ability to evaluate any record produced will be jeopardized and irreparable harm will occur. Further, the six-month statutory limitation on Section 1329 proceedings only compounds the harm and adds to the compelling reasons. Finally, the refusal to provide the requested information is suspect and leads to the inevitable suspicion that the Authority is hiding this relevant information from the parties for a reason. This, in turn, may forever cast a shadow of doubt over any decision rendered in this Section 1329 proceeding. It is incumbent upon the statutory parties to protect the public interest and the ratepayers of both the Steelton Authority and PAWC. The statutory parties are driven by the goal of fulfilling that obligation. The decision rendered in this proceeding has the potential of affecting not only this proceeding, but also, every future Section 1329 proceeding.

¹⁹ See generally, *McCloskey v. Pa. PUC*, 1624 C.D. 2017 (Pa. Cmwlth. 2017).

WHEREFORE, the Bureau of Investigation and Enforcement respectfully requests that the Commission answer the material question in the affirmative, and that the Steelton Borough Authority be ordered to provide to the OCA and the parties the information requested in OCA Set V, Question 2. Additionally, it may also be necessary to, in the interim, issue a stay of proceedings with respect to PAWC's request for a Certificate of Public Convenience under 66 Pa. C.S. §1102 as the evidentiary hearing in this proceeding is scheduled for June 10, 2019. I&E respectfully requests that the ALJ's certify and the Commission rule on the OCA's Petition as expeditiously as possible.

Respectfully submitted,



Scott B. Granger
Prosecutor
PA Attorney ID: 63641

Bureau of Investigation and Enforcement
Pennsylvania Public Utility Commission
400 North Street
Harrisburg, PA 17120
(717) 425-7593

Dated: May 28, 2019

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of Steelton Borough Authority :

CERTIFICATE OF SERVICE

I hereby certify that I am serving the foregoing **I&E Responsive Brief in Support of the Office of Consumer Advocate's Petition for Certification of a Discovery Ruling for Interlocutory Review** dated May 22, 2019, in the manner and upon the persons listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party):

Served via First Class and Electronic Mail

Hon. Benjamin J. Myers
Hon. Steven J. Haas
Office of Administrative Law Judge
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120

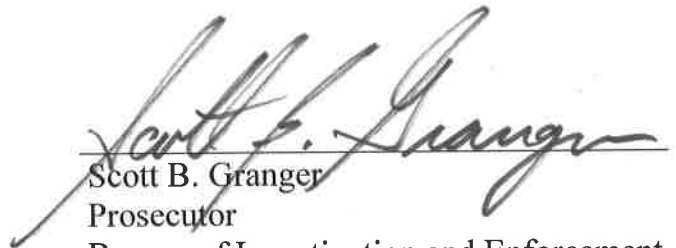
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