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May 28, 2019

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

VIA ELECTRONIC FILING

RE: Application and related filings of Pennsylvania-American Water Company under Sections 507, 1102(a), and 1329 of the Pennsylvania Public Utility Code, 66 Pa. C.S. §§ 507, 1102(a), 1329, for approval of its acquisition of water system assets of the Steelton Borough Authority, related water service rights, fair market valuation ratemaking treatment, deferral of the post-acquisition improvement costs, and certain contracts with municipal corporations; Docket No. A-2019-3006880, *et al.*

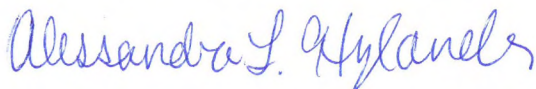
Dear Secretary Chiavetta:

Enclosed for filing with the Pennsylvania Public Utility Commission is the Steelton Borough Authority's Brief in Opposition to the Office of Consumer Advocate's Petition for Certification of a Discovery Ruling for Interlocutory Review in the above-referenced proceeding.

As shown by the attached Certificate of Service, all parties to this proceeding are being duly served. Thank you.

Sincerely,

McNEES WALLACE & NURICK LLC

By 
Alessandra L. Hylander

Counsel to the Steelton Borough Authority

c: Administrative Law Judge Stephen K. Haas (via E-Mail and First-Class Mail)
Administrative Law Judge Benjamin J. Myers (via E-Mail and First-Class Mail)
Certificate of Service

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CERTIFICATE OF SERVICE

I hereby certify that I am this day serving a true copy of the foregoing document upon the participants listed below in accordance with the requirements of Section 1.54 (relating to service by a participant).

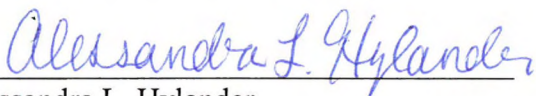
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Dated this 28th day of May, 2019, in Harrisburg, Pennsylvania.

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Application and related filings of Pennsylvania- :
American Water Company under Sections 507, : Docket No. A-2019-3006880, *et al.*
1102(a), and 1329 of the Pennsylvania Public :
Utility Code, 66 Pa. C.S. §§ 507, 1102(a), 1329, :
for approval of its acquisition of water system :
assets of the Steelton Borough Authority, related :
water service rights, fair market valuation :
ratemaking treatment, deferral of the post- :
acquisition improvement costs, and certain :
contracts with municipal corporations. :

**STEELTON BOROUGH AUTHORITY’S BRIEF IN OPPOSITION TO THE OFFICE
OF CONSUMER ADVOCATE’S PETITION FOR CERTIFICATION OF A
DISCOVERY RULING FOR INTERLOCUTORY REVIEW**

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Dated: May 28, 2019

TABLE OF CONTENTS

I. INTRODUCTION 2

II. BACKGROUND 3

III. ARGUMENT 4

 A. OCA Has Not Met the Standard for Certification of a Discovery Question to the ALJs. 4

 B. Neither The Code Nor The Commission's Regulations Support The Relevance Arguments In OCA's Petition. 6

 C. Case Precedent Similarly Offers No Support for OCA's Relevancy Arguments... 8

IV. CONCLUSION..... 11

TABLE OF AUTHORITIES

Court Cases

McCloskey v. Pa. PUC, 195 A.3d 1055, 1067 (Pa. Commw. Ct. 2018) 8

Administrative Cases

Application of Aqua Pennsylvania Wastewater, Inc. Pursuant to Sections 1102 and 1329 of the Public Utility Code for Approval of its Acquisition of the Wastewater System Assets of New Garden Township and the New Garden Township Sewer Authority, 2017 Pa. PUC LEXIS 163, *2-6 (Order entered June 29, 2017)..... 9

MCI WorldCom Communications, Inc. v. Verizon Pennsylvania Inc., Docket No. C-00015149, at pp. 14-15 (Order entered Nov. 13, 2001)..... 5

Pa. Pub. Util. Comm’n v. Dauphin Consolidated Water Supply Co., 1987 Pa. PUC LEXIS 215, at *9 (Opinion and order entered Aug. 21, 1987) 5

Pa. PUC v. Equitable Gas Co., 61 Pa. PUC 468, 477 (1986) 9, 10

Statutes

52 Pa. Code § 5.304 1, 2, 5

52 Pa. Code § 5.321 2, 4, 8, 9

66 Pa. C.S. § 1101 2, 6

66 Pa. C.S. § 1102 1, 2, 6, 8

66 Pa. C.S. § 1103 2, 6, 8

66 Pa. C.S. § 1329 passim

66 Pa. C.S. § 2807 7

66 Pa. C.S. § 333 2, 4

Other Authorities

Order Denying Motion to Compel, *Application of Pennsylvania-American Water Company Pursuant to Sections 1102 and 1329 of the Public Utility Code for Approval of its Acquisition of the Water System Assets of the Steelton Borough Authority*, Docket No. A-2019-3006880, p. 9 (May 15, 2019) 7

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**STEELTON BOROUGH AUTHORITY'S BRIEF IN OPPOSITION TO THE OFFICE
OF CONSUMER ADVOCATE'S PETITION FOR CERTIFICATION OF A
DISCOVERY RULING FOR INTERLOCUTORY REVIEW**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGES STEPHEN K. HAAS AND
BENJAMIN J. MYERS:

Pursuant to 52 Pa. Code § 5.304(d), Steelton Borough Authority ("the Authority") hereby files this Brief in Opposition ("Brief") to the Office of Consumer Advocate's ("OCA") Petition for Certification of a Discovery Ruling for Interlocutory Review ("Petition"). The Authority respectfully requests that the Administrative Law Judges ("ALJs") deny certification of OCA's requested question for review by the Pennsylvania Public Utility Commission ("PUC" or "Commission"). Further pursuant to 52 Pa. Code § 5.304(d), the Authority hereby indicates that it is not requesting a stay of proceedings.

In support thereof, the Authority provides as follows:

I. INTRODUCTION

In its Petition, OCA seeks a certification from the ALJs to submit the following question for interlocutory 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?

The OCA improperly believes that such proposals are relevant or reasonably calculated to lead to the discovery of evidence relevant to the review of the above-captioned proposed transaction. Petition at 1-2.

As discussed in Sections II and III, *infra*, the OCA's arguments are flawed and without merit. Sections 1101, 1102, 1103 and 1329 of the Public Utility Code ("Code"), *see* 66 Pa. C.S. §§ 1101, 1102, 1103, and 1329, limit the Commission's review to the proposed transaction rather than the bidding process preceding an agreed-upon transaction between the buyer and seller parties. Accordingly, proposals from other potential buyers are not reasonably calculated to lead to discovery of admissible evidence and are irrelevant to the Commission's review of the proposed transaction between the selected buyer and the seller. *See* 52 Pa. Code § 5.321(c).

Furthermore, this matter can be resolved through pathways other than seeking an opinion from the Commission on this issue. To the extent that OCA desires Commission review of the ALJs' Order denying its Motion to Compel, OCA can challenge the Order through Exceptions. OCA has not raised important matters of law or policy supporting an exemption to the general and well-established rule disfavoring interlocutory review of discovery matters. 66 Pa. C.S. § 333(h); 52 Pa. Code § 5.304.

For these reasons, as further explained below, the OCA's Petition should be denied.

II. BACKGROUND

The OCA's Petition arose from a discovery dispute between the Authority and the OCA. Specifically, On May 10, 2019, the OCA filed a Motion to Compel the Authority to provide an answer to the interrogatory posed in OCA Set V, Question 2. That interrogatory, to which the Authority had objected, requested that the Authority provide copies of the proposals submitted by other bidders in response to the Authority's Request for Proposals ("RFP") in relation to the sale of its water assets. OCA's Motion to Compel relied upon a procedural argument (that the Authority's objection to the interrogatory was untimely) and a substantive argument (that the information sought was relevant to review the proposed valuation studies that the Authority and PAWC have submitted in support of their proposed transaction). In addition, the OCA argued that some of the information sought through that interrogatory was already publicly available or subject to disclosure under the Pennsylvania Right to Know Law ("RTK Law").

The Authority filed an Answer to OCA's Motion to Compel on May 13, 2019. The Authority argued that its objection was timely because the Authority had provided answers to all of OCA's Set V discovery, and when OCA raised its concerns regarding the Authority's initial response to OCA Set V, Question 2, the parties had cooperated to try and resolve that issue. In addition, the Authority argued that the copies of other proposals sought by OCA in Set V, Question 2 are irrelevant to the assessment of the valuation studies submitted by PAWC and the Authority in the above-captioned docket. The Authority also indicated that even assuming the information sought by OCA would be subject to disclosure under the RTK Law, it would still have no bearing on the relevancy of the information to the issues before the Commission in the present matter. The Authority therefore asked that the ALJs deny the OCA's Motion to Compel.

On May 15, 2019, the ALJs issued an Order denying OCA's Motion to Compel. The ALJs rejected the OCA's argument that the Authority's objection to OCA Set V, No. 2 should be deemed untimely and dismissed. In addition, the ALJs rejected the OCA's substantive arguments underlying its Motion to Compel. The ALJs determined that whether the requested proposals were subject to the RTK Law is immaterial to the relevancy standard set forth in 52 Pa. Code § 5.321(c) and agreed with the Authority that 66 Pa. C.S. § 1329(c)(2) does not provide for the use or consideration of rejected proposals in analyzing the proposed transaction between the selected buyer and the seller.

In light of the ALJs' Order on OCA's Motion to Compel, OCA filed a Petition on May 20, 2019, seeking certification to submit its material question to the Commission for interlocutory review. OCA's Petition does not raise the procedural argument discussed above; rather, the Petition only seeks further review of OCA's substantive argument. Accordingly, the Authority's Brief only addresses the substantive arguments raised in OCA's Petition.

III. ARGUMENT

On the merits, OCA's Petition offers no support for the notion that proposals submitted during the bidding process of an RFP for a utility asset sale are relevant to analyzing the ultimate transaction between the selected buyer and the seller.

A. OCA Has Not Met the Standard for Certification of a Discovery Question to the ALJs.

As a threshold matter, OCA's Petition fails to meet the well-established standard for certifying a question for interlocutory review and should be summarily denied. Section 333(h) of the Code, 66 Pa. C.S. § 333(h), provides as follows regarding certification of interlocutory appeals:

. . . an interlocutory appeal from a ruling of the presiding officer on discovery shall be allowed only upon certification by the presiding officer that the ruling involves an important question of law or policy which should be resolved at that time. Notwithstanding the

presiding officer's certification, the commission shall have the authority to dismiss summarily the interlocutory appeal if it should appear that the certification was improvident. An interlocutory appeal shall not result in a stay of the proceedings except upon a finding by the presiding officer and the commission that extraordinary circumstances exist.

In addition, Section 5.304 of the Commission's regulations, 52 Pa. Code § 5.304, regarding interlocutory review of discovery matters states, in relevant part:

(a) General. Rulings of presiding officers on discovery are not subject to interlocutory review unless one or more of the following apply:

- (1) Interlocutory review is ordered by the Commission.
- (2) Interlocutory review is certified by the presiding officer.
- (3) The ruling has as its subject matter the deposing of a Commissioner or Commission employee.

(b) Standard for certification. A presiding officer may certify that a discovery ruling is appropriate for interlocutory review when the ruling involves an important question of law or policy that should be resolved immediately by the Commission.

Consistent with the applicable statutes and regulation, the Commission's review of prior petitions for certification of discovery matters confirm interlocutory review of discovery orders are generally disfavored and are only permitted in limited circumstances. *See MCI WorldCom Communications, Inc. v. Verizon Pennsylvania Inc.*, Docket No. C-00015149, at pp. 14-15 (Order entered Nov. 13, 2001) ("*MCI WorldCom*"). Important questions of law or policy are not implicated by routine discovery rulings that deem information outside the scope of a case to be irrelevant. *See Pa. Pub. Util. Comm'n v. Dauphin Consolidated Water Supply Co.*, 1987 Pa. PUC LEXIS 215, at *9 (Opinion and order entered Aug. 21, 1987) ("*Dauphin Consolidated*") ("there is nothing exceptional about disputes over the scope of discovery...").

Contrary to the applicable precedents, OCA seeks certification of a routine dispute over the scope of discovery. Consistent with the Commission's prior rulings, the ALJs should deny OCA's Petition.

B. Neither The Code Nor The Commission's Regulations Support The Relevance Arguments In OCA's Petition.

To support its argument that proposals from other non-PAWC entities are relevant to its review of the proposed transaction, OCA relies primarily on Sections 1102, 1103(a), and 1329 of the Code, 66 Pa. C.S. §§ 1102, 1103(a), and 1329, as well as case precedent. First, OCA alleges that it "is not seeking Commission review of the bidding process." Petition, 2. Rather, OCA attempts to argue that its discovery is "tailored to the proposals received by the selling utility", and that such "proposals are relevant or reasonably calculated to lead to the discovery of evidence relevant to review of the proposed transaction." *Id.* OCA avers that the unselected proposals submitted during the bidding process may contain information, such as capital project plans and ratemaking rate base, that OCA believes is relevant to a transaction between the Authority and PAWC. *Id.*

Regardless of OCA's denial, reviewing copies of proposals from other interested bidders amounts to a review of the bidding process and is therefore an inappropriate request. The Commission requires regulated utilities to obtain Certificates of Public Convenience to acquire public utility assets, which are issued only upon review and approval of the ultimate proposed transaction. Unlike the Commission's Provider of Last Resort ("POLR") statute applicable to electric utilities, Sections 1101, 1102, 1103(a) and 1329 of the Code limit the Commission's review to the actual proposed transaction rather than the bidding process preceding an agreed-upon transaction between the buyer and seller parties. *See* 66 Pa. C.S. § 1101, 1102, 1103(a), and 1329.

OCA also argues that knowledge of how other utilities might value the seller's assets and proposals for future investment would give context to the appraisals and adjusted appraisal results. Petition, 2. However, Code Section 1329(c)(2) specifically states that the Commission will only consider the utility valuations provided by the acquiring and selling entities. In fact, Code Section 1329(c)(2) confirms that the rate base adjustment granted to the buyer shall be the lower of the negotiated purchase price or the "fair market value" defined therein as the average of the valuations developed by the Commission-approved valuation engineers retained by the seller and buyer. *See* 66 Pa. C.S. § 1329(c)(2) and (g). Nothing in that statute suggests that proposals declined by the buyer have any relevance to that analysis. In comparison, when the General Assembly intended to expand the Commission's jurisdiction to include review of proposals for POLR electric supply service, the statute unambiguously stated "[t]he electric power acquired shall be procured through competitive procurement processes...." *See* 66 Pa. C.S. § 2807(e)(3.1). Here, where the statute grants the Commission more limited authority to review only the proposed transaction between the chosen buyer and the seller, any interrogatories requesting proposals from other potential buyers are irrelevant to the case at hand. By definition, rejected offers are not relevant indicators of market value of the proposed transaction. *See* Order Denying Motion to Compel, *Application of Pennsylvania-American Water Company Pursuant to Sections 1102 and 1329 of the Public Utility Code for Approval of its Acquisition of the Water System Assets of the Steelton Borough Authority*, Docket No. A-2019-3006880, p. 9 (May 15, 2019).

Finally, the OCA makes a clarification regarding the RTK Law in footnote 4 of its Petition, indicating that the ALJs had misinterpreted the OCA's argument. The OCA alleges that it raised that argument to demonstrate "that confidentiality is not an obstacle to production of the proposals by the Authority." Petition, 3. The Authority avers that OCA's RTK Law argument should be

disregarded. Even if true, the fact that such information may be subject to disclosure under the RTK Law is immaterial to the relevancy standard set forth in 52 Pa. Code § 5.321(c).

C. Case Precedent Similarly Offers No Support for OCA's Relevancy Arguments.

In light of the lack of statutory authority supporting OCA's request, it is not surprising that case precedent does not bolster OCA's argument. The OCA cites to a prior proceeding involving Aqua Pennsylvania Wastewater, Inc.'s ("Aqua") application (pursuant to Code Sections 1102 and 1329) to acquire the wastewater system assets of New Garden Township and the New Garden Township Sewer Authority (the "*New Garden*" proceeding) for the premise that the PUC must "weigh all the factors for and against the transaction, including the impact on rates, to determine if there is a substantial public benefit under Sections 1102 and 1103." Petition, 2 (quoting *McCloskey v. Pa. PUC*, 195 A.3d 1055, 1067 (Pa. Commw. Ct. 2018) (internal citations omitted)). Through that citation, OCA suggests that the *New Garden* proceeding supports its allegation that interlocutory review of this discovery issue is required in order to reach a determination that the other proposals submitted by non-PAWC bidders contain information "relevant or reasonably calculated to lead to the discovery of evidence relevant to the PUC's determination whether terms of the proposed transaction are reasonable and provide substantial affirmative benefits under [Code] Sections 1102 and 1103." Petition, 2.

However, as noted previously, the Code dictates a specific formula to determine fair market value, stating that the fair market value is the "average of the two utility valuation expert appraisals conducted under subsection (a)(2)." 66 Pa. C.S. § 1329(g). Accordingly, rate base for ratemaking purposes shall be the lesser of the negotiated purchase price or the "fair market value" defined in Section 1329(g). *See* 66 Pa. C.S. § 1329(c)(2) and (g). By way of contrast, the *New Garden* transaction did not involve a situation where parties requested interlocutory review of a discovery issue.

In the *New Garden* proceeding, the Bureau of Investigation and Enforcement (“I&E”) filed a Petition for Interlocutory Review, Stay of Proceeding, and Answer to Material Questions. *Application of Aqua Pennsylvania Wastewater, Inc. Pursuant to Sections 1102 and 1329 of the Public Utility Code for Approval of its Acquisition of the Wastewater System Assets of New Garden Township and the New Garden Township Sewer Authority*, 2017 Pa. PUC LEXIS 163, *2-6 (Order entered June 29, 2017). I&E’s petition had included material questions pertaining to: (1) whether Section 1329 imposes a six-month time limitation upon the PUC’s consideration of an Application by an acquiring public utility for a Certificate of Public Convenience under Section 1102 where no such time limitation previous existed and the purchaser is an existing, certificated public utility; and (2) whether Section 1329 bars I&E from developing a record for the PUC regarding whether the valuation proposed by an applicant is appropriate. *Id.*

These questions raise significant legal and policy matters potentially impacting parties’ ability to move forward with the relevant inquiry and are distinguishable from the routine discovery dispute raised in OCA’s Petition. In this case, OCA’s proposition to consider information from other proposers as relevant towards a determination of fair market value under Section 1329 of the Code would directly frustrate the General Assembly’s statutory directive. 66 Pa. C.S. § 1329(c)(2). Accordingly, the ALJs properly denied OCA’s Motion to Compel and should similarly deny the Petition.

OCA further attempts to justify the requested information by citing to a prior PUC ruling favoring generous application of the PUC's relevancy test should also be rejected. OCA recounts that 52 Pa. Code § 5.321 and *Pa. PUC v. Equitable Gas Co.*, 61 Pa. PUC 468, 477 (1986) (*Equitable*) indicate that the relevancy test should be liberally applied in the context of discovery requests, but omits critical contextual details. The Commission in *Equitable* dealt with an extreme

assertion that historical purchased gas cost data from 1981-1982 is irrelevant to the PUC's review of purchased gas costs for the following 1983-1984 period. *See Equitable*, *20, *22. In *Equitable*, the PUC sought to dismiss the idea that discovery is limited to current operations and reinforce parties' ability to inquire into historical data. Here, where the General Assembly instructed the PUC to review a transaction to determine the fair market value based on a negotiated purchase price and the buyer's and seller's asset valuations, the liberal discovery principle does not extend to broaden the scope of discovery beyond the investigative authority set forth in a statute.

Accordingly, in light of the aforementioned arguments in Sections II and III, *supra*, proposals from other potential sellers are not reasonably calculated to lead to discovery of admissible evidence and are irrelevant to the Commission's review of the proposed transaction between the Authority and PAWC.

IV. CONCLUSION

WHEREFORE, the Steelton Borough Authority respectfully requests that the Office of Consumer Advocate's Petition for Certification of a Discovery Ruling for Interlocutory Review should be denied.

Respectfully submitted,

McNEES WALLACE & NURICK LLC

By Alessandra L. Hylander

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Dated: May 28, 2019