

COMMONWEALTH OF PENNSYLVANIA



OFFICE OF CONSUMER ADVOCATE

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June 14, 2019

Rosemary Chiavetta, Secretary
PA 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
Wastewater System Assets of Exeter
Township
Docket No. A-2018-3004933

Dear Secretary Chiavetta:

Attached for electronic filing please find the Office of Consumer Advocate's Answer to Pennsylvania-American Water Company's Motion to Dismiss Objections, in the above-referenced proceeding. The undersigned certifies that this filing contains no averments or denials of fact subject to verification and penalties under 52 Pa. Code Section 1.36.

Copies have been served per the attached Certificate of Service.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'H. Breitman', with a long horizontal flourish extending to the right.

Harrison W. Breitman
Assistant Consumer Advocate
PA Attorney I.D. # 320580
E-Mail: HBreitman@paoca.org

Enclosures:

cc: Honorable Andrew Calvelli
Certificate of Service
*274501

CERTIFICATE OF SERVICE

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

I hereby certify that I have this day served a true copy of the foregoing, the Office of Consumer Advocate's Answer to Pennsylvania-American Water Company's Motion to Dismiss Objections, upon parties of record in this proceeding in accordance with the requirements of 52 Pa. Code Section 1.54 (relating to service by a participant), in the manner and upon the persons listed below:

Dated this 14th day of June 2019.

SERVICE BY E-MAIL and INTER-OFFICE MAIL

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

ANSWER OF THE OFFICE OF CONSUMER ADVOCATE TO
PENNSYLVANIA-AMERICAN WATER COMPANY'S
MOTION TO DISMISS OBJECTION

I. INTRODUCTION

On June 6, 2019, Pennsylvania-America Water Company (PAWC or Company) served Set I Interrogatories to the Office of Consumer Advocate (OCA) consisting of ten questions. Pursuant to the Prehearing Order, the OCA was to communicate its objections to the Company within two calendar days of service of the interrogatories, to attempt to work out a resolution of the objection prior to filing a written objection, and to file a written objection to the interrogatory if the matter was not resolved within three (3) calendar days. As required by the Prehearing Order, the OCA communicated its objections to Set I, Nos. 5 and 8 to Company counsel on Monday, June 10, 2019. The OCA objected to these interrogatories as information sought in these questions may be protected by the attorney work-product doctrine. Counsel for OCA and for PAWC were unable to resolve the OCA's objection to Set I, No. 8. On June 10, 2019, the OCA filed its Objection to PAWC Set I, Question 8. On June 12, 2019, PAWC filed a Motion to Dismiss the Objection of

the Office of Consumer Advocate (Motion). As such, the OCA submits the following Answer to PAWC's Motion pursuant to 52 Pa. Code § 5.342(e).

II. OBJECTION TO PAWC SET I, QUESTION 5

The OCA communicated its objection to Question 5 seeking information in the form of e-mails and other written communications exchanged between OCA experts. Question 5 has since been withdrawn by agreement of counsel.

III. OBJECTION TO PAWC SET I, QUESTION 8

The OCA objects to PAWC's Set I Interrogatory, Question 8, which seeks e-mails and other written communication between the OCA and the Bureau of Investigation and Enforcement (I&E) that is protected by the attorney work-product doctrine. Such information is or may be attorney work-product, which is beyond the permissible scope of discovery. The attorney work-product doctrine acknowledges that "attorneys need a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel." Pa. PUC v. Sunrise Energy, LLC, 177 A.3d 436, 442 (Pa. Cmwlth 2018) (Sunrise Energy), citing Hickman v. Taylor, 329 U.S. 495, 510-11 (1947). The OCA and I&E, in serving the interests of consumers and the public, require communication between them which facilitates the protection of these interests. Mandating that OCA and I&E disclose communication of this nature in this and future proceedings would inhibit their ability to adequately serve consumers and the public. Further, the doctrine serves the purpose of safeguarding the mental processes of an attorney, as well as the materials prepared by agents of that attorney. Sunrise Energy at 443, citing Bagwell v. Pennsylvania Dep't of Education, 103 A.3d 409, 415 (Pa. Cmwlth. 2014) (Bagwell). Discovery does not include mental impressions of a party's attorney or his or her conclusions, opinions, memoranda, notes or summaries, legal research or legal theories.

In addition, discovery does not include the disclosure of mental impressions, conclusions or opinions of representatives of a party other than the party's attorney. 52 Pa. Code § 4003.3. When a representative employee of the attorney who is acting as the agent of the attorney and is directed by the attorney to do the desired preparatory work in the investigation of a case and its preparation for trial, the product of that work becomes a part of the hiring attorney's work product, just as if the work had been done by the attorney in person or by an employee of his office.¹ 35 ALR 3d 412, 429; See also Brant v. Turnamian, 9 Pa. D. & C. 4th 216, 219 (Com. Pl. 1991).

In its Motion, PAWC argues that the ALJ should dismiss the OCA's objection and compel answers to Question 8 because there is no common interest between the OCA and I&E as OCA is a statutory agency within the Office of Attorney General and I&E is the Commission's prosecutorial bureau and that they represent separate interests. PAWC also states in support of its argument that OCA is not the client of the I&E's attorneys, nor is I&E the client of OCA's attorneys. As discussed further below, PAWC's arguments are without merit and its Motion should be denied because the communications at issue are attorney work product and that privilege was not waived.

In Sunrise Energy, PUC submitted an *amicus* brief on behalf of First Energy, a party not involved in the litigation. Id. at 440. Sunrise then submitted a request to PUC to release all e-mail and correspondence between PUC and First Energy related to the case, which the PUC denied as

¹ Regarding work performed as an agent of an attorney, the Commonwealth Court stated as follows:

The work-product doctrine also "protects materials prepared by agents for the attorney." Kennedy, 876 A.2d at 945 (quoting U.S. v. Nobles, 422 U.S. 225, 239, 95 S. Ct. 2160, 45 L. Ed. 2d 141(1975)); Commonwealth v. Hetzel, 2003 PA Super 100, 822 A.2d 747, 757 (Pa. Super. 2003). This includes an attorney's "[investigator's or other agent's] opinions, theories, or conclusions" as part of preparing his client's case. Sandusky, 70 A.3d at 898.

Bagwell at 416.

protected by attorney work-product and attorney-client privilege. Id. The Office of Open Records (OOR) determined that the responsive e-mails were attorney work-product, but the privilege was waived because the e-mails were shared with First Energy, a party not involved in the litigation. Id. at 441. On appeal, PUC argued the common interest standard serves as an exception to waiver. Id. To demonstrate applicability of the common interest doctrine, four elements must be shown:

- (1) the parties' agreement to the same; (2) a common-interest in the litigation or a jointly shared litigation strategy; (3) the communications were made pursuant to such agreement, and (4) the continued confidentiality of the communications, i.e., the communications were not disclosed to other third parties such that the privileges were waived.

Id. at 442, citing Rosser International, Inc. v. Walter P. Moore & Associates, Inc., No. 2:11-CV-1028, 2013 WL 3989437, at *19 (W.D. Pa. Aug. 2, 2013).

In this case, e-mails between OCA, including its attorneys and employees and I&E are privileged attorney work-product. The OOR in Sunrise Energy initially found that the privilege was waived because e-mails were shared between the PUC and First Energy, whom was not a party to the litigation. Sunrise Energy at 441. Here, e-mails were shared between OCA and I&E, both of whom are parties to the litigation. Because OCA did not share information with a third party outside of the litigation, the communication is privileged and has not been waived by OCA. Id. at 445. Even if waiver is found, the common interest doctrine provides an exception to waiver applicable to the facts of this case as was similarly argued by the PUC in Sunrise Energy.²

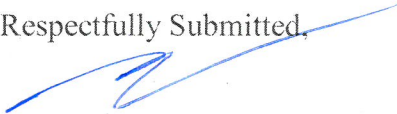
² PAWC argues that the common interest doctrine is inapplicable because I&E is the Commission's prosecutorial bureau whereas OCA is a statutory agency within the Office of Attorney General. This is not the common interest anticipated by the common interest standard. The common interest doctrine does not require two parties to share the same function, purpose or have the same client. In First Energy, PUC argues that it shares a common interest with First Energy because they share similar concerns under the Alternative Energy Portfolio Standards Act. Id. at 441. The OCA and I&E are closely aligned in their overall statutory purpose and function. The common interest anticipated by the standard is one whereby the sharing of certain information would assist both parties in litigation strategy and encourage efficiency. Id. at 445.

Additionally, requiring the OCA to release the information sought by PAWC in this case would impede communication between the OCA and I&E in this and future matters to the detriment of consumers and the public interest. The OCA's communications with I&E are oftentimes in furtherance of settlement and promote the working relationship between the statutory parties. Requiring the OCA to disclose e-mails exchanged with I&E hinders the ability of the OCA and the statutory parties to assist each other when one statutory party asks for the assistance of another statutory party.

IV. CONCLUSION

The information sought in PAWC's Set I Interrogatory Question 8 is privileged information protected by the attorney work-product doctrine. Therefore, for the reasons stated above, the OCA submits that PAWC's Motion should be denied.

Respectfully Submitted,



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