



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

IN REPLY PLEASE
REFER TO OUR FILE

June 14, 2019

Via Electronic Filing

Secretary Rosemary Chiavetta
Pennsylvania Public Utility Commission
400 North Street, 2nd Floor
Harrisburg, PA 17105

Re: Application of Pennsylvania-American Water Company Pursuant to
Section 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 please find the Bureau of Investigation and Enforcement's (I&E)
**Answer to the Motion of Pennsylvania-American Water Company to Dismiss the
Objections of the Bureau of Investigation and Enforcement** in the above-captioned
proceeding.

Copies are being served on all active parties of record as evidenced in the attached
Certificate of Service. If you have any questions, please do not hesitate to contact me at
(717) 783-6170.

Sincerely,

Erika L. McLain
Prosecutor
Bureau of Investigation and Enforcement
PA Attorney ID No. 320526

ELM/ac
Enclosure

cc: Hon. Andrew M. Calvelli (ALJ, 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	:	Docket No. A-2018-3004933
Public Utility Code for Approval of its	:	
Acquisition of the Wastewater System	:	
Assets of Exeter Township	:	

**ANSWER OF THE BUREAU OF INVESTIGATION AND ENFORCEMENT
TO THE MOTION OF PENNSYLVANIA-AMERICAN WATER COMPANY TO
DISMISS THE OBJECTIONS OF THE BUREAU OF INVESTIGATION AND
ENFORCEMENT**

AND NOW COMES the Bureau of Investigation and Enforcement (“I&E”), by and through its prosecutor, Erika L. McLain, files this Answer to the Motion of Pennsylvania-American Water Company (“PAWC”) to Dismiss the Objections of the Bureau of Investigation and Enforcement (“Motion”). As presented herein, I&E has answered PAWC Interrogatories – Set I, numbers 1, 10, and 11 and submits that the Motion should be denied with recognition that all parties’ arguments concerning admissibility of evidence should be reserved for hearing and briefing.

I. BACKGROUND

1. PAWC filed its original Application on September 25, 2018 pursuant to 66 Pa. C.S. §507, §1102, and §1329. The Application requested that the Pennsylvania Public Utility Commission (“PUC” or “Commission”) approve the transfer, by sale, of substantially all Exeter Township’s assets, properties and rights related to its wastewater system.

2. On October 1, 2018, by Secretarial Letter, the Commission declined to accept the filing due to incompleteness.

3. On December 5, 2018, PAWC filed its Amended Application with the Commission.

4. The Commission notified PAWC, by Secretarial Letter on December 19, 2018, that its Amended Application had been conditionally accepted for filing.

5. On April 16, 2019, the Commission issued a Secretarial Letter accepting the Amended Application for filing.

6. A Prehearing Conference was held on May 17, 2019 where the Commission's discovery rules were modified as stated in the Scheduling Order entered May 28, 2019.

7. On June 6, 2019 PAWC served I&E discovery identified as Set I.

8. Counsel for I&E contacted counsel for PAWC on June 6, 2019 to orally object to Interrogatories 1, 10, and 11 as required by the Scheduling Order.

9. On June 10, 2019, I&E served its Interrogatory Responses. Consistent with its communication to PAWC counsel on June 6, I&E objected to Set I numbers 1, 10 and 11, indicating that the information sought was outside the scope of permissible discovery. However, in the interest of avoiding delay in this expedited proceeding, I&E also provided responses to Set I numbers 1, 10 and 11 but indicated that its responses were made without waiving its objection.

II. I&E HAS ANSWERED PAWC INTERROGATORIES SET I NUMBERS 1, 10 AND 11 THEREBY MAKING PAWC'S MOTION MOOT

10. I&E has answered the Interrogatories PAWC now seeks in its Motion. I&E provided responses to PAWC to I&E Set I numbers 1, 10, and 11 on Monday, June 10, 2019, as required by the May 28, 2019 Scheduling Order.

11. Despite the undersigned counsel's attempt to prevent the need for the continued pleadings and continued waste of parties', the ALJ's and the Commission's resources by agreeing to supplement its responses to the interrogatories at issue without waiving I&E's valid objections, opposing counsel has nonetheless elected to pursue its Motion to Dismiss despite the fact that all material at issue has now been provided. I&E respectfully submits that there is nothing ripe for Your Honor to rule upon at this time, since all responsive materials have been provided and the appropriate time for a ruling will arise only when, and only if, PAWC attempts to introduce the items responsive to PAWC Set I numbers 1, 10, and 11 into evidence at the hearings in this matter. Accordingly, PAWC's Motion to Dismiss is procedurally inappropriate and it is moot.

12. To the extent that PAWC's Motion relies on the need for a ruling upon I&E's objection at this time on the grounds that the interrogatories at issue are continuing and therefore a determination is required to ensure that I&E will turn over any subsequent communications that are responsive, its reliance is completely misplaced. PAWC has no need to establish I&E's continuing obligation because the Commission's discovery regulations already recognize a party's continual duty to supplement its discovery responses to include later acquired information that is responsive to a prior discovery

request.¹ Therefore, I&E acknowledges its obligation to supplement its responses to the identified interrogatories if additional information responsive to those questions materializes. In order to ensure that PAWC understood I&E's recognition of this obligation, I&E's counsel spoke with PAWC's counsel by telephone on June 12, 2019. During the conversation, I&E's counsel informed PAWC's counsel that I&E was committed to supplementing the interrogatories at issue if additional responsive material became available, but that I&E would simply preserve its existing objections for future materials provided. It is unclear why PAWC believes Your Honor must issue a ruling on its Motion in order to secure I&E's obligation to abide by existing discovery rules, an obligation which I&E has already acknowledged its requirement to follow. A ruling is not necessary and PAWC's Motion to Dismiss is moot.

13. Having answered PAWC's Interrogatories and provided the requested information to PAWC, I&E respectfully submits that there is nothing further for your Honor to address at the discovery stage and that the motion should be denied.

14. I&E further submits that the Order denying the Motion should make it clear for the benefit of all parties that all arguments concerning admissibility of evidence should be reserved for hearing and briefing.

III. THE ALJ SHOULD DISMISS PAWC'S MOTION

15. I&E objected to PAWC-I-1 on the basis that the interrogatory sought privileged material pursuant to 52 Pa. Code §5.323(a).

¹ 52 Pa. Code §5.332.

16. In its Motion, PAWC argues that I&E's objection to PAWC-I-1 is not moot because Interrogatory 1 has a continuing obligation in which I&E has a duty to supplement subsequent communications between I&E and the Office of Consumer Advocate ("OCA"). However, as stated above, I&E indicated to counsel for PAWC it acknowledges its obligation to supplement its responses if additional information to the question materializes provided that I&E's objection would be preserved.

17. I&E maintains that any e-mails and other written communication between I&E and the OCA, whether it be between attorneys or witnesses, is beyond the scope of permissible discovery pursuant to 52 Pa. Code §5.323(a), which states;

(a) *Generally.* Subject to this subchapter and consistent with Pa. R.C.P. 4003.3 (relating to scope of discovery trial preparation material generally), a party may obtain discovery of any matter discoverable under § 5.321(b) (relating to scope) even though prepared in anticipation of litigation or hearing by or for another party or by or for that other party's representative, including his attorney, consultant, surety, indemnitor, insurer or agent. The discovery may not include disclosure of the mental impressions of a party's attorney or his conclusions, opinions, memoranda, notes, summaries, legal research or legal theories. With respect to the representative of a party other than the party's attorney, discovery may not include disclosure of his mental impressions, conclusions or opinions respecting the value or merit of a claim or defense or respecting strategy, tactics or preliminary or draft versions of written testimony or exhibits, whether or not final versions of the testimony or exhibits are offered into evidence.

Specifically, PAWC's use of "I&E" includes an intent to inquire about I&E counsel's mental impressions, conclusions, opinions or legal theories which constitute attorney work product which is beyond the scope of discoverable material. Additionally,

§5.323(a) encompasses I&E witnesses' mental impressions, conclusions or opinions respecting the value or merit of a claim or defense or respecting strategy, tactics or preliminary or draft versions of written testimony or exhibits making all not discoverable.

18. Any communications between I&E and the OCA do not waive the protections afforded by 52 Pa. Code §5.323(a). I&E and the OCA are free to share privileged materials on matters where their legal interests coincide to more effectively represent their clients. Furthermore, selective waiver is recognized in Pennsylvania meaning that when the disclosure of privileged materials is very limited, as it is between I&E and the OCA, the work-product privilege remains intact and is not waived.²

19. I&E objected to PAWC-I-10 on the basis that the interrogatory sought to obtain information outside the scope of permissible discovery in this proceeding pursuant to 52 Pa. Code §5.321(c) and §5.321(d).

20. PAWC argues that I&E's objection to PAWC-I-10 is not moot because Interrogatory 10 has a continuing obligation in which I&E has a duty to supplement subsequent communications between I&E and the Bureau of Technical Utility Services ("TUS"). However, as stated above, I&E indicated to counsel for PAWC it acknowledges its obligation to supplement its responses if additional information to the question materializes provided that I&E's objection would be preserved.

21. I&E submits that the plain language of 52 Pa. Code §5.321(d) speaks for itself as it explains that discovery sought of Commissioners or Commission staff serving

² *Bagwell v. Pa. Dep't of Education*, 103 A 3d 409 (Pa. Cmwlth. 2014).

in an advisory or adjudicatory capacity is an exception to discoverable matter. TUS serves as the Commission's technical advisory bureau, serving the Commissioners in an advisory capacity in this proceeding, therefore, its communications are not discoverable in this case. PAWC is improperly attempting to use the instant proceeding as a vehicle to obtain information that is explicitly prohibited by 52 Pa. Code §5.321(d).

22. I&E objected to PAWC-I-11 on the basis that the interrogatory sought to obtain information outside the scope of permissible discovery in this proceeding pursuant to 52 Pa. Code §5.321(c) and §5.321(d).

23. PAWC argues that I&E's objection to PAWC-I-11 is not moot because Interrogatory 11 has a continuing obligation in which I&E has a duty to supplement subsequent communications between I&E and the Commission's Law Bureau. However, as stated above, I&E indicated to counsel for PAWC it acknowledges its obligation to supplement its responses if additional information to the question materializes provided that I&E's objection would be preserved.

24. I&E submits that the plain language of 52 Pa. Code §5.321(d) speaks for itself as it explains that discovery sought of Commissioners or Commission staff serving in an advisory or adjudicatory capacity is an exception to discoverable matter. Law Bureau is essentially the Commission's in-house law firm, serving the Commissioners in an advisory capacity in this proceeding, therefore, its communications are not discoverable in this case. PAWC is improperly attempting to use the instant proceeding as a vehicle to obtain information that is explicitly prohibited by 52 Pa. Code §5.321(d).

IV. CONCLUSION

WHEREFORE, having answered PAWC Interrogatories Set I numbers 1, 10, and 11 and provided the requested information, I&E submits that there is nothing further for your Honor to address at the discovery stage and that the Motion should be denied. I&E submits further that the Order denying the Motion should make it clear for the benefit of all parties that all arguments concerning admissibility of evidence should be reserved for hearing and briefing.

Respectfully submitted,



Erika L. McLain

Prosecutor

PA Attorney ID No. 320526

Bureau of Investigation & Enforcement
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor North
Harrisburg, PA 17120

June 14, 2019

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Application of Pennsylvania-American :
Water Company Pursuant to Section 1329 :
of The Public Utility Code for Approval of : Docket No. A-2018-3004933
its Acquisition of the Wastewater System :
Assets of Exeter Township :

CERTIFICATE OF SERVICE

I hereby certify that I am serving the foregoing **Answer to the Motion of Pennsylvania-American Water Company to Dismiss the Objections of the Bureau of Investigation and Enforcement** dated June 14, 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

David P. Zambito, Esq.
Jonathan P. Nase, Esq.
Cozen O'Connor
17 North Second Street, Suite 1410
Harrisburg, PA 17101
dzambito@cozen.com
JNase@cozen.com


Susan Simms Marsh, Esq.
Pennsylvania-American Water Company
852 Wesley Drive
Mechanicsburg, PA 17055
susan.marsh@amwater.com

Christine Maloni Hoover, Esq.
Harrison W. Breitman, Esq.
Erin L. Gannon, Esq.
Office of Consumer Advocate
555 Walnut Street
5th Floor, Forum Place
Harrisburg, PA 17101
choover@paoca.org
hbreitman@paoca.org
egannon@paoca.org

Samuel W. Cortes, Esq.
Fox Rothschild LLP
Eagleview Corporate Center
747 Constitution Drive, Suite 100
Exton, PA 19341
scortes@foxrothschild.com

Barnett Satinsky, Esq.
Fox Rothschild LLP
2000 Market Street, 20th Floor
Philadelphia, PA 19103
bsatinsky@foxrothschild.com

Joan E. London, Esq.
Kozloff Stoudt Professional Corporation
2640 Westview Drive
Wyomissing, PA 19610
jlondon@kozloffstoudt.com


Erika L. McLain
Prosecutor
Bureau of Investigation and Enforcement
PA Attorney I.D. No. 320526