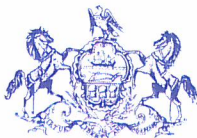




COMMONWEALTH OF PENNSYLVANIA



OFFICE OF CONSUMER ADVOCATE

555 Walnut Street, 5th Floor, Forum Place  
Harrisburg, Pennsylvania 17101-1923  
(717) 783-5048  
800-684-6560

 @pa\_oca

 /pennoca

FAX (717) 783-7152  
consumer@paoca.org

June 28, 2019

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

Re: Pa. Public Utility Commission  
v.  
Delaware Sewer Company  
Docket No. I-2016-2526085

Dear Secretary Chiavetta:

Attached for electronic filing please find the Office of Consumer Advocate's Petition for Reconsideration 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 that reads "Christine Maloni Hoover".

Christine Maloni Hoover  
Senior Assistant Consumer Advocate  
PA Attorney I.D. # 50026  
E-Mail: CHoover@paoca.org

Enclosures

cc: Honorable Steven Haas  
Office of Special Assistants (email only)  
Certificate of Service

\*274822

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Investigation Instituted into Whether the Public :  
Utility Commission Shall Order a Capable Public : Docket No. I-2016-2526085  
Utility to Acquire Delaware Sewer Company :

---

OFFICE OF CONSUMER ADVOCATE'S  
PETITION FOR RECONSIDERATION

---

I. INTRODUCTION

The Office of Consumer Advocate (OCA) hereby submits this Petition pursuant to Sections 5.41 and 5.572 of the Public Utility Commission's (Commission) regulations. 52 Pa. Code §§ 5.41, 5.572. The OCA requests that the Commission reconsider its Order entered June 13, 2019 in the above-captioned proceeding regarding the modification of a unanimous Joint Petition for Settlement that provides for the acquisition of Delaware Sewer Company, a troubled wastewater utility, by Pennsylvania-American Water Company (PAWC) pursuant to Section 529 of the Public Utility Code. 66 Pa. C.S. § 529.

As set forth in Duick v. Pennsylvania Gas and Water Co., 56 Pa. P.U.C. 553 (1985)(Duick), the standards for granting a petition for reconsideration are as follows:

A petition for reconsideration, under the provisions of 66 Pa.C.S. § 703(g), may properly raise any matters designed to convince the Commission that it should exercise its discretion under this code section to rescind or amend a prior order in whole or in part. In this regard we agree with the Court in the Pennsylvania Railroad case, wherein it was stated that “[p]arties..., cannot be permitted by a second motion to review and reconsider, to raise the same questions which were specifically considered and decided against them...”. What we expect to see raised in such petitions are new and novel arguments, not previously heard, or considerations which appear to have been overlooked or not addressed by the Commission. Absent such matters being presented, we consider it unlikely that a

party will succeed in persuading us that our initial decision on a matter or issue was either unwise or in error.

56 Pa. P.U.C. at 559 (citing Pennsylvania R. Co. v. Pa. Publ. Serv. Comm'n, 118 Pa. Super. 380, 179 A. 850 (Pa. Super. Ct. 1935)). In this Petition, the OCA raises considerations which appear to have been overlooked by the Commission or not addressed by the Commission. For the reasons set forth below, the OCA submits that this Petition meets the Duick standard for reconsideration.

As discussed below, the OCA submits that it is reasonable for the Commission to reconsider its *sua sponte* modification of the unanimous Settlement of a mandatory takeover proceeding given that no party in the proceeding below, nor Administrative Law Judge, Steven K. Haas (ALJ), proposed such a provision, nor had the opportunity to address the modification made by the Commission with testimony or briefs. There is no record evidence to support the Commission's modification, nor is the modification necessary given that the parties were able to present a full resolution of the proceeding to the ALJ and the Commission.

## II. BACKGROUND

On February 6, 2014, DSC filed a Petition asking the Commission to open an investigation, pursuant to Section 529 of the Public Utility Code, 66 Pa. C.S. § 529, into whether the Commission should order a capable public utility to acquire its wastewater system.<sup>1</sup> The OCA supported the request for a Section 529 proceeding. By Order entered January 28, 2016, the Commission granted that request and instituted an investigation pursuant to Section 529.

---

<sup>1</sup> While the Petition was pending, DSC filed a general rate increase request on November 7, 2014, at Docket No. R-2014-2457205, requesting an increase of \$67,663, or 285%. The OCA filed a formal complaint against the request and argued, *inter alia*, that no increase should be granted because DSC was not providing safe, adequate and reliable service. The Commission agreed with the OCA that the Company was not fully meeting its requirements under Section 1501 of the Public Utility Code, July 30, 2015 Order (Rate Case Order), Slip op. at 15. The Commission, however, granted a rate increase of \$43,557. Slip op. at 40. DSC filed an appeal of the Rate Case Order. Delaware Sewer Co. v. Pa. PUC, 1561 C.D. 2015. The OCA filed a cross-appeal. McCloskey v. Pa. PUC, 1705 C.D. 2015. Both appeals have been stayed while this proceeding has been pending.

Petition of Delaware Sewer Co. for the Opening of an Investigation into Whether the Public Utility Commission Should Order a Capable Public Utility to Acquire the Company Pursuant to 66 Pa. C.S. § 529, Docket No. P-2014-2404341 (Order entered January 28, 2016). The Section 529 proceeding was docketed at I-2016-2526085. On March 29, 2016, the OCA filed a Motion to Join Pennsylvania-American Water Company (PAWC) in the Section 529 investigation proceeding, arguing that PAWC is an indispensable party.

By Secretarial Letter dated June 7, 2017, PAWC was notified that I&E had identified it as a proximate public utility providing the same type of service as DSC. The Secretarial Letter established June 30, 2017 as the deadline for filing a petition to intervene or other responsive pleading. On June 30, 2017, PAWC filed a Petition to Intervene. Also on June 30, 2017, Aqua Pennsylvania filed a Petition to Intervene.

On June 30, 2017, PAWC filed a Petition to Amend the Order Entered January 28, 2016 (Petition). That Petition argued that the Order should be amended to (i) clarify the scope of the instant proceeding and the potential remedies that can be ordered, and (ii) require that additional notice be published in the *Pennsylvania Bulletin* to ensure due process to DSC's customers. I&E filed correspondence on July 10, 2017, indicating that it would not be filing a response to the Petition. DSC filed an Answer opposing the Petition. The OCA also filed an Answer opposing the Petition on July 10, 2017.

A prehearing conference was held on August 14, 2017. Thereafter, the ALJ issued a procedural order. Among other things, the order stated that the ALJ would take judicial notice of the record in the proceeding at P-2014-2404341.

In accordance with that procedural schedule, on October 27, 2017, I&E submitted Direct Testimony. On December 1, 2017, DSC, OCA and PAWC each submitted Direct Testimony,

and Aqua submitted correspondence indicating that it would not be filing Direct Testimony. On January 5, 2018, DSC, OCA and PAWC each submitted Rebuttal Testimony, and Aqua submitted correspondence indicating that it would not be filing Rebuttal Testimony. On February 9, 2018, I&E, OCA and PAWC each submitted Surrebuttal Testimony.

On February 13, 2018, the ALJ held a status conference call with all of the Parties to this proceeding. At that time, the Joint Petitioners advised the ALJ that they had reached an agreement in principle to resolve this proceeding. The Joint Petitioners requested that this matter be stayed for 120 days so they could pursue further negotiations to resolve all issues. On February 14, 2018, the ALJ issued an Order granting the requested stay. As a result, the hearings scheduled for February 15-16, 2018 were cancelled.

On June 11, 2018, counsel for PAWC advised the ALJ that, although the parties had made significant progress in their negotiations, PAWC and DSC had not yet executed an Asset Purchase Agreement. PAWC requested a 30-day extension of the stay of the litigation schedule. By Order dated June 13, 2018, the ALJ granted a 60-day extension of the litigation schedule.

On August 13, 2018, counsel for PAWC notified the ALJ that PAWC and DSC had still not executed an Asset Purchase Agreement. PAWC requested a further 30-day extension of the litigation schedule. On August 20, 2018, counsel for DSC notified the ALJ that DSC opposed the request for a further extension of the litigation schedule.

On September 12, 2018, counsel for PAWC advised the ALJ that PAWC and DSC had executed an Asset Purchase Agreement and requested an extension of the stay of the litigation schedule for twenty (20) days so the parties could submit a Joint Petition for Settlement.

The Settlement Petition was filed on October 12, 2018.<sup>2</sup> The Settlement Petition represented a comprehensive settlement of all issues presented in the Section 529 proceeding and contained provisions to establish the requirements of Section 529. Further, the Settlement was unanimously supported by all parties.<sup>3</sup> ALJ Haas recommended that the Settlement Petition be accepted, without modification, on March 20, 2019. The Commission, through its Tentative Opinion and Order dated April 29, 2019, made two modifications to the Settlement Petition to address its concern that ineligible property would be incorporated into PAWC's Long-Term Infrastructure Improvement Plan (LTIIP).<sup>4</sup> The Commission, first, modified the Settlement by requiring that the Plan for Improvement (PFI) submitted by PAWC be approved on the condition it is consistent with Section 529(j) of the Code. 66 Pa.C.S. § 529(j). Accordingly, it incorporated eligible property and expenditures from the PFI subject to recovery through the DSIC mechanism into PAWC's LTIIP pursuant to Act 11 of 2012 (Act 11). Tentative Opinion and Order at 5. Second, and relevant to this Petition for Reconsideration, the Commission permitted PAWC to establish a regulatory asset in order to recover costs of accrued depreciation and funds used during construction on improvements not otherwise recoverable through the DSIC mechanism in PAWC's next base rate case (hereinafter referred to as the "second modification"). *Id.*

On May 9, 2019, the OCA submitted Comments explaining why these modifications were either unnecessary or inconsistent with the Settlement Petition. On June 13, 2019, the Commission denied OCA's Comments in its Final Opinion and Order. The OCA files this

---

<sup>2</sup> As stated in the Settlement Petition at ¶¶ 8-14, throughout this process, the parties to the Settlement participated in extensive discussions to reach an agreement on terms to resolve the issues and accomplish the transfer of the system to PAWC without the delay, cost and uncertainties of the eminent domain process and litigation of DSC and OCA's appeals of the Commission's Rate Case Order and I&E's formal complaint before the Commission.

<sup>3</sup> Aqua PA filed a letter indicating that it did not oppose the Settlement.

<sup>4</sup> The Commission also corrected a reference to a docket number in the Joint Petition. Tentative Order and Opinion at 4-5.

Petition for Reconsideration requesting the Commission to reconsider its Order adopting modifications to the Settlement Petition.

### III. ARGUMENT

#### A. The Commission's Modifications Without Hearing Violate Due Process

The Commission may, at any time, after notice and opportunity to be heard as provided in Chapter 7 of the Code, rescind or amend any order made by it. 66 Pa.C.S. § 703(g). However, merely allowing for “notice and comment” without the opportunity to present evidence or cross-examine witnesses does not satisfy Section 703 hearing requirements for due process. Popowsky v. Pa. PUC, 805 A.2d 637, 643 (Pa. Cmwlth. 2002) (Popowsky). The Commission is bound by constitutional due process requirements and fundamental principles of fairness. Id. at 642 (quoting Pittsburgh v. Pa. PUC, 171 Pa. Super. 391, 395, 90 A.2d 850 (Pa. Super. Ct. 1952)). A court's scope of review of a decision of the Pennsylvania Public Utility Commission is limited to a determination of whether constitutional rights were violated, an error of law was committed, or the Commission's findings are, or are not, supported by substantial evidence. Barasch v. Pa. PUC, 493 A.2d 653, 655 (Pa. 1985); 2 Pa.C.S. § 704.

In Scott Paper Co. v. Pa. PUC, the Court held that because the Commission failed to afford Scott a meaningful opportunity to be heard on its decision to modify its prior order, the Commission's modification violated due process. Scott Paper Co. v. Pa. PUC, 558 A.2d 914, 915 (Pa. Cmwlth. 1989) (Scott). There, Philadelphia Electric Company (PECO) filed a tariff supplement to its existing electric tariff. Id. In response, Scott Paper Company (Scott) filed a complaint against the proposed tariff. Id. The parties entered into a stipulation agreement signed by a number of complainants, which the ALJ found was the best resolution of issues. Id. at 916. Subsequently, the Commission entered an opinion and order adopting the decision with certain

modifications altering the parties' stipulated agreement. Id. PECO later filed a new proposed tariff supplement amending the tariff that the Commission had just approved. Id. at 916. Scott filed objections to PECO's filing contending that it did not comply with the Commission's prior order. Id. The Commission entered an order allowing the amendment, and Scott appealed to the Commonwealth Court. Id. at 917. On appeal, the Court noted that the Commission may rescind and amend orders pursuant to Section 703(g), but it may only do so after providing notice and opportunity to be heard. Id. at 919. The Court held that because the Commission failed to afford Scott any meaningful opportunity to be heard by denying them the opportunity to present evidence on the issue, the Commission's amendment was unlawful. Id. at 920. The Commission's opinion and order was vacated and remanded for further evidentiary hearings as its modification represented a substantial change of a prior order, and proof on the issue was never developed on the record. Id.

The same situation exists here. The OCA submits that the opportunity to present evidence on the Commission's modifications is also required in this case. Here, after lengthy discussions, the parties reached agreement set forth in the unanimous Joint Petition for Settlement filed on October 12, 2018. The Petition was granted, without modification, by Administrative Law Judge Steven K. Haas on March 20, 2019. The Commission, through its Tentative Opinion and Order dated April 29, 2019, then made two modifications to the ALJ's Recommended Decision. At issue here is the Commission's second modification allowing PAWC to recover non-DSIC-eligible costs through the regulatory asset mechanism, use of which confers a benefit upon PAWC that PAWC did not request during the litigation. The Commission provided special accounting treatment, which PAWC had not requested and the parties had not agreed to, because the cost of PAWC's sand mound project is almost one-third of the total cost



of the PAWC's Phase 1 improvements in the PFI and is not DSIC-eligible. Pursuant to the Settlement, the Commission provided notice and opportunity to submit Comments on its modification, which the OCA submitted on May 9, 2019, but the parties were not given meaningful opportunity to be heard through the presentation of evidence on the record. As such, OCA submits that the Commission's decision to deny OCA's Comments without a hearing was unlawful and respectfully requests the Commission reconsider its Order.

The Commission's unilateral imposition of special accounting treatment for non-DSIC-eligible costs represents the addition of a term to the parties' settlement which was not developed on the record. In other words, the parties have not had opportunity to present evidence in support of or opposition to use of this special accounting treatment on the record.

Additionally, the record is devoid of an evidentiary basis for the Commission's decision to apply the regulatory asset mechanism to PAWC's acquisition of DSC. As such, the Commonwealth Court would be unable to review the Commission's decision for lawfulness on appeal.

The OCA submits that the Duick standard has been met as these important considerations appear not to have been considered by the Commission. As such, the OCA respectfully requests reconsideration of the Final Order.

B. The Commission Improperly Expanded Applicability of Section 1329 Special Accounting to this Section 529 Acquisition

Section 1329 of the Code enables a public utility or other entity acquiring water and wastewater systems owned by a municipal corporation or authority to utilize fair market valuation. 66 Pa.C.S. § 1329. Both the buyer and the seller in a Section 1329 transaction must agree to the use of the fair market valuation procedure in order to utilize it. Id. Section 529 provides the Commission with the authority to order the mandatory takeover of small water and

sewer utilities, but unlike Section 1329, it does not allow for use of fair market valuation or provide for the special accounting treatment added by the Commission in its Order. 66 Pa.C.S. § 529.

The investigation in this case has been initiated pursuant to Section 529. The special accounting treatment contained in Section 1329 is strictly limited to acquisitions of municipal water and wastewater systems. 66 Pa.C.S. § 1329. As Section 1329 does not apply here, it is improper for the Commission to expand the benefit of its special accounting treatment to a Section 529 acquisition. Id.

Moreover, it is unnecessary for the Commission to provide a special cost recovery mechanism that was not requested by PAWC during the litigation where PAWC can recover costs through its next base rate case. As part of the Settlement in this case, Joint Petitioners agreed to numerous rate recovery provisions that are tailored to this specific transaction. First, Joint Petitioners requested that PAWC be permitted to charge a separate tariffed rate to DSC customers. This *pro forma* tariff establishes initial rates in the Requested Territory equal to the rates currently charged by DSC, which are higher than PAWC's wastewater Rate Zone 1 rates, together with all other fees and surcharges permitted by PAWC's current wastewater tariff including but not limited to capacity reservation fees. Second, Joint Petitioners requested that until PAWC's first base rate case after closing, PAWC be afforded deferred accounting treatment for extraordinary incremental operations and maintenance expenses associated with the provision of service in the Requested Territory. Third, Joint Petitioners will not contest PAWC's rate base claim of the full purchase price of the assets of DSC nor the full purchase price of the land purchased by PAWC from Forest City. Fourth, the Joint Petitioners will not contest PAWC's right to rate recovery of all transaction and transition expenses relating to the acquisition of the

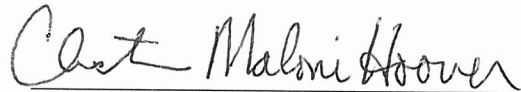
wastewater system assets and service rights of DSC. Fifth, the Joint Petitioners will not contest PAWC's right to a return on and of upgrades to the wastewater system formerly owned by DSC. Sixth, the Joint Petitioners will not contest that DSC is a small, nonviable wastewater system. Finally, the Joint Petitioners will not contest that PAWC's allocation of a portion of its wastewater revenue requirement for the Requested Territory to its combined water and wastewater customer base is in the public interest. The Commission's modification allowing for additional rate recovery goes well beyond the negotiated terms and does so to the benefit of PAWC's shareholders and to the detriment of PAWC's customers.

The OCA submits that the Commission appears to have overlooked or not addressed these considerations and, therefore, the Duick standard has been met. The OCA respectfully requests the Commission reconsider its Order modifying the terms agreed upon by the parties to this case.

III. CONCLUSION

WHEREFORE, the Office of Consumer Advocate respectfully submits that the Commission's modification to the agreed-upon ratemaking principles contained in the cost recovery provisions of the unanimous Joint Petition for Settlement of All Issues should be rescinded and removed.

Respectfully Submitted,



Christine Maloni Hoover  
Senior Assistant Consumer Advocate  
PA Attorney I.D. # 50026  
E-Mail: [CHoover@paoca.org](mailto:CHoover@paoca.org)

Erin L. Gannon  
Senior Assistant Consumer Advocate  
PA Attorney I.D. # 83487  
E-Mail: [EGannon@paoca.org](mailto:EGannon@paoca.org)

Lauren Guerra  
Assistant Consumer Advocate  
PA Attorney I.D. # 323192  
E-Mail: [LGuerra@paoca.org](mailto:LGuerra@paoca.org)

Office of Consumer Advocate  
5th Floor, Forum Place  
555 Walnut Street  
Harrisburg, PA 17101-1923  
Phone: (717) 783-5048  
Fax: (717) 783-7152

Counsel for:  
Tanya J. McCloskey  
Acting Consumer Advocate

DATE: June 28, 2019

274715

CERTIFICATE OF SERVICE

Re: Pennsylvania Public Utility Commission :  
v. : Docket No. I-2016-2526085  
Delaware Sewer Company :

I hereby certify that I have this day served a true copy of the following document, the Office of Consumer Advocate's Petition for Reconsideration, upon parties of record in this proceeding in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant), in the manner and upon the persons listed below:

Dated this 28th day of June, 2019.

SERVICE BY E-MAIL AND INTER-OFFICE MAIL

Scott B. Granger, Esquire  
Allison C. Kaster, Esquire  
Bureau of Investigation & Enforcement  
Pennsylvania Public Utility Commission  
400 North Street  
Harrisburg, PA 17120

SERVICE BY EMAIL AND FIRST CLASS MAIL, POSTAGE PREPAID

Thomas T. Niesen, Esquire  
Thomas, Niesen & Thomas, LLC  
212 Locust Street  
Suite 302  
Harrisburg, PA 17101  
*Counsel for Delaware Sewer Company*

Susan Simms Marsh, Esquire  
Pennsylvania-American Water Company  
852 Wesley Drive  
Mechanicsburg, PA 17055

David P. Zambito, Esquire  
Cozen O'Connor  
17 North Second Street  
Suite 1410  
Harrisburg, PA 17101

Alexander R. Stahl  
Aqua Services, Inc.  
Regulatory Counsel  
762 W. Lancaster Avenue  
Bryn Mawr, PA 19010

/s/ Christine Maloni Hoover  
Christine Maloni Hoover  
Senior Assistant Consumer Advocate  
PA Attorney I.D. # 50026  
E-mail: [CHoover@paoca.org](mailto:CHoover@paoca.org)

Erin L. Gannon  
Senior Assistant Consumer Advocate  
PA Attorney I.D. #83487  
E-mail: [EGannon@paoca.org](mailto:EGannon@paoca.org)

Lauren M. Burge  
Assistant Consumer Advocate  
PA Attorney I.D. #311570  
E-mail: [LBurge@paoca.org](mailto:LBurge@paoca.org)

Counsel for  
Office of Consumer Advocate  
555 Walnut Street, 5th Floor, Forum Place  
Harrisburg, PA 17101-1923  
Phone: (717) 783-5048  
Fax: (717) 783-7152