



July 10, 2019

VIA E-FILE

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Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor North
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Re: Application of Pennsylvania-American Water Company under Sections 507, 1102 and 1329 of the Public Utility Code for Approval of its Acquisition of Wastewater System Assets of Exeter Township; Docket Nos. A-2018-3004933 et al.

MAIN BRIEF OF PENNSYLVANIA-AMERICAN WATER COMPANY

Dear Secretary Chiavetta:

Enclosed for filing with the Pennsylvania Public Utility Commission, please find Pennsylvania-American Water Company's Main Brief in the above-referenced proceeding. A copy of this document has been served in accordance with the attached Certificate of Service.

If you have any questions regarding this filing, please direct them to me. Thank you for your attention to this matter.

Sincerely,

COZEN O'CONNOR

By: Jonathan P. Nase
Counsel for *Pennsylvania-American Water Company*

JPN:kmg
Enclosure

cc: Honorable Andrew M. Calvelli
Certificate of Service
Susan Simms Marsh, Esquire

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Application of Pennsylvania-American Water :
Company under Sections 507, 1102 and 1329 of the : Docket No. A-2018-3004933 *et al.*
Public Utility Code for Approval of its Acquisition of :
wastewater system assets of Exeter Township :

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of **Pennsylvania-American Water Company's Main Brief**, upon the parties, listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

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Date: July 10, 2019

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Administrative Law Judge Andrew M. Calvelli

Application of Pennsylvania-American Water :
Company under Sections 507, 1102 and 1329 of the : Docket Nos. A-2018-3004933 *et al.*
Public Utility Code for Approval of its Acquisition :
Of Wastewater System Assets of Exeter Township :

**MAIN BRIEF OF
PENNSYLVANIA-AMERICAN WATER COMPANY**

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Dated: July 10, 2019

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I. INTRODUCTION

This proceeding concerns an application (“Application”) filed by Pennsylvania-American Water Company (“PAWC”) seeking Pennsylvania Public Utility Commission (“Commission”) approval of PAWC’s purchase of the wastewater system (the “System”) currently owned by the Township of Exeter (“Exeter”). On September 25, 2018, PAWC filed the Application asking the Commission to approve the Transaction pursuant to Sections 1102 and 1329 of the Pennsylvania Public Utility Code (“Code”), 66 Pa. C.S. §§ 1102 and 1329.

By Secretarial Letter dated October 1, 2018, the Commission notified PAWC that the September 25, 2018 Application was not accepted for filing purposes because, in the opinion of Commission staff, the Application was incomplete. On December 5, 2018, PAWC filed an Amended Application with the Commission (for ease of reference, the September 25, 2018 Application and the December 5, 2018 Amended Application will be referred to collectively herein as the “Application”).

By e-mail of December 12, 2018, staff from the Commission’s Bureau of Technical Utility Services (“TUS”) notified PAWC that they believed certain items were missing from the Application. On December 17, 2018, PAWC provided the information that TUS staff requested.

By Secretarial Letter dated December 19, 2018, the Commission notified PAWC that the Application had been conditionally accepted for filing. According to that Secretarial Letter, the Commission would not finally accept the Application until PAWC complied with certain customer notice requirements.

On December 14, 2018, the OCA filed a Petition to Reject or Hold in Abeyance Acceptance of the Application (“OCA’s Petition to Reject or Hold in Abeyance”). PAWC filed an Answer on December 17, 2018.

On December 20, 2018, I&E filed a Motion to Reject or Hold in Abeyance Pennsylvania-American Water Company's Amended Application ("I&E's Motion to Reject or Hold in Abeyance"). PAWC filed an Answer on December 26, 2018.

On December 28, 2018, Exeter filed a Petition to Intervene. On January 7, 2019, the Borough of St. Lawrence ("St. Lawrence") filed a Petition to Intervene. On January 9, 2019, Exeter filed an Answer to I&E's Motion to Reject or Hold in Abeyance. On January 14, 2019, St. Lawrence filed the "Response of Intervenor, Borough of St. Lawrence to Application for Certificate of Public Convenience and Application for Approval of Transfer."

The OCA filed a Protest and Public Statement on January 14, 2019, and a Petition for Stay on that same date. PAWC filed an Answer to the Petition for Stay on January 16, 2019, and Exeter filed an Answer to the Petition for Stay on February 4, 2019.

On February 8, 2019, the Commission issued the following four Secretarial Letters:

- a. One addressed to the OCA indicating that the documents it filed on December 14, 2018 and January 14, 2019 were filed at an inactive docket, and would be addressed if the docket became active;
- b. One addressed to I&E indicating that the document it filed on December 20, 2018 was filed at an inactive docket, and would be addressed if the docket became active;
- c. One addressed to Exeter indicating that the documents it filed on January 9 and February 4, 2019 were filed at an inactive docket, and would be addressed if the docket became active; and,
- d. One addressed to PAWC indicating that its filings of December 17, 2018, December 26, 2018, and January 16, 2019 were filed at an inactive docket, and would be addressed if the docket became active.

On March 8, 2019, PAWC notified the Commission that PAWC would shortly begin giving the required customer notices. On April 15, 2019, PAWC filed a verification stating that it had complied with all required customer notices. On April 16, 2019, the Commission issued a Secretarial Letter accepting the Amended Application for filing.¹ PAWC subsequently provided notice of the Application to certain municipalities, water and wastewater utilities, and state agencies.

On April 27, 2019, notice of the Amended Application was published in the Pennsylvania Bulletin, with a deadline of May 14, 2019 for filing Protests or Petitions to Intervene. 49 Pa. B. 2099. No additional Protests or Petitions to Intervene were filed.

The ALJ issued his Prehearing Conference Order on April 22, 2019 which, among other things, modified the Commission's discovery rules for this proceeding. A Prehearing Conference was held before the ALJ on May 17, 2019, and the ALJ subsequently issued his Scheduling Order which, among other things, established the litigation schedule for this proceeding. An Order Granting Petition for a Protective Order was issued on June 4, 2019.

By e-mail of June 28, 2019, the Parties informed the ALJ that they had reached a settlement of all issues except St. Lawrence's claims against Exeter concerning St. Lawrence's debt service payments relating to the Exeter wastewater treatment plant. A hearing was held before the ALJ on June 28, 2019.

II. STATEMENT OF QUESTIONS PRESENTED

PAWC, Exeter, the OCA and I&E (together, the "Joint Petitioners") will shortly file a Joint Petition for Approval of Partial Settlement resolving all issues in this proceeding other than St.

¹ Consequently, the deadline for a Commission order in this proceeding is October 16, 2019. 66 Pa. C.S. § 1329(d)(2).

Lawrence's issues relating to debt service payments to Exeter. St. Lawrence does not object to that Settlement. Since the Joint Petitioners will shortly submit both the Settlement and Statements in Support explaining why the Settlement is in the public interest and should be approved, this brief need not address the Settlement in detail. This brief simply incorporates by reference the Settlement and PAWC's Statement in Support thereof. Nevertheless, PAWC will briefly discuss the Settlement in order to explain why the sole litigated issue – St. Lawrence's debt service payments to Exeter – should not affect the Commission's approval of the Settlement.

A. SHOULD THE COMMISSION APPROVE THE SETTLEMENT WITHOUT MODIFICATION?

Suggested Answer: Yes, the Commission should approve the Settlement without modification because it is in the public interest.

B. SHOULD THE COMMISSION FIND THAT IT LACKS JURISDICTION TO ADJUDICATE ST. LAWRENCE'S DEBT PAYMENT ISSUE?

Suggested Answer: Yes, the Commission should find that it lacks jurisdiction to adjudicate St. Lawrence's request for the repayment of some or all of the debt service payments it made to Exeter for the Exeter wastewater treatment plant. St. Lawrence's claim is properly a matter for the civil courts.

III. LEGAL STANDARDS

With regard to the sole litigated issue in this proceeding, St. Lawrence seeks affirmative relief from the Commission that is unrelated to the approval of the Application (as demonstrated by St. Lawrence's non-opposition to the Settlement). As the party seeking affirmative relief, St. Lawrence bears the burden of proof pursuant to Section 332(a) of the Code. 66 Pa. C.S.

§ 332(a). The “burden of proof” is composed of two distinct burdens: the burden of production and the burden of persuasion. *Hurley v. Hurley*, 2000 Pa. Super. 178, 754 A.2d 1283 (2000).

The burden of production, also called the burden of producing evidence or the burden of coming forward with evidence, determines which party must come forward with evidence to support a particular proposition. This burden may shift between the parties during the course of a trial. If the party with the burden of production fails to introduce sufficient evidence, the opposing party is entitled to receive a favorable ruling. That is, the opposing party would be entitled to a compulsory nonsuit, a directed verdict, or a judgment notwithstanding the verdict. Once the party with the initial burden of production introduces sufficient evidence to make out a *prima facie* case, the burden of production shifts to the opposing party. If the opposing party introduces evidence sufficient to balance the evidence introduced by the party having the initial burden of production, the burden then shifts back to the party who had the initial burden to introduce more evidence favorable to his position. The burden of production goes to the legal sufficiency of a party’s case.

Having passed the test of legal sufficiency, the party with the burden of proof must then bear the burden of persuasion to be entitled to a verdict in his favor. “[T]he burden of persuasion never leaves the party on whom it is originally cast, but the burden of production may shift during the course of the proceedings.” *Riedel v. County of Allegheny*, 159 Pa. Cmwlth. 583, 591; 633 A.2d 1325, 1328 n. 11 (1993). To establish a sufficient case and satisfy its burden of proof, St. Lawrence must show, by a preponderance of the evidence, that it is entitled to the relief it is seeking. *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm’n*, 578 A.2d 600 (Pa. Cmwlth. 1990), *alloc. denied*, 529 Pa. 654, 602 A.2d 863 (1992). That is, St. Lawrence’s evidence must be more convincing, by even the smallest amount, than that presented by any opposing party. *Se-Ling Hosiery, Inc. v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950). Additionally, this Commission’s decision must be

supported by substantial evidence in the record. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & Western Ry. Co. v. Pa. Pub. Util. Comm'n*, 489 Pa. 109, 413 A.2d 1037 (1980).

IV. SUMMARY OF ARGUMENT

The Commission should approve the Transaction, as modified by the Settlement, without modification; the Commission should not impose conditions on the acquisition as a result of St. Lawrence's claim concerning debt service payments to Exeter. Such claim is outside the proper scope of this proceeding and the Commission's jurisdiction.

Although St. Lawrence preserved for litigation the issue of its debt service payments to Exeter, St. Lawrence did not object to the Settlement. As a result, the Settlement should be approved without modification. Additionally, PAWC has satisfied the legal standards for approving the acquisition. There is no need for the Commission to impose additional conditions on the acquisition as a result of St. Lawrence's claim concerning debt service payments to Exeter.

St. Lawrence contends that it should receive a re-payment of some or all of the amounts that it paid to Exeter as debt service payments pursuant to a May 2003 Agreement. This issue is a private contractual dispute that is unrelated to the instant Application proceeding; PAWC did not assume Exeter's liability for any amounts due to St. Lawrence.

Moreover, St. Lawrence's claim concerning debt service payments to Exeter is beyond the Commission's jurisdiction. The claim arises out of a contract, but the Commission has no jurisdiction to interpret contracts. Moreover, the Commission cannot award monetary damages to St. Lawrence. With respect to its dealings with St. Lawrence, Exeter is not a regulated public utility over which the Commission has jurisdiction.

St. Lawrence would not be put “out of court” if the Commission declines to decide a contractual dispute between Exeter and St. Lawrence; St. Lawrence could assert its claim in the civil courts. The Commission should recognize that St. Lawrence must take its claim to that forum.

V. ARGUMENT

A. The Commission Should Approve the Settlement Without Modification

In this proceeding, PAWC requests that the Commission issue Certificates of Public Convenience approving an acquisition pursuant to Sections 1102, 1103 and 1329 of the Code. 66 Pa. C.S. §§ 1102, 1103 and 1329. The legal standard for approval of such an application is that the applicant must possess the legal, technical and financial fitness to own and operate the system to be acquired. *Seaboard Tank Lines v. Pa. Pub. Util. Comm’n*, 502 A.2d 762, 764 (Pa. Cmwlth. 1985); *Warminster Township Mun. Auth. v. Pa. Pub. Util. Comm’n*, 138 A.2d 240, 243 (Pa. Super. 1958). In addition, the Commission must find that the granting of the certificate is “necessary or proper for the service, accommodation, convenience, or safety of the public.” 66 Pa. C.S. § 1103(a).

PAWC must also demonstrate that its ownership/operation of the Exeter System “affirmatively promote[s] the service, accommodation, convenience, or safety of the public in some substantial way.” *City of York v. Pa. Pub. Util. Comm’n*, 449 Pa. 136, 151, 295 A.2d 825, 828 (1972). An acquisition provides an affirmative benefit if the benefits of the transaction outweigh the adverse impacts of the transaction. *Application of CMV Sewage Co., Inc.*, 2008 Pa. PUC LEXIS 950. When looking at the benefits and detriments of a transaction, the focus of the analysis must be on all affected parties, not merely a particular group or a particular geographic area. *Middletown Township v. Pa. Pub. Util. Comm’n*, 85 Pa. Cmwlth. 191, 482 A.2d 674 (1984).

PAWC's Statement in Support of the Settlement demonstrates that the Transaction, as modified by the Settlement, satisfies these tests. St. Lawrence does not object to the Settlement. As a result, the Commission should approve the Settlement without modification.

Although Section 1103(a) of the Code permits the Commission to impose such conditions "as may be just and reasonable" on its approval of an application, the Commission should not impose any conditions on its approval of the Settlement as a result of St. Lawrence's claim concerning debt service payments to Exeter. First, as discussed below, the Commission lacks authority to adjudicate St. Lawrence's claim or to grant the requested relief.

Second, PAWC has satisfied the legal standards for approval of the acquisition. There is no need for the Commission to impose a further condition on its approval of an acquisition where, as here, the applicant has already demonstrated that it is legally, technically and financially fit; that granting the certificate is necessary or proper for the service, convenience or safety of the public; and that the acquisition will affirmatively benefit the public in a substantial way.

Third, in the Asset Purchase Agreement, PAWC agreed to assume some liabilities of Exeter as part of the transaction, but specifically refused to accept other liabilities. PAWC St. No. 1 REV-A p. 11. St. Lawrence's claim clearly is not an Assumed Liability under the Asset Purchase Agreement. St. Lawrence claims that Exeter would receive a windfall if Exeter sold the wastewater treatment plant without returning some or all of the debt service payments that St. Lawrence made to Exeter, over an extended period of time, pursuant to a May 2003 Agreement. Tr. 45, 47-48. This claim, however, has nothing to do with PAWC or PAWC's acquisition of the Exeter System.

PAWC did not assume Exeter's liability for any amounts due to St. Lawrence. St. Lawrence's claim against Exeter is a private contractual matter between those two parties and has

no place in this Commission proceeding. St. Lawrence's claim is governed by the May 2003 Agreement, not the Asset Purchase Agreement. Consequently, St. Lawrence's claim is appropriately addressed to the civil courts in a contract or equity proceeding, rather than being addressed to the Commission in an application proceeding.

Finally, at the hearing, the ALJ mentioned the possibility of using an offset from the purchase price of the sale as a way of repaying St. Lawrence for any amounts that the Commission determines may be due to St. Lawrence from Exeter. Tr. 17-18. PAWC strongly opposes any such offset. St. Lawrence's claim is a private contractual matter that should be resolved by the civil courts. Moreover, a Commission order that offsets a portion of the purchase price to pay amounts allegedly owed to St. Lawrence could cause Exeter to withdraw from the Settlement in order to litigate its dispute with St. Lawrence in civil court.

The acquisition described in the Application should not be jeopardized by an unrelated issue. Instead, the acquisition (which affirmatively benefits the public in a substantial way) should be approved by an order adopting the Settlement without modification.

B. The Commission Should Find that it Lacks Jurisdiction over St. Lawrence's Debt Payment Issue

St. Lawrence contends that the Commission should order Exeter to re-pay some or all of the amounts that St. Lawrence paid to Exeter for debt service related to Exeter's wastewater treatment plant pursuant to a May 2003 Agreement. Tr. 45, 47-48. However, the Commission, as a creation of the General Assembly, has only the powers and authority granted to it by the General Assembly as contained in the Code. *Tod and Lisa Shedlosky v. Pa. Electric Co.*, Docket No. C-20066937 (Order entered May 28, 2008); *Feingold v. Bell Tel. Co. of Pa.*, 383 A.2d 791 (Pa. 1977).

The Commission must act within, and cannot exceed, its jurisdiction. *City of Pittsburgh v. Pa. Pub. Util. Comm'n*, 43 A.2d 348 (Pa Super. 1945).

The Code does not give the Commission jurisdiction to adjudicate private contractual disputes. See *Shafer v. Nat'l Util. Inc.*, 1996 Pa. PUC Lexis 57; *Consolidated Rail Corp. v. City of Harrisburg*, 577 Pa. 71, 842 A.2d 369 (2004). The Courts have held that the Commission lacks authority to interpret the terms and conditions of a utility's contract or to determine whether a breach of contract has occurred. See generally *Morrow v. The Bell Tel. Co. of Pa.*, 479 A.2d 548 (Pa. Super. 1984) (explaining that the courts retain jurisdiction of a suit for damages based on negligence or breach of contract wherein a utility's performance of its legally imposed and contractually adopted obligations are examined and applied to a given set of facts).

The Commission therefore lacks authority to review the May 2003 Agreement to determine whether that contract requires Exeter to re-pay all or some of St. Lawrence's debt service payments in the event Exeter's wastewater treatment plant is sold. Even if the Commission would have authority to review and interpret the contract, the Commission clearly lacks authority to grant the relief requested by St. Lawrence. Numerous cases have held that the Commission lacks authority to order a public utility to pay monetary damages. See *Byer v. Peoples Natural Gas Co.*, 380 A.2d 383 (Pa. Super. 1977) (holding that the Commission does not have the authority to award damages); *Feingold v. Bell of Pennsylvania*, 477 Pa. 1, 383 A.2d 791 (1977) (holding that the Commission does not have the authority to award damages); *DeFrancesco v. Western Pennsylvania Water Company*, 499 Pa. 374, 453 A.2d 595 (1982); *Elkin v. Bell of Pa.*, 491 Pa. 123, 420 A.2d 371 (1980).

In this regard, it should also be noted that, with respect to its dealings with St. Lawrence, Exeter is not a regulated public utility over which the Commission has jurisdiction. If the

Commission lacks authority to intermeddle in a contractual dispute between a regulated public utility and another entity and to order the payment of damages, it certainly lacks authority to intermeddle in a contractual dispute between two non-regulated entities and to order the payment of damages.

St. Lawrence's claims are properly addressed to the civil courts rather than the Commission. 42 Pa. C.S. § 931. The Commission should recognize that St. Lawrence must take its claims to that forum. St. Lawrence would not be put "out of court" if the Commission declines to get involved in a contractual dispute between Exeter and St. Lawrence. While St. Lawrence's specific claim in this proceeding is not well-defined, St. Lawrence appears to be requesting only monetary relief from Exeter – something that can be satisfied after closing on the Transaction and without the involvement of PAWC.

VI. CONCLUSION

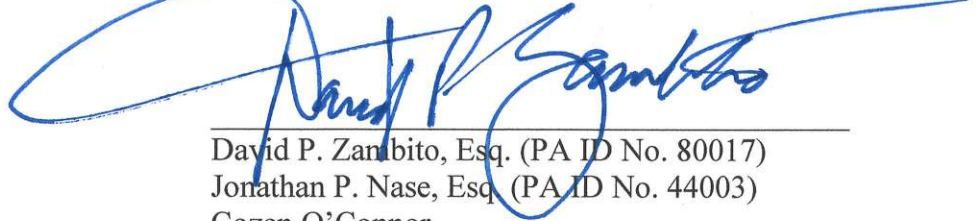
WHEREFORE, for all of the reasons stated above, as well as the reasons set forth in the Settlement and PAWC's Statement in Support of the Settlement, PAWC respectfully requests that Administrative Law Judge Andrew M. Calvelli and the Commission:

- (a) Approve the Settlement, without modification; and,

[Remainder of page intentionally left blank.]

(b) Find that the Commission lacks jurisdiction to adjudicate St. Lawrence's claim relating to its debt service payments to Exeter.

Respectfully submitted,



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