

COMMONWEALTH OF PENNSYLVANIA



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August 16, 2019

Rosemary Chiavetta, Secretary
Pennsylvania 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 Exceptions in the above-referenced proceeding.

Copies have been served per the attached Certificate of Service.

Respectfully submitted,

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Enclosures:

cc: Honorable Andrew M. Calvelli
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Certificate of Service
*277682

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 Exceptions, 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 16th day of August 2019.

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

EXCEPTIONS OF THE
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Dated: August 16, 2019

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I. INTRODUCTION

On August 9, 2019, Administrative Law Judge (ALJ) Andrew M. Calvelli issued a Recommended Decision recommending approval, without modification, of the Joint Petition for Partial Settlement (Joint Petition) filed on July 11, 2019 and entered into by Pennsylvania-American Water Company (PAWC), Exeter Township (Exeter), the Office of Consumer Advocate (OCA), and the Bureau of Investigation & Enforcement (I&E).

The OCA is not withdrawing from the Joint Petition. The OCA fully supports the ALJ's recommendation to approve the Joint Petition and respectfully submits these Exceptions for the limited purpose of clarifying the basis and bounds of the Joint Petition related to two specific material, contested issues. Therefore, the OCA files the following Exceptions pursuant to Section 5.533 of Commission's regulations. 52 Pa. Code § 5.533.

II. EXCEPTIONS

OCA Exception No. 1: The ALJ Adopts Facts Disputed by Some of the Joint Petitioners, Not Contained in the Joint Petition and Unnecessary for Approval of the Joint Petition.

The ALJ correctly noted that Commission policy promotes settlements, as settlements promote judicial efficiency by lessening the time and expense the parties must expend in litigation. R.D. at 25. As stated by the ALJ, the Commission has held that parties to settled cases are afforded flexibility in reaching amicable resolutions, so long as the settlement is in the public interest. *Id.* at 26 citing Pa. PUC v. MXenergy Electric Inc., Docket No. M-2012-2201861 (Opinion and Order entered Dec. 5, 2013). Importantly, the ALJ correctly stated that the focus of the inquiry for determining whether a proposed settlement should be recommended for approval is whether the proposed settlement terms and conditions are in the public interest. R.D. at 25-26.

The OCA supports the ALJ's recommendation to approve the Joint Petition without modification. The OCA submits, however, that certain findings made by the ALJ should not be adopted by the Commission. This is because the findings address material facts that were disputed by the parties.¹ The parties elected not to continue to litigate those material facts and, instead, chose to compromise their positions in order to reach a settlement. Moreover, the OCA submits that the findings at issue are not needed to determine whether the Settlement is in the public interest.

Relying on statements that were subject to opposing testimony undermines the Settlement and the basis for the resolution of the opposing positions through the Settlement. By resolving

¹ On page 7 of the Recommended Decision, the ALJ states that the Joint Petition contained proposed Findings of Fact and Conclusions of Law. To be clear, PAWC attached "PAWC's Proposed Findings of Fact" and "PAWC's Proposed Conclusions of Law" to its Statement in Support. Joint Petition, Att. B. The Joint Petitioners did not agree to PAWC's proposed findings of fact or conclusions of law.

the issues raised by the parties through settlement, the signatory parties have chosen to leave the record as it stands while establishing the substantive provisions of the Settlement as the provisions that must be judged to be in the public interest. It is not necessary, reasonable, or appropriate to use contested facts as Findings of Fact that are then used to support the determination that the Settlement is in the public interest.² The OCA is unable to address the evidence that it presented to rebut those contested facts because, as a signatory to the Joint Petition, it did not file a brief that would have provided legal argument regarding the contested facts.

As such and as discussed further below, the OCA respectfully requests that the following Findings of Fact Nos. 63 and 64 should not be adopted by the Commission.

Those Findings state as follows:

63. In the long-term, the Transaction will help PAWC keep rates reasonable for all of its customers. Through its expertise in wastewater management and the leveraging of economies of scale, PAWC will – over time – be able to improve efficiencies and lower or slow the increase in the cost of operating the System. PAWC St. No. 4 p. 9-10.

64. By adding additional connections to the entire PAWC system, there are more customers to share future infrastructure investment costs, which promotes stable rates across the entire PAWC system. Customers who benefit from near-term improvements will one day help pay for improvements on behalf of other customers on other parts of the PAWC system. Being able to spread the costs of investing in and maintaining public wastewater systems over a growing customers base, particularly in a time of increased environmental requirements, is essential to the continued success of wastewater systems and maintaining reasonable rates for customers.

R.D. at 17.

² The Commonwealth Court has previously noted that “Factual findings must be supported by substantial evidence, which is ‘such relevant evidence that a reasonable mind might accept as adequate to support a conclusion.’” HIKO Energy, LLC v. Pa. PUC, 163 A.3d 1079, 1124 (Pa. Cmwlth. 2017) citing Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania v. Pa. PUC, 120 A.3d 1087 (Pa. Cmwlth. 2015).

The OCA filed testimony containing compelling evidence to dispute these Findings. In response to PAWC's statement reflected in Finding of Fact 63, the OCA's expert witness directly challenged the general statement that the proposed acquisition would produce economies of scale because Ms. Everette found that the transaction resulted in increasing costs, not declining average costs.³ See OCA St. 1 at 19-20, 24-25; OCA St. 1S at 10-11. Finding of Fact 63, which relies on the alleged economies of scale as fact, goes beyond the scope of the Settlement. Some of the signatory parties disagreed whether there are economies of scale.

Similar to Finding of Fact 63, Finding of Fact 64 adopts PAWC's testimony and discusses economies of scale by stating that adding additional customers to PAWC helps spread the costs of investing in and maintaining public wastewater systems over a growing customer base, which is allegedly essential to maintaining reasonable rates in a time of increased environmental requirements. See R.D. at 17. The OCA disagreed with this statement in testimony. OCA St. 1 at 11, 24-25, 29; OCA St. 1S at 4-5, 10-11, 14-15. Moreover, in testimony, the OCA argued that the environmental deficits do not appear to be reflected in the appraisal valuations. OCA St. 1S at 5. In furtherance of Settlement, the OCA and PAWC put aside these factual disagreements. The Recommended Decision goes beyond the scope of the Joint Petition by re-introducing this issue and adopting PAWC's contested testimony as fact.

Findings of Fact 63 and 64 were incorporated into the ALJ's discussion as follows:

The settlement is also in the public interest because another affirmative public benefit of the transaction is rate stabilization and the establishment of reasonable

³ For example, OCA witness Everette testified as follows:

As stated in my direct testimony, economies of scale require declining average costs. Having more customers does not necessarily produce economies of scale. Having PAWC customers pay a portion of improvements to Exeter's wastewater system is not economies of scale.

OCA St. 1S at 10.

customer rates. Although the parties and members of the public recognize that the proposed transaction may in the near future result in an initial substantial increase of up to 80%, the transaction will have no immediate rate impact on PAWC's existing customers. PAWC St. No. 1 REV-A p. 17. Moreover, in the long-term, the Transaction will help PAWC keep rates reasonable for all of its customers. Through its expertise in wastewater management and the leveraging of economies of scale, PAWC will – over time – be able to improve efficiencies and lower or slow the increase in the cost of operating the System. PAWC St. No. 4 p. 9-10. By adding additional connections to the entire PAWC system, there are more customers to share future infrastructure investment costs, which promotes table rates across the entire PAWC system. Being able to spread the costs of investing in and maintaining public wastewater systems over a growing customer base, particularly in a time of increased environmental requirements, is essential to the continued success of wastewater systems and maintaining reasonable rates for customers. PAWC St. No. 1 REV-A p. 17.

R.D. at 49-50. If the case had proceeded to litigation, as opposed to settlement, the OCA would have briefed these issues. As noted above, the OCA filed testimony directly challenging this testimony. Instead of litigating these contested issues, the parties reached a resolution through a Settlement in which certain issues would be put aside in furtherance of compromise in order to agree upon a Settlement between the parties that would be in the public interest. As settlements allow flexibility in reaching amicable resolutions as long as the settlement is in the public interest, the Settlement purposefully did not address the above testimony by PAWC or the testimony by OCA on these issues. The focus of the inquiry for determining whether a proposed settlement should be recommended for approval is whether the proposed settlement terms and conditions are in the public interest. See R.D. at 25-26. The ALJ, however, went beyond the scope of the proposed Settlement terms and conditions by adopting PAWC's positions regarding contested issues. As such, the OCA submits that the Commission should not adopt Findings of Fact Nos. 63 and 64 and the portions of the ALJ's discussion incorporating those findings.

OCA Exception No. 2: Whether the March/April Customer Notice Was Adequate and Sufficient Is a Contested Issue That the Parties Did Not Resolve in Reaching the Proposed Settlement.

Relevant to the issue of notice provided to customers about the proposed acquisition of Exeter by PAWC, the Joint Petition provides:

18. 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.
42. The Joint Petitioners agree that PAWC shall mail the notice attached hereto as Attachment A to existing customers of Exeter notifying them of the settlement in this proceeding concurrently with the filing of this Joint Petition. The Joint Petitioners agree that such notice of settlement provides existing customers of Exeter with adequate notice and opportunity to be heard on this proposed Settlement.

These terms reflect the Joint Petitioners' agreement that (1) a notice was provided to existing PAWC and Exeter customers in March/April 2019 regarding the proposed acquisition and (2) a notice was provided to current Exeter customers on July 11, 2019 regarding the proposed Settlement.

The OCA submits that, in certain respects, the ALJ's discussion of customer notice is inconsistent with the terms of settlement reached by the parties. The OCA seeks to clarify the limitations of the proposed Joint Petition and the purpose and effect of the second customer notice.

First, regarding the first notice that was sent in March/April 2019, the ALJ states:

PAWC's notice of the Application to Exeter's existing customers and PAWC's existing water and wastewater customers sufficient to meet the requirements established by the Commission in *Implementation of Section 1329 of the Public Utility Code*, Docket no. M-2196-2543193 (Final Supplemental Implementation Order entered February 28, 2019) and by the Commonwealth Court of Pennsylvania in *McCloskey v. Pa. Pub. Util. Comm'n*, 1624 CD 2017 2017(Pa. Cmwlth. 2018), *appeal denied*, 207 A.2d 290 (Pa. 2019) (*New Garden*).

R.D. at 63. The OCA presented evidence that the first notice did not meet the requirements of *New Garden*.⁴ Specifically, the OCA presented testimony that the notices did not provide adequate information regarding the impact of the acquisition on the rates⁵ and did not provide the customers with the opportunity to request a public input hearing, among other issues.

Joint Petitioners agreed that the notice in Attachment A would provide existing customers of Exeter with adequate notice and opportunity to be heard on the proposed Settlement. The parties did not agree or stipulate that the first notice met the requirements of *New Garden*. The OCA submits that the ALJ did not need to make that conclusion, that there was no agreement among the Joint Petitioners and Conclusion of Law paragraph 24 should not be approved by the Commission.

Second, on page 52 of the Recommended Decision, with regard to the letters received from Exeter customers in response to the second notice, and specifically regarding those that raised the approximately 11 days to respond, the ALJ states:

I note that the Commission's Regulations and the Public Utility Code do not contain any particular notice requirement for a proposed acquisition once a

⁴ OCA St. 1 at 9-15.

⁵ Q. Given that PAWC's wastewater rates are different from Exeter's current wastewater rates, was it accurate to send Exeter customers a notice that indicates they will see the same \$2.79 per month increase as existing wastewater customers?

A. No. Besides the issues described above regarding which customers will be allocated costs of the Exeter acquisition, the \$2.79 is not calculated based on Exeter's existing rates. PAWC's response to OCA-I-59 shows that this increase was calculated based on a 4.3% increase to an existing PAWC Zone 1 wastewater bill. Furthermore, PAWC "intends to move the rates of the acquired customers to single tariff pricing" (OCA-I-25), and thus, the concept that PAWC will increase Exeter's rates only by the amount they increase existing customers' rates is misleading. If Exeter's rates were set in the next rate case to recover Exeter's full cost of service, the bill for an Exeter customer could be \$74.47, an increase of \$30.15. If Exeter's rates were set in the next rate case to PAWC's current Zone 1 rates, there would be an increase of \$20.60 per month to current Exeter bills.

OCA St. 1 at 12-13 (footnotes omitted).

settlement is reached. Therefore, rather than being provided with limited notice, the customers were provided with additional notice.

The OCA's concern is with the implication of the ALJ's statement that the March/April notice provided customers with adequate notice and an opportunity to be heard and that the July notice was "additional notice". The adequacy and sufficiency of the March/April notice was challenged by the OCA.⁶ In particular, the OCA challenged whether the notice provided accurate and adequate information regarding the impact of the acquisition on rates.⁷ Further, the notice did not inform customers that they could request a Public Input Hearing.⁸ The Joint Petition does not adopt or reject the OCA's position regarding the first notice. See Joint Petition ¶ 42. Rather, the proposed Joint Petition reflects a compromise of the parties' positions. Specifically, to address the OCA's concerns about the accuracy and adequacy of the March/April notice, the Joint Petition provided for a second notice to be sent to Exeter customers. Id. Given the procedural posture of the case and statutory deadline for disposition, the parties agreed the second notice would inform Exeter customers about the terms of the proposed Settlement and that, in a future rate case, rates for Exeter residential customers might increase by \$26.73 per month.⁹ Id., Attachment A.

In summary, the OCA seeks to clarify that there is no agreement that the first notice met the requirements of *New Garden*. In addition, the ALJ's statement regarding the "additional notice" provided by the July notice (R.D. at 52) should not be adopted by the Commission and

⁶ OCA St. 1 at 9-15.

⁷ Id.

⁸ 52 Pa. Code § 53.54; OCA St. 1 at 14.

⁹ Evidentiary hearings were held on June 28, 2019 and the second notice was mailed to Exeter customers on July 11, 2019. Customers were afforded until July 22, 2019 to respond. Attachment A. In order for the customers to provide evidence or testimony in response to the second notice, it would have been necessary to schedule a Public Input Hearing in the brief time before the ALJ issued his Recommended Decision on August 9, 2019.

are not needed to determine whether the Settlement is in the public interest. The OCA fully supports the ALJ's ultimate recommendation to approve the Joint Petition without modification.

III. CONCLUSION

The OCA respectfully requests that the Commission clarify, or refrain from adopting, certain aspects of the Recommended Decision, consistent with the foregoing Exceptions. With that qualification, the OCA supports the ALJ's recommendation to approve the Joint Petition for Settlement without modification.

Respectfully submitted,



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