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*Attorneys and Counsellors at Law*

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February 16, 2021

*Via Electronic Filing*

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

In re: Docket No. I-2016-2526085  
Section 529 Investigation of the Public Utility Commission – Delaware Sewer Company

Dear Secretary Chiavetta:

We are counsel to Delaware Sewer Company in the above matter and are submitting, via electronic filing with this letter, the Company's Reply to New Matter in the Answer and New Matter of Pennsylvania-American Water Company to the Petition of Delaware Sewer Company to Order Pennsylvania-American Water Company to Close Transaction by March 1, 2021. Copies of the Reply are being served upon the persons and in the manner set forth on the certificate of service attached to it.

Very truly yours,

THOMAS, NIESEN & THOMAS, LLC

By

Thomas T. Niesen

Encl.

cc: The Honorable Steven K. Haas (via email, w/encl.)  
Certificate of Service (via email, w/encl.)  
Scott F. Linde (via email, w/encl.)  
ra-OSA@pa.gov (via email, w/encl.)

**Before The  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**Investigation Instituted per Section 529** :  
**Into Whether the Commission Shall** : **Docket No. I-2016-2526085**  
**Order a Capable Public Utility to Acquire** :  
**Delaware Sewer Company** :

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**REPLY OF DELAWARE SEWER COMPANY TO NEW MATTER IN THE ANSWER  
AND NEW MATTER OF PENNSYLVANIA-AMERICAN WATER COMPANY  
TO THE PETITION OF DELAWARE SEWER COMPANY TO ORDER  
PENNSYLVANIA-AMERICAN WATER COMPANY TO  
CLOSE TRANSACTION BY MARCH 1, 2021**

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AND NOW, comes Delaware Sewer Company (“DSC” or “Company”), by its attorneys, and, pursuant to 52 Pa. Code Section 5.63, submits this Reply to New Matter in the Answer and New Matter of Pennsylvania-American Water Company (“PAWC”) to the Petition of DSC to Order PAWC to Close Transaction by March 1, 2021.<sup>1</sup> In support of its Reply, DSC submits as follows:

1. In “New Matter” to its Answer to the request of DSC asking the Public Utility Commission (“Commission”) to do no more than direct PAWC to close the purchase/sale of the DSC wastewater system by March 1, 2021, PAWC asks the Commission to order DSC to make an affiliated interest filing and, if DSC fails to do so, rescind its approval of the Settlement. In

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<sup>1</sup> Commission regulations explain that New Matter is an affirmative defense or a material fact that is not merely a denial of averments in a preceding pleading. PAWC’s request for a directive that DSC submit an affiliated interest filing is neither of the foregoing and, thus, its “New Matter” is not New Matter at all. Additionally, and significantly, this is not a complaint proceeding. New Matter is a pleading opportunity available in response to a complaint allowing a respondent to plead an affirmative defense to the complaint or a material fact which is not a *denial* of complaint averments. PAWC cites no Commission regulation as authority for the submission of its affiliated interest request as “New Matter” to a petition. DSC, accordingly, submits that PAWC’s New Matter should properly be summarily dismissed. DSC, however, desires to move the transaction to closing and, consequently, submits this reply to PAWC’s improper pleading of “New Matter” in its Answer to the DSC Petition.

support of its “New Matter,” PAWC incorporates the “Answer” section of its Answer and New Matter into its “New Matter.”

2. The Settlement, which was negotiated, not just by DSC and PAWC, but also by the Bureau of Investigation and Enforcement (“I&E”) and the Office of Consumer Advocate (“OCA”), was approved by the Commission by Tentative Opinion and Order entered April 29, 2019, Final Opinion and Order entered June 13, 2019 and Opinion and Order entered March 26, 2020.

3. An executed Land Transfer Agreement for the sale of a 140-acre parcel by Forest City Partnership, LLC (“FCP”) to PAWC, reserving to Grantor FCP mineral and related rights, was included with the Settlement negotiated by DSC, PAWC, I&E and OCA and approved by the Commission. A prior mineral rights deed between FCP and Linde NGS, Inc. (the “FCP-Linde Deed”), is identified by name and recorded deed book and page number in the Form of Land Indenture that is attached to and part of the executed Land Transfer Agreement.<sup>2</sup>

4. PAWC states that the transaction can close in two weeks but not until Linde NGS executes an eleventh-hour Surface Use Agreement with PAWC.<sup>3</sup> This proposed Agreement, which PAWC states is the “only thing standing in the way of closing,”<sup>4</sup> was not part of the negotiations resulting in the executed Land Transfer Agreement for the purchase/sale of the 140 acres and was not part of the Settlement submitted to the Commission or approved by it. PAWC, in fact, acknowledges that, with the proposed Surface Use Agreement, it is “attempting to negotiate a new agreement ...”<sup>5</sup>

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<sup>2</sup> The executed Land Transfer Agreement with the Form of Land Indenture is attached as Appendix A to DSC’s Petition. The FCP-Linde Deed is attached as Exhibit 1 to PAWC’s Answer and New Matter.

<sup>3</sup> DSC included the proposed Surface Use Agreement as Appendix B to its Petition.

<sup>4</sup> PAWC Answer and New Matter at 12.

<sup>5</sup> PAWC Answer and New Matter at 4.

5. PAWC contends that the Surface Use Agreement is needed because of a “discrepancy between the Form of Land Indenture and FCP-Linde Deed”<sup>6</sup> and that PAWC only became aware of the discrepancy when it, “again,”<sup>7</sup> reviewed documents for title insurance purposes.<sup>8</sup> It contends that this is a “complex” transaction.<sup>9</sup>

6. There is, however, nothing at all “complex” about either this dispute or the alleged “discrepancy.” What is at controversy are the reservation paragraphs in two deeds. PAWC offers no explanation why the alleged “discrepancy,” which is apparently so very troubling now, was not troubling two and a half years ago when the Land Transfer Agreement, with the Form of Land Indenture, was negotiated and signed.

7. Irrespective of the foregoing and with the hope of producing a successful resolution of this sole impediment to closing as PAWC also states that it is attempting to do,<sup>10</sup> DSC, however, is willing to address the “discrepancy” and PAWC’s concerns with the surface use of the 140 acres. With the following edits to Paragraph 2.a of PAWC’s proposed Surface Use Agreement, DSC will produce the executed Surface Use Agreement at closing:

4th Line - Add after written consent of PAWC, "which shall not be unreasonably withheld, delayed or conditioned."

7th Line - Add after PAWC, "which shall not be unreasonably withheld, delayed or conditioned."<sup>11</sup>

8. DSC submits that the foregoing edits are reasonable. It is possible and, indeed, likely, that PAWC’s use of the surface for utility purposes can coexist with the mineral rights ownership of Linde NGS.<sup>12</sup> Even with DSC’s suggested modifications to the proposed Surface

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<sup>6</sup> PAWC Answer and New Matter at 14.

<sup>7</sup> PAWC Answer and New Matter at 14.

<sup>8</sup> PAWC Answer and New Matter at 14.

<sup>9</sup> PAWC Answer and New Matter at 14.

<sup>10</sup> PAW answer and New Matter at 6.

<sup>11</sup> PAWC’s proposed Surface Use Agreement with the proposed edits “redlined” is attached as Appendix A.

<sup>12</sup> DSC disagrees with PAWC concern with “extensive” Marcellus Shale operations. *See* PAWC Answer and

Use Agreement, PAWC would continue to have the right, as PAWC has proposed, to refuse consent to Linde NGS for proposed mineral right usage *provided* PAWC is not acting “unreasonably.” The foregoing edits would accomplish the objective of a successful conclusion of the discrepancy and do so with commonly acceptable commercial language. When the modifications are accepted, closing could occur within two weeks.

9. While DSC is hopeful of a negotiated resolution based on the foregoing, absent such resolution, PAWC’s “New Matter” request for a affiliated interest directive should be denied. In support of its “New Matter,” PAWC claims that the FCP-Linde Deed is part of “a single common scheme” involving (1) DSC’s sale of its wastewater system for \$61,700; (2) FCP’s sale of 140 acres for \$420,000; and (3) FCP’s retention of “potentially lucrative” mineral rights by conveying those rights to Linde NGS for \$1,000.<sup>13</sup> The request is fatally defective because neither FCP nor Linde NGS is a public utility.

10. Moreover, each of the parts of what PAWC now characterizes as “a single common scheme” was known to PAWC and each of the parties to the Settlement prior to the submission of the Settlement to the Commission. The executed Settlement included the executed Land Transfer Agreement, the Form of Land Indenture and reference to the recorded FCP-Linde Deed. Transparency was absolute. There was nothing secretive about any of the documents that PAWC now asks the Commission to investigate. If there were an affiliated interest issue with the Land Transfer Agreement and Form of Land Indenture, it was resolved through Commission

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New Matter at 6 and 7. The existence of Marcellus Shale activity at the 140-acre tract is uncertain. PAWC’s use of the surface for the existing 39 customers only requires a small part of the existing tract. PAWC’s Plan for Improvements discusses future growth. “From discussions with Delaware Township,” PAWC does “not anticipate a sustainable growth of more than an average of 2 to 3 homes per year, resulting in a 20 year growth projections of an additional 40 to 60 homes.” PAWC Plan for Improvements at 3. Thereafter, beyond the 20 year projection, Phase 2 expansion of the wastewater system is uncertain. “The exact number of new homes that Phase 2 would be capable of serving is uncertain and dependent upon details of the soils, groundwater and overall permitting process, which are also uncertain.” PAWC Plan for Improvements at 4.

<sup>13</sup> PAWC Answer and New Matter ¶20.

action approving the Settlement, which all the Joint Petitioners, including PAWC, asked the Commission to do.<sup>14</sup>

11. In further response to the “New Matter,” DSC submits, first, that DSC is not asking the Commission to amend or reconsider an order.<sup>15</sup> Absent the resolution proposed above, DSC is asking the Commission to order PAWC to close the transaction without the creation of any new documents – specifically without its eleventh-hour Surface Use Agreement. It is, rather, PAWC that is attempting, by insisting upon an “additional agreement,”<sup>16</sup> to amend, reconsider and, thereby, avoid a clear Commission Order.<sup>17</sup>

12. Second, although PAWC contends that the modifications to the Settlement approved by the Commission were not material to its effort to require an additional agreement to close the transaction,<sup>18</sup> it is noteworthy that the Commission’s modifications gave PAWC enhanced recovery of the cost of improving the DSC system. The OCA opposed those modifications, initially, through comments to the Tentative Opinion and Order approving the Settlement and, subsequently, through a petition asking the Commission to reconsider its Final Opinion and Order. The resolution of the cost recovery dispute, ultimately resolved in PAWC’s favor in the Opinion and Order entered March 26, 2020, took almost a full year. Eleven months have now passed since that Order and still the transaction has not closed.

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<sup>14</sup> Notably, in further regard to settled resolution of any affiliated interest issue is the further fact that the Settlement approved by the Commission also included the request of DSC/PAWC/I&E/OCA that the Commission issue any other certificates or approvals necessary under the Code to consummate the transaction. *See* Joint Petition for Settlement, Section D, ¶28 at 9.

<sup>15</sup> PAWC Answer and New Matter at 1-3 and 9-10. PAWC criticizes DSC for not addressing the *Duick* standards for reconsideration. As DSC is not asking the Commission to reconsider its prior Order but rather is asking the Commission to enforce the Order, there was no need for DSC to address the *Duick* standards in its Petition.

<sup>16</sup> PAWC Answer and New Matter at 4.

<sup>17</sup> As the Commission has already addressed and approved the Settlement and APA, it is wide of the mark for PAWC to contend that a Commission directive ordering the transaction to proceed to closing would trample on PAWC’s management discretion. *See* PAWC Answer and New Matter at 7. The Settlement and the Commission’s approval of it does not allow PAWC to unilaterally delay closing.

<sup>18</sup> PAWC Answer and New Matter at 2, footnote 2.

13. DSC initiated Section 529 acquisition of its system through its Petition filed in February 2014. It has continued to support its Petition since its filing. Now, seven years later, although the Commission has approved a Settlement that included an APA for the sale of the DSC system, the matter has yet to be concluded and the effect of PAWC's "New Matter" will be to only delay the final resolution of this matter still further. DSC emphasizes the following PAWC contentions in that regard:

- "PAWC has now raised new matter, to which the other parties to this proceeding must be given an opportunity to respond;"<sup>19</sup>
- "There is clearly a material factual dispute between the parties regarding the necessity for the Surface Use Agreement and, accordingly, a remand and evidentiary hearings would be appropriate;"<sup>20</sup>
- "Finally, in the event that the Commission decides to grant the Petition (which it should not), PAWC respectfully submits that the Commission must do so in a Tentative Order ... [giving] the parties an opportunity to withdraw from the Settlement. If no party withdraws from the Settlement, the Commission can enter a Final Order granting the Petition;"<sup>21</sup>

14. In sum, DSC submits that there is no legal or factual basis for the Commission to direct DSC to make an affiliated interest filing. The Commission has already considered and approved the documents that PAWC cites as the bases for its request and done so as part of a settlement petition presented to the Commission by DSC/PAWC/I&E/OCA. Lacking any support, PAWC's "New Matter" should be viewed as an effort to further delay the final closing of this matter. That effort should be denied.

WHEREFORE Delaware Sewer Company requests that the Pennsylvania Public Utility Commission deny the "New Matter" request of Pennsylvania-American Water Company to direct Delaware Sewer Company to file an affiliated interest agreement and grant the Petition of

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<sup>19</sup> Answer and New Matter at 7.

<sup>20</sup> Answer and New Matter at 8.

<sup>21</sup> Answer and New Matter at 8.

Delaware Sewer Company to Order Pennsylvania-American Water Company to Close the Transaction by March 1, 2021.

Respectfully submitted,

By  \_\_\_\_\_

Thomas T. Niesen, Esquire  
PA Attorney ID No. 31379  
THOMAS, NIESEN & THOMAS, LLC  
212 Locust Street, Suite 302  
Harrisburg, PA 17101

Attorneys for Delaware Sewer Company

Date: February 16, 2021



**APPENDIX A  
SURFACE USE AGREEMENT  
WITH PROPOSED REDLINED EDITS**

THIS INSTRUMENT PREPARED BY,  
AND PLEASE RETURN TO:

K&L Gates LLP  
210 Sixth Avenue  
Pittsburgh, PA 15222  
Attn: Pierce Richardson

**SURFACE USE AGREEMENT**

This SURFACE USE AGREEMENT (this “**Agreement**”) is dated as of \_\_\_\_\_, 2020, but shall be effective as of \_\_\_\_\_, 2020, by and among PENNSYLVANIA-AMERICAN WATER COMPANY, a Pennsylvania corporation (“**PAWC**”), and LINDE NGS, INC., a Pennsylvania corporation (the “**Mineral Holder**”) and FOREST CITY PARTNERSHIP, LLC, a Pennsylvania limited liability company (“**Forest City Partnership**”).

**RECITALS:**

A. Prior to the recording of this Agreement in the Pike County Recorder of Deeds’ Office (the “**Recorder’s Office**”), PAWC acquired from Forest City Partnership by Special Warranty Deed dated on even date herewith, a parcel of real estate located in Delaware Township, Pike County, Pennsylvania, as more particularly described on Exhibit A attached hereto and made a part hereof (the “**Property**”), which PAWC intends to use for the provision of wastewater service to the public (the “**Intended Use**”);

B. Prior to PAWC’s acquisition of the Property from the Forest City Partnership, Forest City Partnership granted to Mineral Holder all of Forest City Partnership’s interest in and to all of the oil, gas, natural gas, petroleum or other products, including all carbon-related and hydrocarbon products, and other minerals in and under, and that may be produced from, the Property by Deed Conveying Mineral Rights recorded in the Recorder’s Office at Deed Book Volume 2551, Page 1953 (Instrument No. 201900004177) (the “**Mineral Deed**”);

C. The Mineral Deed contains provisions regarding the rights of Mineral Holder, its successors and assigns, to make use of the surface of the Property (“**Deed Surface Use Provisions**”);

D. In connection with PAWC’s acquisition of the Property and the Intended Use, PAWC has requested that Mineral Holder agree to restrictions on its rights to use the surface of the Property in connection with the exploration, production and/or mining of oil, gas, coal and other minerals in, on and under the Property that will supersede and replace the Deed Surface

Use Provisions, and the Mineral Holder has agreed to accept such restrictions on the terms and conditions set forth herein; and

E. Forest City Partnership desires to join in this Agreement to evidence its consent to the replacement of the Deed Surface Use Provisions and the provisions of this Agreement for the benefit of PAWC.

**NOW, THEREFORE**, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, and intending to be legally bound hereby, agrees as follows:

1. Recitals. The above recitals are incorporated by reference in this Agreement.

2. Surface Use Agreement.

a. Mineral Holder, on behalf of itself and its successors and assigns, hereby covenants and agrees that neither Mineral Holder nor its successors and assigns shall disturb the surface of the Property in a way which would interfere with the Intended Use of the Property, without the written consent of PAWC, which shall not be unreasonably withheld, delayed or conditioned. The construction of any well pad or other related surface improvements for the extraction of subsurface minerals by Mineral Holder, its successors and assigns, is prohibited unless approved in writing by PAWC, which shall not be unreasonably withheld, delayed or conditioned. Surface access to Mineral Holder, including, without limitation, Mineral Holder's successors and assigns, shall be limited to access that is necessary to traverse the Property, at a future location, which shall be mutually agreeable to PAWC and Mineral Holder. PAWC shall not unreasonably withhold, delay or condition Mineral Holder's access to the Property.

b. Nothing herein contained shall be construed to prevent Mineral Holder or its successors and assigns, including mineral lessees, from developing or producing the oil, gas or other minerals in and under the Property by pooling, unitization or by slant, directional or horizontal drilling under the Property from well sites located on tracts other than the Property so long as there is no surface use of the Property or risk of subsidence of the surface of the Property.

3. Binding Effect. This Agreement is executed for the benefit of PAWC and its successors and assigns and shall be binding upon the Mineral Holder's heirs, legal representatives, successors and assigns. The covenants and agreements set forth herein are covenants running with the land, which touch and concern the Property, the mineral estates of the Property, and the owners of any interests therein and supersede and replace in their entirety the Deed Surface Use Provisions, which shall have no further force and effect.

4. Representation. Mineral Holder represents and warrants that it has not granted or assigned to any other party any rights to use the surface of the Property or any part thereof in connection with any oil, gas or mineral investigation, operations, exploration or development. Forest City Partnership represents and warrants that it has not granted or assigned to any other party any rights to use the surface of the Property or any part thereof in connection with any oil, gas or mineral investigation, operations, exploration or development.

5. Headings. Titles and headings in this Agreement are for convenience only and shall not affect the construction of any provision of this Agreement.

6. Counterparts. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

7. Governing Law. This Agreement shall be governed by the laws of the Commonwealth of Pennsylvania, without regard to its conflicts of law provisions.

8. Recordation. The parties acknowledge and agree that this Agreement will be recorded in the Recorder's Office at the cost and expense of PAWC.

*[Signature page follows]*

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date set forth above.

**PAWC:**

PENNSYLVANIA-AMERICAN WATER  
COMPANY, a Pennsylvania corporation

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

**FOREST CITY PARTNERSHIP:**

FOREST CITY PARTNERSHIP, LLC, a  
Pennsylvania limited liability company

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

**MINERAL HOLDER:**

LINDE NGS, INC., a Pennsylvania corporation

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

*[Acknowledgements on following page]*



**MINERAL HOLDER:**

COMMONWEALTH OF PENNSYLVANIA )  
 ) ss:  
COUNTY OF \_\_\_\_\_ )

On this the \_\_\_\_ day of \_\_\_\_\_, 2020, before me, the undersigned officer, a Notary Public, personally appeared \_\_\_\_\_, who acknowledged himself/herself to be the \_\_\_\_\_ of LINDE NGS, INC., a Pennsylvania corporation, and that he/she as such officer, being authorized to do so, executed the foregoing instrument for the purposes therein contained by signing the name of the corporation by himself/herself as such officer.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal.

\_\_\_\_\_  
Notary Public

My Commission Expires:

## **EXHIBIT A**

### **Legal Description of the Property**

ALL that certain tract, piece or parcel of land situate in Delaware Township, Pike County, Pennsylvania, bounded and described as follows:

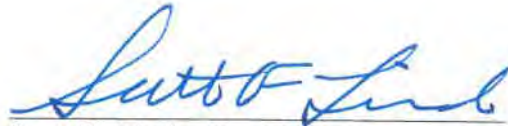
BEGINNING at the most westerly corner of the Thomas Camey warrantee, on line of the Isabella Mease warrantee, also a corner of the Elizabeth Ingram warrantee; thence along said Isabella Mease warrantee, now or formerly of the Mink Pond Club, North 31 degrees East 1,155 feet, more or less, to a corner; thence through the aforementioned Thomas Camey warrantee, of which this tract was formerly a part, South 70 degrees East 5,280 feet more or less to a corner on line of the Hannah Carney warrantee; thence along said Hannah Carney warrantee South 31 degrees West 1,155 feet more or less to a corner; thence along the aforementioned Elizabeth Ingram warrantee, now or formerly of the Mink Pond Club, North 70 degrees West 5,280 feet, more or less, to the place of BEGINNING.

CONTAINING 140 acres, more or less.



## VERIFICATION

I, Scott F. Linde, President of Delaware Sewer Company, hereby state that the facts set forth in the foregoing Reply of Delaware Sewer Company to New Matter in the Answer and New Matter of Pennsylvania-American Water Company to the Petition of Delaware Sewer Company to Order Pennsylvania-American Water Company to Close the Transaction by March 1, 2021 are true and correct to the best of my knowledge, information and belief and that I expect Delaware Sewer Company to be able to prove the same at a hearing held in this matter. I understand that the statements herein are made subject to the penalties of 18 Pa. C.S. § 4904 (relating to unsworn falsification to authorities).



Scott F. Linde, President  
Delaware Sewer Company

Dated: *February 16, 2021*

**Before the  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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**Administrative Law Judge  
Steven K. Haas, Presiding**

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**Investigation Instituted Into Whether the : Docket No. I-2016-2526085  
Public Utility Commission Should Order A :  
Capable Public Utility to Acquire :  
Delaware Sewer Company Pursuant to :  
Section 529 :**

**CERTIFICATE OF SERVICE**

I hereby certify that I have this 16<sup>th</sup> day of February, 2021, served a true and correct copy of the foregoing Reply to New Matter in the Answer and New Matter of Pennsylvania-American Water Company to the Petition of DSC to Order PAWC to Close Transaction by March 1, 2021, upon the persons and in the manner indicated below:

**VIA ELECTRONIC MAIL**

The Honorable Steven K. Haas  
Administrative Law Judge  
Pennsylvania Public Utility Commission  
Post Office Box 3265  
Harrisburg, PA 17105-3265  
sthaas@pa.gov

Scott B. Granger, Prosecutor  
Allison Kaster, Prosecutor  
Pennsylvania Public Utility Commission  
Bureau of Investigation & Enforcement  
Post Office Box 3265  
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akaster@pa.gov

Christine M. Hoover, Esquire  
Erin L. Gannon, Esquire  
Lauren M. Burge, Esquire  
Office of Consumer Advocate  
555 Walnut Street  
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Alexander Stahl, Esquire  
Aqua Pennsylvania Wastewater, Inc.  
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Bryn Mawr, PA 19010  
astahl@aquaamerica.com

Susan Simms Marsh, Esquire  
Elizabeth Triscari, Esquire  
Pennsylvania American Water Company  
susan.marsh@amwater.com  
Elizabeth.Triscari@amwater.com

A handwritten signature in blue ink, appearing to read "Thomas T. Niesen", is written over a horizontal line.

Thomas T. Niesen  
PA ID No. 31379