

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Valuation of Acquired Municipal Water &  
Wastewater Systems - Act 12 of 2016  
Tentative Supplemental Implementation  
Order Section

Docket No.: M-2016-2543193

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**COMMENTS OF TOWAMENCIN TOWNSHIP  
TO THE  
FEBRUARY 7, 2024 TENTATIVE SUPPLEMENTAL IMPLEMENTATION ORDER**

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**I. INTRODUCTION AND BACKGROUND**

The Township of Towamencin (the “Township”) is a Home Rule Charter Municipality (as of May 16, 2023) located in Montgomery County, Pennsylvania, approximately 28 miles north of the City of Philadelphia. The Township is governed by a Board of Supervisors and a Township Manager appointed by the Board of Supervisors. There are approximately 18,009 residents in the Township (based on the 2020 U.S. Census). The Township is approximately 9.68 square miles. According to the 2020 American Community Survey by the U.S. Bureau of the Census, the Township’s median household income is \$66,736.

The Township owns, operates, and maintains a sanitary wastewater collection and conveyance system (the “Collection System”) and the Towamencin Township Wastewater Treatment Plant (the “Plant,” and together with the Collection System, the “System”). Along with the residents of the Township, a total of six municipalities contribute to the flow treated at the Plant, including Worcester Township, Lower Salford Township, Franconia Township, the Borough of Lansdale, Upper Gwynedd Township, and Hatfield Township (the “Contributing Municipalities”). The Township does not own any of the collection and conveyance sewers of the

Contributing Municipalities. The Collection System includes approximately 79.5 square miles of pipe. The Plant has a hydraulic design capacity of 6.5 million gallons per day.

After extensive considerations and discussions with Township leadership, staff, and citizens, the Township decided to pursue the sale of the System. The Township conducted a thorough internal review and solicited outside experts to review the System, while taking into account future costs and the potential liabilities of managing the System.

The Township conducted an evaluation to determine both qualitative and quantitative factors in reference to selling or maintaining ownership of the System. The decision to sell resulted from the following considerations.

First, the Township wanted to exit the business of providing sanitary water service and instead focus on its core governmental functions while still ensuring that its residents would have safe, reliable service at affordable rates. Second, the Township wanted to generate revenue that would help secure the Township's financial stability in the coming years. Third, the Township desired to avoid the increasingly complex environmental challenges of operating the System.

After the Board of Supervisors decided to pursue the sale of the System, the Township issued a Request for Qualifications to select a pool of qualified buyers on February 12, 2021. Five bidders were pre-qualified during this process. The Township then issued a Request for Bids due February 11, 2022. Once the Township reviewed the responses, it determined that NextEra Water Pennsylvania, LLC ("NextEra") submitted a bid that was in the best interests of, and provided the greatest value to, the Township and its residents. The Township considered all bids on what presented the best overall package, inclusive of all qualitative and quantitative aspects of the bids.

On May 25, 2022, the Township held multiple public meetings to receive input from residents on the state of the System and the advantages and disadvantages of the potential sale. The duly elected members of the Board of Supervisors then decided that the sale of the System

was in the best interests of the Township. Accordingly, the Board of Supervisors voted to authorize the Township's solicitor prepare an ordinance accepting NextEra's bid. The Township and NextEra executed the APA dated as of June 14, 2022.

However, several months after the execution of the APA, NextEra withdrew from the wastewater business and sold its Pennsylvania assets to Pennsylvania-American Water Company ("PAWC"). Consequently, NextEra and the Township entered into the First Amendment of the APA dated March 23, 2023. Then the Township, NextEra, and PAWC executed an Assignment and Assumption Agreement assigning NextEra's rights and obligations under the APA to PAWC effective as of March 23, 2023.

On May 16, 2023, PAWC filed a Section 1329 Application with the PUC seeking all necessary PUC approvals of the transactions contemplated by the APA. *See* PUC Docket No. A-2023-3039900. Although the Application has not yet even been conditionally accepted for filing, the Office of Consumer Advocate and the Office of Small Business Advocate have issued extensive discovery requests to PAWC. Further, the Bureau of Technical Utility Services has issued extensive data requests related to PAWC's Application. PAWC and the Township have incurred countless hours at significant cost to complete this process, and they continue to work diligently and extensively on the application and subsequent requests.

## **II. LEGISLATIVE INTENT OF SECTION 1329**

On April 14, 2016, Governor Tom Wolf signed into law Act 12 of 2016, which amended Chapter 13 of the Pennsylvania Utility Code by adding Section 1329 to the Code. Section 1329 became effective on June 13, 2016.

Section 1329 addresses the valuation of the assets of municipally or authority-owned water and wastewater systems that are acquired by investor-owned water and wastewater utilities or entities. Importantly, the legislative history of Section 1329 reflects a determination by the

Pennsylvania General Assembly that fair-market-value acquisitions of municipal wastewater systems further the public interest.

The sale of wastewater systems owned by municipal corporations to an investor-owned public utility helps facilitate necessary infrastructure improvements and ensures the continued provision of safe, reliable service to customers at reasonable rates. *Implementation of Section 1329 of the Public Utility Code – Tentative Implementation Order*, Docket No. M-2016-2543193, at 2 (Pa. P.U.C. July 21, 2016). Further, the Commission has relied upon the Pennsylvania General Assembly’s determination that acquisitions of municipal wastewater systems under Section 1329 further the public interest in decisions. *See, e.g., Application of Aqua Pennsylvania Wastewater, Inc.*, Docket No. A-2021-3026132, 2022 WL 3138913 (Pa.P.U.C.) at \*22 (July 29, 2022).

### **III. REASONABLENESS REVIEW RATIO**

On February 7, 2024, the Pennsylvania Public Utility Commission (the “PUC”) published the Tentative Supplemental Implementation Order (the “TSIO”) which provides for changes to be made to the process of reviewing Section 1329 applications. *See Implementation of Section 1329 of the Public Utility Code – Tentative Supplemental Implementation Order*, Docket No. M-2016-2543193 (Pa. P.U.C. Feb. 7, 2024). Among other changes, the PUC proposed to introduce the Reasonableness Review Ratio as a “guidepost that the [PUC] can use when it analyzes and eventually makes a final determination on the overall prudence of various Section 1329 applications.” *Id.* at \*6. The PUC would publish the Reasonableness Review Ratio annually based on various data points to determine the ratio of the fair market value of water and wastewater systems to the depreciated original cost of a barometer group of similar situated investor-owned water utility companies. The Township believes that this significant change to the process of evaluating Section 1329 applications is beyond the power of the PUC to effectuate through a TSIO.

The Supreme Court of Pennsylvania explained the difference between a general statement of policy and policies that have the force of law:

An agency may establish binding policy through rulemaking procedures by which it promulgates substantive rules, or through adjudications which constitute binding precedents. A general statement of policy is the outcomes of neither a rulemaking nor an adjudication; it is neither a rule nor a precedent but is merely an announcement to the public of the policy which the agency hopes to implement in future rulemakings or adjudications.

...

The critical distinction between a substantive rule and a general statement of policy is the practical effect that these two types of pronouncements have in subsequent administrative proceedings. A properly adopted substantive rule established a standard of conduct which has the force of law. The underlying policy embodied in the rule is not generally subject to challenge before the agency.

A general statement of policy, on the other hand, does not establish a “binding norm.” A policy statement announces the agency’s tentative intentions for the future. When the agency applies the policy in a particular situation, it must be prepared to support the policy just as if the policy statement had never been issued.

*Pennsylvania Human Relations Commission v. Norristown Area School District*, 374 A.2d 671, 679 (Pa. 1977) (quoting *Pac. Gas & Elec. Co. v. FPC*, 506 F.2d 33, 41 (D.C. Cir. 1974) (cleaned up); see also *Hardiman v. Commonwealth, Department of Public Welfare*, 550 A.2d 590, 596 (Pa. Cmwlth. 1988) (“Our Supreme Court has established that an agency must have a properly promulgated regulation before it may implement a rule or policy having a substantive effect) (emphasis added).

The TSIO does not constitute a general statement of policy. The TSIO, as drafted, proposes the PUC publish a Reasonableness Review Ratio as a guidepost for the PUC to use when analyzing and making a determination on the overall prudence on Section 1329 applications. This would have a substantive effect on how Section 1329 applications are processed, as the PUC would be taking a factor into consideration that is not currently provided by Section 1329. The TSIO does not merely announce the PUC’s intentions for the future. The TSIO seeks to establish a binding norm that changes how Section 1329 applications will be processed in the future.

Further, the PUC is a creature of statute, having been created by the Public Utility Law. As such, the PUC “has only those powers which are expressly conferred upon it by the Legislature and those powers which arise by necessary implication.” *Feingold v. Bell Tel. Co. of Pennsylvania*, 477 Pa. 1, 7 (1977). The legislative grant of power to act in any particular case must be clear. *PECO Energy Co. v. Pennsylvania Pub. Util. Comm’n*, 568 Pa. 39, 46 (2002). Courts rely on the meaning or intention of the Pennsylvania General Assembly to ensure the reach of an agency’s power. *Id.* at 47.

Here, the intention of the General Assembly is clear, as the PUC itself has recognized. Section 1329 encompasses a noted preference for acquisitions of municipally-owned water and wastewater systems by investor-owned public utilities. This legislative history must be taken into account when considering the reach of the TSIO, which runs against the preference for acquisitions like PAWC’s acquisition of the System. The PUC cannot, without further directive from the General Assembly, exercise its power when that power was clearly not conferred upon it by the General Assembly. It is undeniable that the General Assembly would not expressly confer or necessarily imply that the PUC holds the power to act against its stated preference for acquisitions of water and wastewater systems.

For the foregoing reasons, the Township opposes implementation of the TSIO and, in particular, the Reasonableness Review Ratio.

#### **IV. RETROACTIVITY**

Under Pennsylvania and United States constitutional law, the TSIO cannot apply retroactively to contracts entered into prior to the TSIO’s passage, including the APA between the Township and PAWC.

Both the Pennsylvania and United States Constitutions prohibit *ex post facto* laws that impair the obligations of existing contracts. *See* Pa. Const. art. I, § 17; U.S. Const. art. I, § 10. *See*

also *Workers' Comp. Judges Prof'l Ass'n v. Exec. Bd. of Commonwealth*, 39 A.3d 486, 493 (Pa. Commw. 2012), *aff'd*, 66 A.3d 765 (Pa. 2013). A violation of the Contracts Clause is demonstrated where a change in state law would effect a substantial impairment of a contractual relationship. Thus, Contract Clause analysis requires three inquiries: (1) whether there is a contractual relationship; (2) whether a change in a law has impaired that contractual relationship; and (3) whether the impairment is substantial. *Corman v. Nat'l Collegiate Athletic Ass'n*, 74 A.3d 1149, 1170 (Pa. Commw. 2013). Here, there is no doubt that a contract exists between the Township and PAWC. Further, there is no doubt that the TSIO represents a change in the law that would impair that contractual relationship, since the TSIO would add requirements to Section 1329 that did not exist when the APA was signed. Finally, there is no doubt that the impairment of the APA is substantial considering the Reasonableness Review Ratio changes the existing law and valuation of water and wastewater systems under Section 1329, significantly limited the purchase price of the systems.

If a state regulation constitutes a substantial impairment, to survive a challenge under the Contracts Clause, the State, in justification, may argue that it had a significant and legitimate *public purpose* behind the regulation, for example, if the intent behind the governmental action was to remedy a broad and general social or economic problem. *EnergyCare, Inc. v. Millcreek Twp.*, 68 A.3d 1, 4–5 (Pa. Commw. 2013). Therefore, in order to properly make a decision on such a proffered justification, a court would need to determine whether or not the TSIO, and its *ex post facto* prohibition on a sewer system sale, meets that public interest-driven test.

As stated *supra*, there is a recognized public interest *supporting* the sale of water and wastewater systems from a municipality, such as the Township, to an investor-owned public utility, such as PAWC. This is especially true considering the realities of the sale of the System.

The sale of the System to PAWC will “facilitate necessary infrastructure improvements and ensure the continued provision of safe, reliable service to customers at reasonable rates.” *Implementation of Section 1329 of the Public Utility Code – Tentative Implementation Order*, Docket No. M-2016-2543193, at 2 (Pa. P.U.C. July 21, 2016). Further, sale of the System to a “larger, well-capitalized and well-run regulated public utility [such as PAWC] can be prudent because it can facilitate necessary infrastructure improvements and access to capital markets, and, ultimately, it can ensure the long-term provision of safe, reliable service to customers at reasonable rates.” *Implementation of Section 1329 of the Public Utility Code – Tentative Supplemental Implementation Order*, Docket No. M-2016-2543193, at 4 (Pa. P.U.C. August 20, 2018).

To approve the TSIO as written and impair the APA between the Township and PAWC, a court must determine that there exists a significant and legitimate public purpose behind this change while recognizing the significant and public purpose behind Section 1329 supporting the sale of the System. The Township strongly encourages the PUC to effectuate the original significant and legitimate public purpose espoused by the Pennsylvania General Assembly when it passed Section 1329 in support of the sale of water and wastewater systems from municipalities to investor-owned public utilities. Furthermore, and in the alternative, where purchase agreements have been executed by municipalities and regulated utilities prior to the TSIO and, in particular, where substantial time and money have been spent towards a 1329 application to the PUC, the PUC should establish a non-retroactive rule based on such grandfather status. To do otherwise, would be terribly unfair to all parties that, in good faith, relied upon the law as it was written.

## **V. CONCLUSION**

For the foregoing reasons, the Township does not support the passage of the TSIO.