



May 17, 2019

VIA E-FILE

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Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street, 2nd Floor North  
Harrisburg, PA 17120

**Re: Pennsylvania Public Utility Commission, Bureau of Investigation and Enforcement  
v. Winola Water Company; Docket Nos. P-2018-3006216, C-2018-2644592 and I-  
2018-3006498**

**PETITION OF PENNSYLVANIA-AMERICAN WATER COMPANY FOR  
RECONSIDERATION OF STAFF ACTIONS**

Dear Secretary Chiavetta:

Enclosed for filing with the Commission is Pennsylvania-American Water Company's Petition for Reconsideration of Staff Actions. Copies of the Petition are being served on the Presiding Officer, Deputy Chief Administrative Law Judge Joel H. Cheskis, and on all parties to the above-referenced proceedings, as indicated on the enclosed 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 Joel H. Cheskis  
Per Certificate of Service  
Elizabeth R. Triscari, Esquire  
ra-osa@pa.gov (including MS Word version)

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission,	:	
Bureau of Investigation and Enforcement	:	Docket No. P-2018-3006216
	:	C-2018-2644592
v.	:	I-2018-3006498
	:	
Winola Water Company	:	

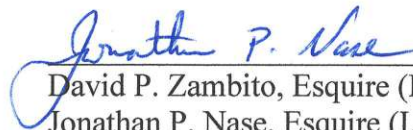
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**NOTICE TO PLEAD**

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TO: Parties at Docket Nos. P-2018-3006216, C-2018-2644592 and I-2018-3006498

Pursuant to 52 Pa. Code § 5.44, you are hereby notified that Pennsylvania-American Water Company (“PAWC”) has filed a Petition for Reconsideration from Actions of the Staff (“Petition”) regarding the Secretarial Letter issued in this proceeding on May 8, 2019, to which you may file an answer within ten (10) days. Your failure to answer will allow the Commission to rule on the Petition without a response from you, thereby requiring no other proof. All pleadings such as an Answer to this Petition must be filed with the Secretary of the Pennsylvania Public Utility Commission at P.O. Box 3265, Harrisburg, PA 17105-3265, with a copy served on the undersigned counsel for PAWC.



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Date: May 17, 2019

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission,	:	
Bureau of Investigation and Enforcement	:	Docket No. P-2018-3006216
	:	C-2018-2644592
v.	:	I-2018-3006498
	:	
Winola Water Company	:	

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**PETITION OF PENNSYLVANIA-AMERICAN WATER  
COMPANY FOR RECONSIDERATION OF STAFF ACTIONS**

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AND NOW COMES Pennsylvania-American Water Company (“PAWC” or the “Receiver”), pursuant to 52 Pa. Code § 5.44(a), to request that the Pennsylvania Public Utility Commission (“Commission”) reconsider the staff’s decision to issue the Secretarial Letter dated May 8, 2019 (the “Secretarial Letter”) in the above-referenced matters. The Secretarial Letter refers PAWC’s Petition for Amendment and Deferred Accounting Treatment (“Petition for Amendment”) to the Office of Administrative Law Judge (“OALJ”) “for disposition according to the procedural schedule at the above-referenced dockets.”

For the reasons set forth below, PAWC respectfully requests that the Commission reverse the staff’s action and consider the Petition for Amendment. Specifically, PAWC asks the Commission to amend expeditiously the Ex Parte Emergency Order (“Emergency Order”) entered on November 29, 2018 at Docket Nos. P-2018-3006216 and C-2018-2644592.<sup>1</sup> In the alternative, PAWC requests that the Commission strike the language in the Secretarial Letter requiring the

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<sup>1</sup> Since the Petition for Amendment requested that the Commission amend the Emergency Order issued at Docket Nos. P-2018-3006216 and C-2018-2644592, the Petition for Amendment was filed only at those two docket numbers. The Secretarial Letter, however, was issued at Docket Nos. P-2018-3006216, C-2018-2644592 and I-2018-3006498. Consequently, the instant Petition for Reconsideration of Staff Action (“Petition for Reconsideration”) is being filed at Docket Nos. P-2018-3006216, C-2018-2644592 and I-2018-3006498.

Petition to be considered “according to the procedural schedule” previously established in these matters, thereby enabling the Administrative Law Judge (“ALJ”) to expedite the consideration of the issues raised in the instant Petition for Reconsideration.

In support thereof, PAWC states as follows:

**I. Procedural History**

On January 26, 2018, the Commission’s Bureau of Investigation and Enforcement (“I&E”) filed a formal complaint against Winola Water Company (“WWC”) at Docket No. C-2018-2644592 requesting, *inter alia*, that WWC be ordered to perform all necessary repairs and maintenance to its water system. On October 5, 2018, the Pennsylvania Department of Environmental Protection (“DEP”) directed WWC to issue to its customers a public notification advising that water produced by WWC is not safe for consumption (the “Do Not Consume Order”). On November 28, 2018, I&E filed a Petition for an Ex Parte Emergency Order (“I&E’s Petition”) at Docket No. C-2018-2644592, requesting, *inter alia*, that the Commission appoint a competent water utility as receiver for WWC pursuant to 66 Pa. C.S. § 529(g). I&E’s Petition was assigned Docket No. P-2018-3006216.

On November 29, 2018, Commissioner Norman J. Kennard issued the Emergency Order granting I&E’s Petition with modifications, initiating a Section 529 investigation (which was subsequently given Docket No. I-2018-3006498), and appointing PAWC as receiver of WWC. PAWC was ordered to manage and operate WWC beginning December 10, 2018 and continuing throughout the pendency of the Section 529 Investigation. Emergency Order, p. 5. On December 6, 2018, the Commission ratified the Emergency Order.

The proceedings at C-2018-2644592, P-2018-3006216 and I-2018-3006498 have been consolidated. An April 5, 2019 Hearing Cancellation/Reschedule Notice advised the parties that a hearing is scheduled in these matters for August 27-28, 2019.

On April 19, 2019, PAWC filed the Petition for Amendment. I&E and the Office of Consumer Advocate (“OCA”) filed answers opposing the Petition. On May 8, 2019, the Commission issued the Secretarial Letter.

## **II. The Staff’s Decision to Refer the Petition to OALJ Should be Reversed**

In pertinent part, 52 Pa. Code § 5.44 states:

(a) Actions taken by staff, other than a presiding officer, under authority delegated by the Commission, will be deemed to be the final action of the Commission unless reconsideration is sought from the Commission within 20 days after service of notice of the action, unless a different time period is specified in this chapter or in the act.

(b) An action taken by staff under delegated authority will note the parties’ right to seek reconsideration of the action under this section.

Although the Secretarial Letter does not note the parties’ right to seek reconsideration, a petition for reconsideration of staff action is appropriate in this case. PAWC’s Petition for Reconsideration was specifically addressed to the Commission, but it was referred to the OALJ without Commission action. That action must have been taken by Commission staff under delegated authority. As such, Section 5.44 confers the right to request reconsideration, regardless of whether or not the staff action notifies the parties of their right to seek reconsideration.

In this case, staff erred in referring the matter to OALJ. The Petition seeks an amendment of a Commission order. Only the Commission has authority to amend a Commission order; the ALJ lacks authority to amend a Commission order. Consequently, the staff action should be reversed because the ALJ lacks the authority to grant the requested relief.

The only way that PAWC could obtain relief from the Commission pursuant to the Secretarial Letter would be to file exceptions to the decision of the ALJ, but that could not occur until some distant point in the future. The Petition for Amendment requests expedited consideration by the Commission because that petition seeks to amend the Emergency Order to address certain duties and responsibilities of PAWC, as Receiver of WWC, *pending the disposition of the Section 529 Investigation of WWC*. By referring the Petition to the OALJ for disposition *as part of the Section 529 Investigation of WWC*, the Secretarial Letter effectively denies PAWC's request for relief. The Commission, not its staff, should decide whether to grant or deny the Petition for Amendment.

For these reasons, the Commission should reverse the staff decision to refer the Petition for Amendment to the OALJ for disposition. Instead, the Commission should address the merits of the Petition for Amendment.

### **III. The Commission Should Grant PAWC's Petition to Amend**

The Petition for Amendment argues that the standards for reconsideration, set forth in *Duick v. Pennsylvania Gas and Water Company*, 56 Pa. P.U.C. 553 (1982) ("*Duick*"), have been satisfied. The Petition for Amendment then asks the Commission to amend Appendix A to the Emergency Order in three respects: to grant explicit authority to PAWC to make capital improvements to WWC's system, to grant PAWC explicit authority to request recovery of unpaid expenses in rates, and to grant PAWC explicit authority to bill customers of WWC for water service despite the Do Not Consume Order. The following sections explain why the Commission should grant the requested relief.

**A. The *Duick* Standards have been Satisfied**

A party may seek relief following the issuance of a final decision pursuant to 66 Pa. C.S. § 703(f) and § 703(g), relating to rehearings, as well as the rescission and amendment of orders. Such requests for relief must be consistent with 52 Pa. Code § 5.572, relating to petitions for relief following the issuance of a final decision.

Under the *Duick* standards, a Petition for Amendment may properly raise any matter designed to convince the Commission that it should exercise its discretion to amend a prior Order, in whole or in part. Such petitions are likely to succeed only when they raise “new and novel arguments” not previously heard or considerations which appear to have been overlooked or not addressed by the Commission. *Duick*, 56 Pa. P.U.C. at 559.

The *Duick* standards are met in this case because the Emergency Order did not address certain critical issues that require expeditious resolution. In particular, but without limiting the generality of the foregoing, the Emergency Order did not address the Receiver’s right to recover in rates any amounts for which PAWC is ultimately not re-paid by WWC or its customers. Since PAWC became receiver of WWC, it has obtained the existing financial data of WWC. Although that documentation is outdated and incomplete, at this time, it appears that WWC will have the ability to re-pay PAWC only a *de minimus* portion of the costs that PAWC will incur as Receiver of WWC. Appendix A to the Emergency Order did not address the critical issues of whether, and how, the Receiver can recover its costs if WWC and its customers are not able to re-pay those costs in full. An expeditious resolution of this issue is in the public interest; PAWC should be assured of its ability to recover expenses *before* it incurs those expenses. Additionally, ratepayers should be assured quickly that the Receiver and the utility that ultimately purchases WWC in the Section 529 Investigation will not charge ratepayers twice for the same improvements.

Consequently, the Commission should find that the *Duick* standards are satisfied and should address the merits of PAWC's Petition.

**B. PAWC'S Request for Explicit Authority to Make Capital Improvements Should be Granted**

Introduction. Appendix A to the Emergency Order states that PAWC, as the Receiver of WWC, has certain duties and responsibilities. The order is unclear as to whether PAWC has the authority to make capital improvements, which are necessary to lift the Do Not Consume Order. As discussed below, reasonable arguments may be offered on both sides of this question.

In the absence of clear authority, PAWC is reluctant to make capital improvements because a party to a future rate proceeding could challenge PAWC's recovery of those expenses on the grounds that PAWC lacked authority to make the improvements. PAWC respectfully requests that the Commission amend the Emergency Order to make clear that PAWC has authority to make capital improvements. PAWC also requests that the Commission do so now, while the Section 529 Investigation is on-going, rather than referring this issue to the ALJ for disposition as part of the Section 529 Investigation.

Argument. The Emergency Order states that PAWC is to:

- "Operate the system in compliance with all State, Federal, and local laws and regulations." Appendix A Section 1.a.
- "Provide all supervision and personnel necessary to operate the system in a professional, efficient and economic manner, and in accordance with sound operating practices and prudent industry and utility standards." Appendix A Section 1.d.
- "Respond to system emergencies by taking necessary action to ensure the continued provision of adequate, efficient, safe and reasonable service." Appendix A Section 1.e.

These provisions suggest that the Receiver has authority to make capital improvements. In fact, in their Answers to PAWC's Petition, the OCA and I&E argued that the Emergency Order does

not need to be amended because it already gives PAWC the authority to make capital improvements.

However, Appendix A states that PAWC is to:

-- “Provide a listing of recommended capital improvements, identifying the capital improvements necessary to improve the performance of the system, to address or anticipate the obsolescence of portions of the system, to reduce the cost of operating the system, to provide cost savings or efficiency innovations to the system, or to comply with existing or anticipated changes to applicable laws and regulations.” Section 1.c.

Using the rule of construction *expressio unius est exclusio alterius*, one could reasonably argue that the Emergency Order requiring PAWC to *develop a list* of recommended capital improvements actually denied PAWC authority to make those capital improvements.

This argument is particularly powerful considering that the Emergency Order directed the initiation of a Section 529 investigation. If the Commission orders a capable public utility to acquire WWC, that utility would be required to develop a Plan for Improvements to bring WWC’s system into compliance with statutory and regulatory standards. 66 Pa. C.S. § 529(j). The Commission is to approve the Plan for Improvements before it is implemented, and, following such approval, the acquiring company has authority to recover in rates the reasonably and prudently incurred costs of each improvement when it becomes used and useful in the public service. *Id.* Considering these statutory provisions, it could be argued that the Emergency Order intended the acquiring public utility – not the Receiver – to make the capital improvements (but only after Commission approval, which is not required by the Emergency Order).

PAWC believes that the Commission intended to give the Receiver authority to make the capital improvements in the list developed as required by Section 1.c. PAWC simply asks the Commission to amend the Emergency Order to make this authority clear. In the absence of clear authority to make the improvements, PAWC’s right to recover the costs could be challenged in the

future. It is unreasonable to expect the Receiver to undertake significant capital improvements without clear assurances of its ability to recover the costs of those improvements.

**C. PAWC'S Request for the Right to Seek Recovery in Rates of Expenses Incurred as the Receiver of WWC Should be Granted**

Introduction. At this time, it appears that WWC and its customers will only pay a *de minimus* portion of PAWC's expenses as Receiver. The issue presented is: Who will pay the remaining costs? It is in the public interest for a capable public utility to act as the receiver of a troubled water or wastewater system, but capable public utilities may be unwilling to undertake this role if they are not assured of their ability to recover their costs while serving as receiver. Additionally, Constitutional principles of due process, and applicable principles of public utility law affirmed by Pennsylvania's Appellate Courts,<sup>2</sup> require that a Commission-appointed receiver be permitted to recover the reasonable and prudent costs it incurs in its capacity as receiver. The Commission should resolve this issue now, eliminating PAWC's risk of being surprised later by an *ex post facto* decision denying it the ability to recover the costs it incurred while serving as receiver.

Argument. The Emergency Order clearly requires the Receiver to incur expenses on behalf of WWC. Among other things, the Emergency Order requires PAWC to:

- provide bottled water during the period from November 29, 2018 (the date that order was entered) through December 10, 2018. Ordering Paragraph No. 5.
- provide for normal routine maintenance and the provision of supplies for the system. Appendix A Section 1.g.
- provide WWC's customer service. Appendix A Section 1.j.
- submit all necessary paperwork to regulatory agencies of the system on behalf of WWC. Appendix A Section 1.n.

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<sup>2</sup> See, e.g., *UGI Corp. v. Pa. Pub. Util. Comm'n*, 49 Pa. Cmwlth. 69, 86, 410 A.2d 923, 932 (1980) ("A public utility is entitled to recover all of its reasonably incurred expenses.").

The Emergency Order contemplates that the Receiver will be able to recover these costs.

The Emergency Order provides that PAWC:

- shall establish a deferred expense account for expenses incurred by WWC that are payable to the Receiver. Appendix A Section 1.s.
- shall establish a deferred expense account for expenses incurred by the Receiver resulting from this order, including prudent and reasonable legal expenses. Appendix A Section 2.b.

The Emergency Order further contemplates that PAWC's costs will be paid by WWC and its customers. The Order states that PAWC is to charge WWC reasonable rates for all services rendered to or for WWC on behalf of the receivership. Appendix A Section 1.w.

As explained above, according to the limited and outdated financial data of WWC that PAWC has obtained to date, it appears that WWC will have the ability to re-pay PAWC only a *de minimus* portion of the costs that PAWC will incur as Receiver of WWC. PAWC respectfully requests that the Commission amend the Emergency Order to make clear that PAWC will not be left with a large sum in stranded costs at the conclusion of its Receivership.

PAWC respectfully requests that the Commission amend the Emergency Order to make clear that the costs of its receivership will be paid as follows:

- First, by amounts PAWC bills to and collects from WWC's customers pursuant to WWC's tariff during the period of PAWC's receivership;
- Second, by amounts invoiced to and paid by WWC. This amount could be paid, at least in part, from funds paid to WWC for the purchase of its system as a result of the Section 529 Investigation.
- Third, with regard to any amounts not paid by WWC or its customers pursuant to the above paragraphs, PAWC should be permitted to defer all unreimbursed expenses and to record such deferred expenses as a regulatory asset that PAWC may recover in its next base rate proceeding following the termination of PAWC's receivership, to the extent that such expenses are found to have been reasonably and prudently incurred.

If the Commission orders a capable public utility to purchase WWC in the Section 529 Investigation, the Commission's order can resolve additional financial issues, such as the accounting treatment of the acquiring utility's transaction and closing costs and post-acquisition

expenses. In this sense, the above amendment to Appendix A would assure the Receiver that it can recover the expenses it incurred during the period of its receivership without tying the Commission's hand in resolving the Section 529 Investigation.

**D. PAWC'S Request for Authority to Bill Customers, Despite the Do Not Consume Order, Should be Granted**

Introduction. Appendix A provides that PAWC is to bill WWC's customers for water service. However, the system is currently subject to the Do Not Consume Order. In past cases, the public advocates and other complainants have asked the Commission for rate relief or refunds due to the utility's failure to provide reasonable and adequate service. *See, e.g., McCloskey v. Hidden Valley Utility Services, L.P.*, Docket Nos. C-2014-2447138 and 2447169. In the interest of minimizing the risk of litigation, PAWC asks the Commission to amend Appendix A to explicitly state that PAWC may bill customers the full amount stated in WWC's tariff despite the Do Not Consume Order.

Argument. Appendix A to the Emergency Order gives PAWC the duty and responsibility to assume WWC's billing and collection functions, Paragraph 1.i., and to comply with WWC's effective tariff for WWC's customers, Paragraph 1.m. Nevertheless, PAWC has not issued bills to WWC's customers since assuming the role of Receiver because PAWC is in the process of identifying the customers of WWC.

PAWC intends to begin billing customers of WWC soon, but is concerned that a customer of WWC may file a complaint requesting rate relief, or refunds of amounts previously charged to customers, due to WWC's failure to provide reasonable and adequate service as required by 66 Pa. C.S. § 1501. The Emergency Order protects the Receiver from liability for pre-existing conditions, Ordering Paragraph 7, but PAWC recognizes that unsatisfied customers may file complaints when

they start receiving bills for water they cannot drink. As receiver, PAWC would be responsible for defending these complaints, thereby increasing the cost of its receivership. The fact that the 529 Investigation is pending would not shield PAWC, as receiver, from these complaints.

In order to mitigate the risk of litigation when PAWC begins billing customers of WWC, and to minimize the costs of defending such litigation, PAWC respectfully requests that the Commission amend Appendix A to clearly state that PAWC may charge customers of WWC the full amounts due pursuant to WWC's tariff, even during the period that the Do Not Consume Order remains in effect.

**IV. In the Alternative, the Commission Should Strike the Statement in the Secretarial Letter Requiring the Petition to be Considered "According to the Procedural Schedule" Previously Established in these Matters**

The Secretarial Letter states "You are advised that the matter addressed in the Petition is referred to the Office of Administrative Law Judge for disposition *according to the procedural schedule at the above-referenced dockets.*" (emphasis added). In reliance on that statement, Deputy Chief Administrative Law Judge Joel H. Cheskis advised the parties via e-mail on May 8, 2019 that the Petition could not be considered on a separate track from the Section 529 Investigation; it had to be considered as part of the Section 529 Investigation. As noted in the Secretarial Letter, the procedural schedule that was entered previously in the Section 529 Investigation provides for a trial on August 27-28, 2019, followed by briefs and reply briefs and the issuance of a decision by the Presiding Officer. Only then could the issues in the Petition for Amendment be brought before the Commission.

ALJs generally have authority to regulate the course of proceedings. 52 Pa. Code § 5.483(a). There is no reason that the ALJ's hands should be tied in the instant case. The ALJ should have the ability to consider the issues raised in the Petition for Amendment on a separate track from the Section 529 Investigation, thereby expediting consideration of the issues raised in that petition. Consequently, even if the Commission does not reverse the staff's decision to refer the Petition for Amendment to the OALJ, the Commission should reverse the staff's mandate that the Petition for Amendment be considered "according to the procedural schedule previously established" in the Section 529 Investigation.

**V. PAWC's Request for Expeditious Consideration of its Petition for Amendment Should be Granted**

Due to the need for PAWC to begin promptly billing customers and making the capital improvements necessary to lift the Do Not Consume Order, PAWC respectfully requests that the Commission render a decision on the Petition for Amendment on an expedited basis. A receiver should not have to guess about its authority, and should not face the risk of an *ex post facto* decision denying it the right to recover expenses incurred while serving as receiver. Arguments that PAWC may already have adequate authority under the Emergency Order are an unconvincing reason for delay in entering a decision removing any doubt.

**VI. Conclusion**

For the foregoing reasons, Pennsylvania-American Water Company respectfully requests that the Commission (a) grant the instant Petition for Reconsideration of Actions of the Staff and (b) amend the Ex Parte Emergency Order as requested herein. In the alternative, Pennsylvania-American Water Company respectfully requests that the Commission strike the language in the

Secretarial Letter issued on May 8, 2019, requiring the Petition for Amendment to be considered “according to the procedural schedule” previously established in these matters.

Respectfully submitted,

  
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Dated: May 17, 2019

Counsel for *Pennsylvania-American Water Company*

VERIFICATION

I, Don A. Kessler, hereby state that the facts set forth above are true and correct to the best of my knowledge, information and belief and that I expect to be able to prove the same at a hearing if 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).

Dated: 5/17/19

  
Don A. Kessler  
Senior Manager, Operations

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission  
Bureau of Investigation & Enforcement

v.

Winola Water Company

:  
: Docket Nos. C-2018-2644592  
: P-2018-3006216  
: I-2018-3006498  
:

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a true copy of the foregoing **Petition of Pennsylvania-American Water Company for Reconsideration of Staff Actions**, 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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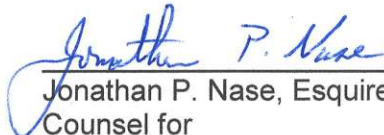
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DATED: May 17, 2019

  
\_\_\_\_\_  
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