



May 18, 2021

VIA E-FILING

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

Re: Application of Pennsylvania-American Water Company under Section 1102(a) of the Pennsylvania Public Utility Code, 66 Pa. C.S. § 1102(a), for approval of (1) the transfer, by sale, of substantially all of Upper Pottsgrove Township's assets, properties and rights related to its wastewater collection and conveyance system to Pennsylvania-American Water Company, and (2) the rights of Pennsylvania-American Water Company to begin to offer or furnish wastewater service to the public in Upper Pottsgrove Township, Montgomery County and a portion of Douglass Township, Berks County, Pennsylvania; Docket No. A-2020-3021460 *et al.*

Joint Preliminary Objections of Pennsylvania-American Water Company and Upper Pottsgrove Township to the Protest of Pottstown Borough Authority and Borough of Pottstown, Montgomery County

Dear Secretary Chiavetta:

Enclosed for filing with the Pennsylvania Public Utility Commission ("Commission") are the above-referenced Joint Preliminary Objections. All parties to this proceeding have been served, as shown on the attached Certificate of Service.

Please contact me if you have any question or concern. Thank you for your attention to this matter.

Sincerely,

Cozen O'Connor
Counsel for *Pennsylvania-American Water Company*

DPZ/kmg
Enclosure

cc: Hon. Jeffrey A. Watson
Nick Miskanic, Legal Assistant
Per Certificate of Service
Elizabeth Rose Triscari, Esq.

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Application of Pennsylvania-American Water :
Company under Section 1102(a) of the :
Pennsylvania Public Utility Code, 66 Pa. C.S. § :
1102(a), for approval of (1) the transfer, by sale, of :
substantially all of Upper Pottsgrove Township’s :
assets, properties and rights related to its : Docket No. A-2020-3021460, *et*
wastewater collection and conveyance system to : *al.*
Pennsylvania-American Water Company, and (2) :
the rights of Pennsylvania-American Water :
Company to begin to offer or furnish wastewater :
service to the public in Upper Pottsgrove Township, :
Montgomery County and a portion of Douglass :
Township, Berks County, Pennsylvania :

CERTIFICATE OF SERVICE

I hereby certify that I have this 18th day of May served a true copy of the foregoing **Joint Preliminary Objections of Pennsylvania-American Water Company and Upper Pottsgrove Township to the Protest of Pottstown Borough Authority and Borough of Pottstown, Montgomery County** on the parties, listed below in accordance with the requirements of 52 Pa. Code §1.54 (relating to service by a party).

Due to the COVID-19 Pandemic, Service is Being Made by E-Mail Only

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Respectfully submitted,



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Attorneys for *Pennsylvania-American Water Company*

VERIFICATION

I, Scott D. Fogelsanger, 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 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).

Date: 5/18/2021

Scott D. Fogelsanger

VERIFICATION

I, Trace Slinkard 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 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).

Date: May 18, 2021

A handwritten signature in black ink, consisting of several overlapping, sweeping strokes that form a stylized, somewhat abstract representation of the name 'Trace Slinkard'.

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Application of Pennsylvania-American Water Company :
under Section 1102(a) of the Pennsylvania Public Utility :
Code, 66 Pa. C.S. § 1102(a), for approval of (1) the :
transfer, by sale, of substantially all of Upper Pottsgrove :
Township's assets, properties and rights related to its :
wastewater collection and conveyance system to : Docket No. A-2020-3021460, *et al.*
Pennsylvania-American Water Company, and (2) the :
rights of Pennsylvania-American Water Company to :
begin to offer or furnish wastewater service to the public :
in Upper Pottsgrove Township, Montgomery County :
and a portion of Douglass Township, Berks County, :
Pennsylvania :

NOTICE TO PLEAD

YOU ARE HEREBY ADVISED THAT, PURSUANT TO THE REGULATIONS OF THE PENNSYLVANIA PUBLIC UTILITY COMMISSION AT 52 PA. CODE § 5.101(f), YOU MAY FILE AN ANSWER TO THE ENCLOSED PRELIMINARY OBJECTIONS WITH THE SECRETARY'S BUREAU OF THE PENNSYLVANIA PUBLIC UTILITY COMMISSION AT THE FOLLOWING ADDRESS:

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street – Filing Room (2nd Floor)
P.O. Box 3265
Harrisburg, PA 17105-3265

AN ANSWER MAY BE FILED WITHIN TEN (10) DAYS OF THE DATE OF SERVICE OF THIS PRELIMINARY OBJECTION. FOR MORE INFORMATION REGARDING THE FILING OF AN ANSWER, PLEASE CONTACT THE SECRETARY'S BUREAU AT (717) 772-7777. A COPY OF ANY ANSWER SHOULD BE SERVED ON THE UNDERSIGNED COUNSEL.



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Date: May 18, 2021

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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Application of Pennsylvania-American Water Company :
under Section 1102(a) of the Pennsylvania Public Utility :
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Pennsylvania-American Water Company, and (2) the :
rights of Pennsylvania-American Water Company to :
begin to offer or furnish wastewater service to the public :
in Upper Pottsgrove Township, Montgomery County :
and a portion of Douglass Township, Berks County, :
Pennsylvania :

JOINT PRELIMINARY OBJECTIONS OF PENNSYLVANIA-AMERICAN WATER
COMPANY AND UPPER POTTSBORO TOWNSHIP TO THE PROTEST OF
POTTSTOWN BOROUGH AUTHORITY AND BOROUGH OF POTTSTOWN,
MONTGOMERY COUNTY

AND NOW COMES Pennsylvania-American Water Company (“PAWC”) and Upper Pottsgrove Township (“UP”) to file these Joint Preliminary Objections to the Protest of Pottstown Borough Authority (“PBA”) and Borough of Pottstown (“BP”), Montgomery County, filed on May 14, 2021 (“Protest”). PAWC respectfully requests that the Honorable Jeffrey A. Watson (the “Administrative Law Judge”) dismiss the Protest in its entirety and with prejudice for two reasons. First, the Pennsylvania Public Utility Commission (“Commission” or “PUC”) clearly lacks jurisdiction to interpret or enforce the Settlement Agreement and Release dated July 2, 2013 (“Settlement Agreement”) between PBA, BP and UP. PBA and BP’s attempt to use the Commission process to pressure either UP into a monetary concession is improper. Second, assuming for purposes of these preliminary objections that PAWC’s acquisition of the wastewater collection and conveyance system of UP (“Acquisition”) is not in the public interest without assignment of the Sewage Treatment Service Agreement between UP, PBA and BP dated as of September 13, 2004 (the “STSA”) to PAWC, the Protest’s argument is legally insufficient because the Asset Purchase Agreement By and Among UP, as Seller, and PAWC, as Buyer, dated as of April 28, 2020 (the “APA”) already clearly

states that such assignment is a condition precedent of closing of the Acquisition (“Closing”). In other words, the concern raised by PBA and BP is already addressed by the structure of the Acquisition and APA for which PAWC seeks Commission approval. If the ALJ grants these Preliminary Objections, he should dismiss the Protest of PBA and BP with prejudice. PBA and BP should not be permitted to refile their Protest and continue to use the Commission process to pressure a monetary concession in a contractual dispute over which the Commission has no jurisdiction. Any monetary dispute is properly resolved before the Court of Common Pleas of Montgomery County, Pennsylvania.

In support whereof, PAWC avers as follows:

I. Background

1. This proceeding involves the Application of PAWC (the “Application”) to acquire the wastewater collection and conveyance system of UP pursuant to 66 Pa. C.S. §§ 1102 and 1329.

2. UP’s wastewater system transports the wastewater for treatment to the PBA’s wastewater treatment plant.

3. The Application also requests that the Commission issue a Certificate of Filing or otherwise approve, pursuant to 66 Pa. C.S. § 507, the APA, and the STSA. The STSA must be assigned to and assumed by PAWC in order for the acquisition to close. Application ¶¶ 3, 18 and 45; Application Appendix A-24-a § 12.01(a) (“Consents and Approvals”).

II. Legal Standard

4. The Commission’s regulations permit a party to file preliminary objections in response to a pleading for certain enumerated reasons, including but not limited to lack of Commission jurisdiction and legal insufficiency of a pleading. 52 Pa. Code § 5.101(a)(1), (4).

5. When ruling on preliminary objections, the Presiding Officer must accept as true all well-pleaded allegations of material facts as well as all inferences reasonably deducible therefrom. *Stilp v. Cmwlth.*, 910 A.2d 775, 781 (Pa. Cmwlth. 2006) (citing *Dep’t of General Serv. v. Bd. of Claims*, 881 A.2d

14 (Pa. Cmwlth. 2005)). In order to sustain preliminary objections, it must appear with certainty that the law will permit no recovery, and any doubt must be resolved in favor of the non-moving party. *Stilp*, 910 A.2d at 781. However, the Presiding Officer does not need to accept as true conclusions of law, unwarranted inferences from facts, argumentative allegations, or expressions of opinion. *Stanton-Negley Drug Co. v. Dep't of Public Welfare*, 927 A.2d 671, 673 (Pa. Cmwlth. 2007).

III. Preliminary Objection No. 1: The Commission Lacks Jurisdiction to Interpret or Enforce Contracts, Particularly Contracts Entirely Among Municipal Corporations

6. PBA and BP allege that UP owes them money pursuant to the Settlement Agreement. Protest ¶¶ 16 and 19. This is a purely contractual claim, which is contested by UP.

7. PBA and BP ask the Commission to “condition any approval of the Application on the full reimbursement of the \$470,184.22 in Authority costs advanced towards the Siphon Project, plus interest and costs.” Protest, Concluding Paragraph. PBA and BP are clearly using their Protest in an attempt to pressure UP into making the disputed payments in order for the STSA to be assigned and for Closing to be allowed to occur.¹

8. As an agency created by the General Assembly, the Commission has only the power given to it by the General Assembly, either explicitly or implicitly. *Feingold v. Bell Tel. Co. of Pa.*, 383 A.2d 791 (Pa. 1977).

9. The Protest’s averments concerning the Settlement Agreement ask this Commission to interpret or enforce that contract, rather than the provisions of the Pennsylvania Public Utility Code (“Code”), 66 Pa. C.S. § 101 *et seq.*, a Commission regulation or order, or a utility tariff.

¹ On May 18, 2021, UP filed a Complaint in Equity for Final Injunction against PBA and BP in the Court of Common Pleas for Montgomery County (“UP Civil Complaint”) asking the Court to order PBA and BP to consent to the assignment and assumption of the STSA prior to Closing. The contractual dispute between PBA, BP and UP is a matter for the Court of Common Pleas for Montgomery County, Pennsylvania. The PUC should not get involved. The Commission lacks jurisdiction over contractual matters and Commission involvement could potentially result in inconsistent determinations.

10. It is well-settled that the Commission lacks jurisdiction to construe and enforce contracts. *See, e.g., Allport Water Auth. v. Winburne Water Co.*, 258 Pa. Super. 555, 393 A.2d 673 (Pa. Super. 1978); *Adams et al. v. Pa. Pub. Util. Comm'n*, 819 A.2d 631 (Pa. Cmwlth. 2003); *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 No. A-2018-3004933 (Opinion and Order entered October 3, 2019);² *Evans v. FirstEnergy Solutions Corp.*, Docket No. P-2014-2421556 (Opinion and Order entered Jan. 26, 2015). A civil court is the proper forum for the contractual claim alleged in the Protest. Approving the Acquisition, and allowing it to close upon assignment of the STSA to PAWC, will not deprive PBA and BP of their claim against UP for monetary damages under the Settlement Agreement. Such a claim could be resolved by the Court of Common Pleas of Montgomery County, Pennsylvania after Closing.

11. The Settlement Agreement is a contract entirely between and among municipal corporations as that term is defined in the Code. 66 Pa. C.S. § 102. PAWC is not a party to it and the Settlement Agreement will not be assigned to PAWC as part of the transaction contemplated by the Application.

12. The Commission has general administrative power to supervise and regulate public utilities doing business within this Commonwealth. 66 Pa. C.S. § 501(b). The Commission lacks jurisdiction to regulate municipal corporations or to enforce their contracts. To the extent that the Protest concerns the Settlement Agreement, the Commission lacks jurisdiction to adjudicate the claims raised in the Protest.

² The Commission adopted the Recommended Decision of Administrative Law Judge Andrew M. Calvelli, who found that the Commission lacked jurisdiction over the contract claims pursued by St. Lawrence Borough in a Section 1329 acquisition proceeding:

Given the above jurisdictional limitations, and given the fact that St. Lawrence is clearly seeking money damages only, the Commission lacks the authority to rule on those claims. Those claims, should any exist, must be brought in a court of general legal jurisdiction such as the Common Pleas Court. Such claims are not properly before the Commission, as they are outside of the Commission's legal jurisdiction.

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 No. A-2018-3004933 (Recommended Decision issued August 9, 2019) p. 59.

IV. Preliminary Objection No. 2: The Claim that the Acquisition Would Not be in the Public Interest if the STSA is not Assigned to PAWC is Legally Insufficient because Closing is Conditioned on the Assignment of the STSA to PAWC

13. PBA and BP note that Section 10.10 of the STSA prohibits the assignment of the STSA to PAWC without the consent of PBA and BP. Protest ¶ 6. PBA and BP therefore suggest that the Acquisition should be denied, as not being in the public interest, if the Acquisition Closes without the assignment of the STSA to PAWC. Protest ¶ 20. This argument is legally insufficient because it is a straw man. PAWC and UP are the only parties that have taken a position on this issue, and they have asked the Commission to approve the Acquisition *with* the assignment of the STSA to PAWC.

14. The Application, ¶¶ 3 and 45, asks the Commission to approve the APA as submitted, which clearly states that assignment of the STSA is a condition precedent to Closing. APA § 12.01 (“Consents and Approvals”).

15. PAWC has not requested that the Commission modify the STSA or otherwise approve the Acquisition without assignment of the STSA. The Commission can approve the Application as submitted because the Acquisition is already conditioned on the assignment of the STSA under the APA. If necessary, the Commission’s approval of the Application could explicitly acknowledge this condition or the Commission could condition its approval on the assignment of the STSA prior to Closing.

16. Allowing PBA and BP to litigate an issue that is not contested, and on which the outcome is already known (*i.e.*, Closing cannot occur without assignment of the STSA), would waste the time and resources of the Commission and the parties. Consequently, the Commission should end that litigation now by finding the Protest is legally insufficient. The Commission can move forward with an approval of the Application conditioned upon assignment of the STSA, as already contemplated by the Application and the APA. The issue of assignability will be resolved through the UP Civil Complaint.

V. The Protest of PBA and BP Should be Dismissed with Prejudice

17. The Protest of PBA and BP improperly attempts to use the Commission’s process to pressure UP into a monetary concession in order for the STSA to be assigned and for Closing to be allowed

to occur. If the ALJ grants these Preliminary Objections, and dismisses the Protest of PBA and BP, those entities should not be permitted to refile their Protest and continue to use the Commission process to cause delay and get a monetary concession in a contractual dispute over which the Commission has no jurisdiction.

VI. Conclusion and Request for Relief

WHEREFORE, for the reasons stated above, PAWC and UP respectfully request that the Administrative Law Judge:

- (1) GRANT these Preliminary Objections; and
- (2) dismiss the Protest of PBA and BP in its entirety and with prejudice.

Respectfully submitted,



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Dated: May 18, 2021