



May 18, 2021

VIA E-FILING

David P. Zambito

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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 Petition to Intervene of Shadeland Development Corporation

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

By: David P. Zambito
Counsel for *Pennsylvania-American Water Company*

DPZ/kmg
Enclosure

cc: Administrative Law Judge Jeffrey A. Watson
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 Petition to Intervene of Shadeland Development Corporation** 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 Slinger 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 Slinger'.

**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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Counsel for *Upper Pottsgrove Township*

Date: May 18, 2021

**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 POTTSTOWN TOWNSHIP TO THE PETITION TO INTERVENE OF
SHADELAND DEVELOPMENT CORPORATION**

AND NOW COMES Pennsylvania-American Water Company (“PAWC”) and Upper Pottstown Township (“UP”), pursuant to 52 Pa. Code § 5.101, to file these Joint Preliminary Objections to the Petition to Intervene (“Intervention”) filed by Shadeland Development Corporation (“Shadeland”) on May 14, 2021. PAWC and UP respectfully request that the Honorable Jeffrey A. Watson (the “Administrative Law Judge”) dismiss the Intervention in its entirety and with prejudice because it asks the Commission to resolve a contractual dispute between Shadeland and UP involving the ownership of property. The Pennsylvania Public Utility Commission (“Commission” or “PUC”) clearly lacks jurisdiction to interpret or enforce the Construction and Access Agreement (“Construction Agreement”) between Shadeland and UP dated August 5, 2016, or the Pennsylvania Municipalities Planning Code (“MPC”), 53 P.S. § 10507-A (“Prerequisites for assessing sewer and water tap-in fees”). Shadeland’s attempt to use the Commission process to pressure UP into a monetary concession is improper. In addition, Shadeland lacks standing because it fails to satisfy the standards for intervening in a Commission proceeding. If the ALJ grants these Preliminary Objections, he should dismiss the Intervention of Shadeland with prejudice. Shadeland should not be permitted to refile

its Intervention and continue to use the Commission process to get a monetary concession in a contractual dispute over which the Commission has no jurisdiction.

In support whereof, PAWC and UP aver 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. Shadeland alleges that it constructed a sanitary sewer line and related improvements (the “Sewer Line”) to serve Shadeland’s Sprogel’s Run residential development (the “Development”).

3. UP presently serves the Development using the Sewer Line.

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 lack of standing. 52 Pa. Code § 5.101(a)(1), (7).

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 Determine the Ownership of the Sewer Line.

6. Shadeland alleges that it constructed the Sewer Line pursuant to the Construction Agreement. Intervention ¶ 2.

7. Shadeland further alleges that it is the owner of the Sewer Line because UP has “refused to honor its obligation under the Pennsylvania Municipalities Planning Code to provide Shadeland reimbursement for the Sewer Line.” Intervention ¶ 7. The agreement between Shadeland and UP never contemplated the obligation for reimbursement since the Sewer Line that was installed is located on open space property owned by UP. The agreement is silent as to any obligation of the Township to provide reimbursement.

8. UP avers that it owns the Sewer Line. The ownership of the Sewer Line is therefore disputed. Additionally, the Sewer Line is located, in part, on property owned by UP and UP disputes that the Sewer Line must be dedicated to UP.

9. Shadeland contends that its intervention is necessary for Shadeland to ensure that PAWC’s Application does not include the disputed Sewer Line. Intervention ¶ 4.

10. 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). The Commission lacks authority to determine the ownership of the disputed Sewer Line.

11. 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);¹ *Evans v. FirstEnergy Solutions Corp.*, Docket No. P-2014-2421556

¹ 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:

(Opinion and Order entered Jan. 26, 2015). To the extent that the Intervention asks the Commission to determine the ownership of the Sewer Line by construing or enforcing the Construction Agreement, the Commission lacks jurisdiction to adjudicate the claims raised in the Intervention.

12. The Construction Agreement is a contract between a private developer and a municipal corporation. PAWC is not a party to the Construction Agreement and that contract will not be assigned to PAWC as part of the transaction contemplated by the Application.

13. The Commission has general administrative power to supervise and regulate public utilities doing business within this Commonwealth, 66 Pa. C.S. § 501(b), but the Commission lacks jurisdiction to regulate municipal corporations or to enforce their contracts. To the extent that the Intervention requires the Commission to determine the ownership of property by interpreting or enforcing a contract that does not involve a public utility, the Commission lacks jurisdiction to adjudicate the claims raised in the Intervention.

14. The Commission has no authority to construe or enforce 53 P.S. § 10507-A (“Prerequisites for assessing sewer and water tap-in fees”). To the extent that the Intervention requires the Commission to determine the ownership of property by interpreting or enforcing the MPC, the Commission lacks jurisdiction to adjudicate the claims raised in the Intervention.

15. The ownership of the Sewer Line is a question for a court of general jurisdiction; namely, the Court of Common Pleas of Montgomery County, Pennsylvania. The Commission should not get involved. The Commission lacks jurisdiction and Commission involvement could potentially result in inconsistent determinations.

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: Shadeland Does Not Have Standing to Intervene Because It Does Not Meet the Standards for Intervention Set Forth in 52 Pa. Code § 5.72.

16. A party may file a preliminary objection contending that an intervenor lacks standing because the putative intervenor does not satisfy the regulatory standards for intervention. *Cf. Application of Rasier-PA, LLC a limited liability company of the State of Delaware, for the right to begin to transport, by motor vehicle, persons in the experimental service of shared-ride network for passenger trips between points in Allegheny County*, Docket No. A-2014-2416127 (Initial Decision Dismissing the Protest of JB Taxi LLC issued July 3, 2014, reversed on other grounds, Opinion and Order entered August 15, 2014).

17. In order to intervene, Shadeland must have:

(1) A right conferred by statute of the United States or of the Commonwealth.

(2) An interest which may be directly affected and which is not adequately represented by existing participants, and as to which the petitioner may be bound by the action of the Commission in the proceeding.

(3) Another interest of such nature that participation of the petitioner may be in the public interest.

52 Pa. Code § 5.72(a).

18. Shadeland does not seek to intervene based on a right conferred by statute. Neither PAWC nor UP is aware of any federal or state statute that would give Shadeland a right to intervene in this proceeding.

19. Shadeland does not have an interest that will be bound by the Commission's action in this proceeding. As stated above, the Commission does not have jurisdiction to determine the ownership of property. Therefore, even if the Commission approves the Acquisition as described in the Application, Shadeland could subsequently file a proceeding in a court of common pleas² to pursue its claim that it owns the Sewer Line.³ Additionally, the Office of Consumer Advocate, the Office of Small Business Advocate,

² There is no pending court proceeding to determine the ownership of the Sewer Line.

³ Even if the Commission approves the Acquisition as described in the Application, PAWC's obligation to Close on the Acquisition is conditioned on the representations and warranties of UP being true and correct on the Closing date. APA § 12.02. One such representation and warranty is that UP has title to the acquired assets. APA § 4.16(a). Thus,

and the Commission's Bureau of Investigation and Enforcement can adequately represent the public's interest in ensuring that the fair market value of the UP wastewater system is not overstated in this proceeding, considering the dispute over the ownership of the Sewer Line.⁴ Shadeland therefore fails to satisfy the standard for intervention at 52 Pa. Code § 5.72(a)(2).

20. Shadeland describes no interest in this proceeding other than its alleged ownership of the disputed Sewer Line. PAWC and UP respectfully submit that this allegation of private ownership of property, standing alone, fails to give Shadeland an interest in this proceeding such that Shadeland's participation would promote the public interest. To the contrary, Shadeland's participation would be contrary to the public interest because Shadeland is trying to raise extraneous and irrelevant issues. Moreover, Shadeland is obviously trying to use the Commission's proceeding to pressure UP to make a monetary concession in a private contractual dispute over which the PUC has no jurisdiction.

V. The Intervention of Shadeland Should be Dismissed with Prejudice

21. The Intervention of Shadeland improperly attempts to use the Commission process to pressure UP into a monetary concession to resolve the dispute over ownership of the Sewer Line. If the ALJ grants these Preliminary Objections, and dismisses Shadeland's Intervention, Shadeland should not be permitted to refile its Intervention and continue to use the Commission process to get a monetary concession in a contractual dispute over which the Commission has no jurisdiction.

even if the Commission approves the Acquisition as described in the Application, PAWC could refuse to Close until UP has resolved the dispute with Shadeland over the Sewer Line. In the alternative, the Commission could condition its approval of the Application on the resolution of this dispute prior to Closing. These options reinforce the point that Shadeland does not have an interest that will be bound by the Commission's action in the present proceeding.

⁴ Shadeland's Intervention includes no information regarding the alleged value of the Sewer Line and its resulting impact on the valuation of UP's wastewater system. The Sewer Line was installed in the last five years at an original cost of approximately \$283,000. PAWC's requested fair market value rate base is \$13,750,000 which is substantially lower than the average of the Utility Valuation Experts' appraisals (\$17,320,346 average), which were calculated including the Sewer Line. Even if excluded from the assets to be acquired, the Sewer Line would not impact the use of the purchase price as the fair market value rate base under 66 Pa. C.S. § 1329.

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 Intervention of Shadeland in its entirety and with prejudice.

Respectfully submitted,



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