

Vincent M. Pompo
West Chester Office
Direct: 610-701-4411
General: 610-430-8000
Fax: (610) 692-6210
vpompo@lambmcerlane.com

May 21, 2021

Via Electronic Filing

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

Re: In Re: Application of PA-American Water Company
Docket Numbers: A-2020-3021460

Dear Secretary Chiavetta:

Enclosed for electronic filing with the Commission please find the Answer of Pottstown Borough Authority and Borough of Pottstown, Montgomery County to Joint Preliminary Objections of PA-American Water Company and Upper Pottsgrove Township to the Protest of Pottstown Borough Authority and Borough of Pottstown, Montgomery County in regard to the above-referenced proceeding.

All parties of record have been served pursuant the attached Certificate of Service. If you have any questions or concerns, please do not hesitate to contact this office.

Thank you very much for your cooperation and assistance.

Very truly yours,

LAMB MCERLANE PC

By: */s/ Vincent M. Pompo*

Vincent M. Pompo

/sg

Enclosures served via E-mail

cc: Honorable Jeffrey A. Watson (jeffwatson@pa.gov)
Nick Miskanic (nmiskanic@pa.gov)

All Counsel and parties of record per Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

In Re:	:	Application Docket
	:	
APPLICATION OF PENNSYLVANIA-AMERICAN	:	No. A-2020-3021460
WATER COMPANY PURSUANT TO SECTIONS	:	
507, 1102 AND 1329 OF THE PUBLIC UTILITY CODE	:	
FOR APPROVAL OF ITS APPLICATION OF ITS	:	
ACQUISITION OF THE WASTEWATER SYSTEM	:	
ASSETS OF UPPER POTTS GROVE TOWNSHIP	:	
	:	

**ANSWER OF POTTS TOWN BOROUGH AUTHORITY AND BOROUGH OF
POTTS TOWN, MONTGOMERY COUNTY TO JOINT PRELIMINARY OBJECTIONS
OF PENNSYLVANIA-AMERICAN WATER COMPANY AND UPPER POTTS GROVE
TOWNSHIP TO THE PROTEST OF POTTS TOWN BOROUGH AUTHORITY AND
BOROUGH OF POTTS TOWN, MONTGOMERY COUNTY**

Pottstown Borough Authority and Borough of Pottstown, Montgomery County (individually the “Authority” and the “Borough” and collectively the “Protestants”) hereby file with the Pennsylvania Public Utility Commission (“Commission”) this Answer to the Joint Preliminary Objections of Pennsylvania-American Water Company and Upper Pottsgrove Township and, in support thereof, aver the following:

I. Background

1. Admitted.
2. Admitted.
3. Admitted in part and denied in part. It is admitted that the Sewage Treatment Service Agreement dated September 13, 2004 (the “STSA”) between Upper Pottsgrove Township (“Upper Pottsgrove”) and the Protestants must be assigned to and assumed by Pennsylvania-American Water Company (“PAWC”) in order for the acquisition of Upper Pottsgrove’s sewer

system to close. It is further averred that Protestants must consent to the assignment of the STSA by Upper Pottsgrove to PAWC. By way of further response, the Application of PAWC to the Commission is a document that speaks for itself and any characterization thereof is strictly denied.

II. Legal Standard

4. Denied as a conclusion of law to which no response is required.
5. Denied as a conclusion of law to which no response is required.

III. Preliminary Objection No. 1: Protestants Are Not Solely Seeking Enforcement Of A Contract

6. Denied. Although the dispute between Protestants and Upper Pottsgrove involves a contractual claim, the likely failure of Upper Pottsgrove to ever obtain the necessary consent to assign the STSA to PAWC in order to complete the transaction ought to be allowed to be brought before the Commission and falls squarely within the Commission's purview. Moreover, the Protest is necessary to inform the Commission of Upper Pottsgrove's failure to satisfy its obligations under the July 2, 2013 Settlement Agreement and Release (the "Settlement Agreement") to reimburse the costs of the Siphon Project, and that such failure is a good faith basis for the Protestants to withhold consent to the assignment of the STSA to PAWC.

7. Denied. The Protest is a document that speaks for itself and any characterization thereof is strictly denied. By way of further response, it is specifically denied that Protestants are "attempting to pressure Upper Pottsgrove into making the disputed payments." To the contrary, Protestants filed a Protest to inform the Commission that the transaction cannot close until Upper Pottsgrove fulfills its obligations under the Settlement Agreement and to further urge the Commission to condition any approval on full and complete satisfaction of Upper Pottsgrove's outstanding obligations. Moreover, Upper Pottsgrove's failure to make the payments as required by the Settlement Agreement has a direct and substantially detrimental effect on residents and

ratepayers of the Protestants in that residents and ratepayers will bear the costs of the Siphon Project when they do not benefit from the Siphon Project. Absent the Protest, the Protestants will lose their rights to raise this concern to the Commission, and the Commission will be unable to weigh such detrimental effects in rendering its decision as to whether the Application is in the public interest. Protestants object to Upper Pottsgrove's and PAWC's mischaracterizations of Upper Pottsgrove recently-filed lawsuit in the Court of Common Pleas of Montgomery County (the "Common Pleas Litigation"), which was filed after the filing of the Protest. The complaint has yet to be served upon Protestants. As such, the mere filing of the lawsuit cannot and should not form a pretext for the Commission to dismiss the Protest, since to do so would encourage litigants such as Upper Pottsgrove who are attempting to sell their wastewater assets to file lawsuits against protestants in order to chill protests being raised before the Commission. Assuming for the sake of argument that jurisdiction may ultimately be determined by the Court of Common Pleas to be properly before the Court, the Commission should defer to the Court to adjudicate those claims, and either defer action on the Application until Upper Pottsgrove's claims before the Court are finally adjudicated, or alternatively condition any approval of the Application on a final resolution of Upper Pottsgrove's claims in its favor. In any case, the fact that Upper Pottsgrove has sued Protestants days after the filing of the Protest cannot and should not be a basis upon which the Commission should preliminarily dismiss the Protest.¹

8. Denied as a conclusion of law to which no response is required.

¹ If requested by the Administrative Law Judge, Protestants have no objection to the Commission's review of the complaint filed in the Upper Pottsgrove Litigation, so long as the Commission is aware that the complaint has yet to be served on Protestants and, as such, Protestants have not had the opportunity to substantively respond to the specious claims contained therein.

9. Denied. The Protest is a document that speaks for itself and any characterization thereof is strictly denied. By way of further response, the Protest merely sets forth Protestants' "statement of the nature of the protestant's interest in the application", as required by 52 Pa. Code 3.502(a)(4).

10. Denied. It is specifically denied that the Protest is solely based on a request for the Commission to construe or enforce a contract. To the contrary, the Protest sets forth the basis for Protestants' interest in these proceedings, requests a condition of approval, and seeks permission for Protestants to **become parties to these proceedings.**² Given PAWC's and Upper Pottsgrove's admissions that they must obtain the consent of the Protestants to assign the STSA prior to closing, Protestants should be permitted to participate in these proceedings. The remaining averments of this paragraph are denied as conclusions of law to which no response is required.

11. Admitted. By way of further response, neither Protestant has asserted that the Settlement Agreement is part of the instant transaction. Instead, Protestants are simply asserting that Protestants have a good faith basis for withholding their consent to any assignment of the STSA to PAWC given Upper Pottsgrove's anticipated breach of the Settlement Agreement.

12. Denied. As previously stated, Protestants are not asking the Commission to "adjudicate" the claims in the Protest. Instead, Protestants simply set forth the nature of their interests in PAWC's application.

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 Sufficient

13. Denied. The Protest is a document that speaks for itself and any characterization thereof is strictly denied. By way of further response, the transaction cannot close, and PAWC

² The Commission's regulations state that "[u]pon the filing of a timely protest the protestant will be allowed to participate in the proceeding as a party intervenor." 52 Pa. Code 3.502(b).

cannot serve its potential customers, without the assignment of the STSA to PAWC. Accordingly, PAWC cannot demonstrate to the Commission that it has the ability to provide adequate wastewater collection, treatment or disposal capacity to meet present and future customer demands. The Commission should be aware that Protestants will not agree to an assignment of the STSA unless and until Upper Pottsgrove satisfies its obligations under the Settlement Agreement. By way of further answer, the Upper Pottsgrove Litigation seeks a final injunction on the grounds that Upper Pottsgrove will allegedly suffer irreparable harm if it is not able to close on the Acquisition. With the stated position of Upper Pottsgrove, it is specifically denied that Protestants have created a “straw man” argument as alleged by PAWC and Upper Pottsgrove in their preliminary objections.

14. Denied. The Application is a document that speaks for itself and any characterization thereof is strictly denied.

15. Admitted. By way of further response, in addition to the relief requested in the Protest, Protestants request that the Commission expressly condition any approval of the transaction on a completed assignment of the STSA prior to closing, and further request that Protestants be permitted to participate as parties to this proceeding.

16. Denied. To the contrary, Protestants seek to participate as parties in these proceedings to protect the interests of Borough residents and Authority ratepayers. The Commission should not approve the requested transaction until PAWC has demonstrated its ability to service Upper Pottsgrove’s customers, which ability, in turn, depends upon the assignment of the STSA and Protestants’ consent thereto.

V. The Protest Should Not Be Dismissed

17. Denied. To the contrary, the Protest is merely a mechanism intended to inform the Commission that PAWC is unable to adequately serve its customers unless and until Upper Pottsgrove satisfies its outstanding obligations. Protestants request participation in these proceedings in order to protect the interests of their residents and ratepayers. Should it be ultimately determined by the Montgomery County Court of Common Pleas that jurisdiction on whether Upper Pottsgrove is in violation of the Settlement Agreement is properly before the Court of Common Pleas, the Commission should defer to the Court to adjudicate those claims, and either defer action on the Application until Upper Pottsgrove's claims before the Court are finally adjudicated, or alternatively condition any approval of the Application on a final resolution of Upper Pottsgrove's claims before that Court. In any case, the fact that Upper Pottsgrove has sued Protestants days after the filing of the Protest cannot and should not be a basis upon which the Commission should preliminarily dismiss the Protest. Accordingly, the preliminary objections must be denied.

WHEREFORE, Protestants request that this Honorable Administrative Law Judge DENY the 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.

Respectfully submitted,

LAMB MCERLANE PC

By: /s/ Vincent M. Pompo

Vincent M. Pompo
24 E. Market Street, P.O. Box 565
West Chester, PA 19381-0565
(610) 430-8000
vpompo@lambmcerlane.com
Attorney I.D. #37714
Attorney for Protestants

Dated: May 21, 2021

VERIFICATION

I, Vincent M. Pompo, hereby state that I am the Solicitor of the Borough of Pottstown Authority and Special Counsel for the Borough of Pottstown, Montgomery County, Pennsylvania and am duly authorized to make this verification on its behalf. The facts set forth in the foregoing Answer are true and correct to the best of my knowledge, information and belief. 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: May 21, 2021

/s/Vincent M. Pompo
Vincent M. Pompo
LAMB MCERLANE, PC
24 E. Market Street
P.O. Box 565
West Chester, PA 19381-0565
(610) 430-8000
vpompo@lambmcerlane.com

CERTIFICATE OF SERVICE

I hereby certify that this day I have served a copy of Answer of Pottstown Borough Authority and Borough of Pottstown, Montgomery County to Joint Preliminary Objections of PA-American Water Company and Upper Pottsgrove Township to the Protest of Pottstown Borough Authority and Borough of Pottstown, Montgomery County upon the persons listed below in the manner indicated in accordance with the requirements of 52 Pa. Code Section 1.54 (relating to service by a party).

Electronic Mail Transmission ONLY:

Elizabeth Rose Triscari, Esquire
Pennsylvania American Water Company
852 Wesley Drive
Mechanicsburg PA 17055
elizabeth.triscari@amwater.com
Counsel for Applicant, PAWC-WD

David P. Zambito, Esquire
Jonathan Nase, Esquire
Cozen O'Connor
17 North Second Street Suite 1410
Harrisburg, PA 17101
dzambito@cozen.com
jnase@cozen.com
Counsel for Applicant, PAWC-WD

Erin L. Gannon, Esquire
Christine M. Hoover, Esquire
Harrison W. Breitman, Esquire
Office of Consumer Advocate
555 Walnut Street; 5th Floor; Forum Place
Harrisburg, PA 17101
egannon@paoca.org
choover@paoca.org
hbreitman@paoca.org

James J. Rodgers, Esquire
Dilworth Paxson LLP
1500 Market Street, Suite 3500E
Philadelphia, PA 19102
jrodgers@dilworthlaw.com
Counsel for Intervenor Upper Pottsgrove Township

Gina Miller, Esquire
PA PUC Bureau of Investigation and
Enforcement
400 North Street
Harrisburg, PA 17120
ginmiller@pa.gov

Erin K. Fure
Office of Small Business Advocate
555 Walnut Street; 5th Floor; Forum Place
Harrisburg, PA 17101
efure@pa.gov

Dated: May 21, 2021

/s/ Vincent M. Pompo
Vincent M. Pompo, Esq.
LAMB MCERLANE, PC
24 E. Market Street; P.O. Box 565
West Chester, PA 19381-0565
(610) 430-8000
vpompo@lambmcerlane.com