

**PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Birdsboro Kosher Farms Corporation, et al	:	
	:	P-2021-3026165
	:	C-2021-3026163
v.	:	
	:	
Pennsylvania-American Water Company	:	
(water)	:	
	:	
Birdsboro Kosher Farms Corporation, et. al	:	
	:	P-2021-3026180
	:	C-2021-3026178
v.	:	
	:	
Pennsylvania-American Water Company	:	
(wastewater)	:	

**BIRDSBORO KOSHER FARMS CORPORATION, ET AL’S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

AND NOW COMES, Birdsboro Kosher Farms Corporation, et. al (“BKF”), proposing the following Findings of Fact and Conclusions of Law:

**I. Applicable Standard(s):**

Pursuant to 52 Pa. Code § 3.6. Petitions for interim emergency orders:

(a) A party may submit a petition for an interim emergency order during the course of a proceeding. The petition shall be filed with the Secretary and served contemporaneously on the Chief Administrative Law Judge and on the parties.

(b) To the extent practicable, a petition for an interim emergency order must be in the form of a petition as set forth in § 5.41 (relating to petitions generally). A petition for an interim emergency order must be supported by a verified statement of facts which establishes the existence of the need for interim emergency relief, including facts to support the following:

- (1) The petitioner’s right to relief is clear.
- (2) The need for relief is immediate.
- (3) The injury would be irreparable if relief is not granted, and;
- (4) The relief requested is not injurious to the public interest.

Id.

PAWC's conduct, as outlined below, raises substantial legal questions and, therefore, the grant of the interim emergency relief BKF seeks herein is proper. *Core Communications, Inc. v. Verizon Pennsylvania, Inc. and Verizon North LLC*, Docket No. P-2011-2253650 (Order entered September 23, 2011) (*Core*); *Level 3 Communications, LLC v. Marianna & Scenery Hill Telephone Company*, Docket No. C-20028114 (Order entered August 8, 2002) (*Level 3*); cf. *T.W. Phillips Gas and Oil Company v. The Peoples Natural Gas Company*, 492 A.2d 776 (Pa. Cmwlth. 1985) (*T.W. Phillips*).<sup>1</sup>

**II. Pennsylvania American Water Company ("PAWC") is in Violation of its Tariff(s) by failing to properly Meter BKF's Effluent.**

Pursuant to Supplement No. 27 to Tariff Wastewater PA P.U.C. No. 16, Pennsylvania American Water Company's Wastewater Division, approved Rates, Rules and Regulations Governing the Furnishings of Wastewater Collection and Disposal Service for Exeter Township, situs of BKF, "Meter" is defined as:

First Revised Page 21, Canceling Original Page 21 RULES AND REGULATIONS

**Section A – DEFINITIONS (cont'd)**

**21. Meter:** *Any device supplied by the Company or other for the purpose of measuring water consumption or wastewater discharge.*

PAWC's testimony was quite clear, they are purportedly calculating BKF's wastewater charges on an inflow meter located in BKF's well that is inside BKF's plant and NOT the meter for potable water OR the effluent meter PAWC installed over a year ago. BKF, therefore, should

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<sup>1</sup>In reviewing the issuance of an injunction, the Commonwealth Court held that the moving party was not required to demonstrate its absolute right to relief on the underlying claim where the other elements for injunctive relief were satisfied. The Court held that ". . . if the other elements of a preliminary injunction are present, and the underlying claim raises important legal questions, the plaintiff's right to relief is clear." *T.W. Phillips* at 781 (emphasis supplied).

have been billed a flat rate until such time as PAWC determines it will use the Effluent Meter it installed over a year ago.

### **III. PAWC Is in violation of 52 P.S. §65.7(a).**

52 P.S. §65.7(a) requires metered water service. The exceptions do not apply in this case, because BKF is not a fire protection service, and flat rate service may only continue pending implementation of a reasonable metering program, or with permission from the Commission. The evidence shows that BKF is charged a metered rate for wastewater based upon a meter in its well located inside the plant that calculates how much water BKF has drawn from its well for operations. The evidence also shows that PAWC installed a meter for BKF's wastewater over a year ago and simply refuses to use it. PAWC is choosing not to rely on wastewater meters in favor of determining the wastewater volume based on the volume of water provided to BKF. This is because their tariff for Exeter purports to allow for them to bill based on water usage or sewer flows at their discretion.

This practice violates the universal metering mandate of 52 P.S. §65.7 because accepting wastewater discharge is a separate water service from the provision of water. PAWC must meter both to comply with this law. PAWC's witnesses testified that they base the wastewater volume based on the volume of water provided. This does not make scientific sense given how BKF operates. BKF's processing results in the chicken retaining significant amounts of added water and therefore the volume of water flowing out will be less than the amount of water flowing in. PAWC simply picks the water in meter instead of the sewage out meter because the water in will be higher. See,

<https://www.fsis.usda.gov/food-safety/safe-food-handling-and-preparation/food-safety-basics/water-meat-poultry>.

This is why metering of the wastewater is required. Consumptive use of the water reduces the total amount of water discharged and it is inherently unfair and unlawful to not account for that difference. PAWC is knowingly violating the law in order to overcharge more than 2000 other industrial customers for wastewater, and their own witnesses admitted it.

#### **IV. PAWC is in Violation of Exeter Township Code.**

Pursuant to Exeter Township Code, Chapter 305, Art. III, Sect. 305-17E, Exeter Township Code requires connections to the sewer system be metered when a meter is installed. § 305-17(E)(3) and (4) provide for inspection of meters for the purpose “of measuring the consumption of water which will flow to the sewer system.” This means that PAWC can only charge for wastewater based on “**water consumed that will flow to the sewer**” not just water provided. By their own admission, PAWC is not “measuring the consumption of water which will flow to the sewer system”, but measuring water provided to determine wastewater charges. This means they are trying to collect amounts for wastewater determined using a method disapproved of by Exeter Township Code. They are trying to collect unlawfully determined charges and they shut off BKF’s sewer access because BKF questioned the legality of their methods.

#### **V. PAWC’s Testing Methods Violated Its Tariff and Churned Fees**

The method of testing PAWC uses is unlawful because it does not ensure reliable and accurate results. Instead, PAWC allows its sampling team to put its thumb on the scale<sup>2</sup> to increase the amount of money they can charge. First, the evidence shows that they selectively test in order to get the highest pollutant results they can get. Their inspectors are even crass

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<sup>2</sup> Please note, as was testified to by PAWC’s witnesses, the contested surcharges would be similarly inflated – above the skewed sampling results, because they are applied to the amount of water BKF took in and NOT what it sent to PAWC.

enough to admit to BKF that they will re-sample to get the results they want, rather than the results that are scientifically solid. While another section specifically addresses the free exercise problems with Friday testing, their stubborn refusal to not sample on Friday results in abnormally high results because BKF's pre-treatment is not operating. This is a violation of the permit which requires testing during operation. Second, PAWC put on no evidence to refute the allegation of improper testing procedure. Their testimony on how they gathered samples consisted of testimony of one person who said he would have to punch through solids on top of the liquid to sample – a claim easily debunked by BKF's demonstrative videos. That alone shows the deficiency in their testing because breaking that solid layer will result in particles that would be skimmed off getting into the water and pulled out as if they would be sent to the sewer. That is akin to letting the cream rise to the top, putting in a spoon to stir it up, and then complaining that the milk isn't skimmed.

PAWC has a duty to perform scientifically valid testing and they simply do not follow scientifically valid procedures. Garbage in means garbage out, and they cannot rely on their testing to determine IPP charges because it has no relation to the amounts of pollutants discharged.

## **VI. PAWC has Violated the Pennsylvania Religious Freedom Protection Act**

The Pennsylvania Religious Freedom Protection Act ("PRFP") provides that an "agency shall not substantially burden a person's free exercise of religion, including any burden which results from a rule of general applicability." 71 P.S. §2404. PAWC is a Non-Commonwealth agency regulated by PFRP. BKF is entitled to the protection of the PFRP as kosher poultry processor operated by devout Orthodox Jews and they must comply with the observance of the Shabbat in strict accordance with Halakha. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct.

2751, 2767-68 (2014) (analyzing the Federal RFRA and finding that its protections apply to for-profit corporations); *see also Braunfeld v. Brown*, 366 U.S. 599 (hearing a free exercise claim where a business operated by Orthodox Jews was compelled to close on Sunday but decided against them pre-RFRA).

It is simply impossible to operate a kosher food plant during Shabbat because it would result in multiple violations of Halakha and Friday testing significantly burdens BKF's free exercise rights and their PRFP rights. PAWC's practice of sampling – placing the equipment in BKF's wet well AFTER production for the week has ended has resulted in BKF facing a choice PRFP is designed to eliminate; burden your beliefs by operating during Shabbat so we can test that day or get your water services shutoff because you will not pay the excessive and unscientific bills that result from Friday testing.

This is the exact evil that Justice Stewart found odious in *Braunfeld* where he found that “Pennsylvania ha[d] passed a law which compels an Orthodox Jew to choose between his religious faith and his economic survival. That is a cruel choice. It is a choice which I think no State can constitutionally demand.” 366 U.S. at 616 (Stewart, J. dissenting). PAWC's witnesses demonstrated a complete lack of concern for BKF's religious beliefs and the “cruel choice” their sampling procedure causes. As their witnesses testified, their permit requires random sampling and they say this requires testing on Friday. But their witnesses also testified that they do not sample on Saturday, Sunday or Monday because it is more costly for them to do sampling on those days. This results in 38% of the tests being performed on Thursdays and 28% on Fridays --- when the plant is not operating at all because it closed at 4:00 on the prior day.

In *Yoder v. Sugar Grove Area Sewer Authority*, the trial court required the sewer authority “to take due care as to [Owners'] religious convictions and shall proceed in a manner so as to

pose the least possible intrusion on [Owners'] religious convictions and beliefs” with regard to a requirement they operate an electric grinder before privy waste entered the sewer.” Pa. Commonwealth. No. 1927 C.D. 2016. While the Commonwealth Court upheld the trial court’s determination that using an electrical grinder was the least intrusive means of connecting to the sewer because there were no other feasible non-electric options, it still found that the Yoder’s still had a right to the least intrusive means of connecting to the sewer. *Id.*

In this case there is an obvious solution to the problem, do not test on Thursdays and Fridays when the plant is not operating. But PAWC does not want to do this because it results in inflated bills for BKF, not because of any fidelity to the randomness requirement of the permit. Indeed, a sampling method is not truly random when 28% of the tests happen on one day of the week. Under a truly random sampling method the number Friday tests would be 1/7th or 14%. PAWC cannot demonstrate that Thursday and Friday sampling is the least intrusive means of determining the levels of pollutants in the wastewater. The agency has not proven, by a preponderance of the evidence, that the burden placed on BKF by Thursday and Friday testing furthers a compelling interest of the agency or is the least restrictive means of furthering the compelling interest. This Court should enforce BKF’s right to free exercise and hold that Thursday and Friday testing substantially burdens their right to observe the Shabbat and that PAWC is not entitled to any charges or fees that derive from such testing.

#### **VII. An emergency exists**

The grant of interim emergency relief herein is necessary and proper. See, 52 Pa. Code § 3.6. PAWC’s conduct violates its Tariff, state law, and Exeter Township’s Code and was in bad faith, unreasonable, inequitable, and unjust. See 66 Pa. C.S. § 508; *AT&T v. Pa. PUC*, 709 A.2d 980, 989 (Pa. Cmwlth. 1998) (“the General Assembly has specifically told the Commission that

when any terms or conditions of an agreement are ‘unjust, unreasonable or inequitable, or otherwise contrary or adverse to the public interest and general well-being of the Commonwealth,’ it shall determine the terms and conditions that will rectify that situation”); *Octoraro Railway, Inc. v. Pa. PUC*, 482 A.2d 278 (Pa. Cmwlth. 1984) (since the Commission has power to modify contracts under Section 508 of the Code, the ALJ has the authority to rule on the validity of agreements between public utilities and municipal corporations).

Issues concerning the reasonableness, adequacy, and sufficiency of public utility service, be they contractual or otherwise, are squarely within the Commission’s jurisdiction. 66 Pa. C.S. §§ 1501 and 1505; *Disanto v. Dauphin Consolidated Water Supply Co.*, 291 Pa. Super. 440, 436 A.2d 197 (1981). In *Fitzgerald v. Mountain Laurel Racing, Inc.*, 607 F.2d 589, 598 (3d Cir. 1979), the court determined that where a licensed horse racing trainer and driver, suffered irreparable injury to his business and reputation after being evicted from defendant’s race track, which “had the extreme effect of barring him from any activity at the track.”

Herein, BKF will be shut down and bankrupt within weeks except and unless the Court grants the relief sought.<sup>3</sup> In *Newlife Homecare Inc. v. Express Scripts*, No. 3:07 cv 761, 2007 WL 1314861 (M.D. Pa., May 4, 2007), the plaintiff moved for a temporary restraining order, asking the court to order the defendant to pay plaintiff over \$1.6 million that plaintiff claimed it was owed. Noting that “the law requires convincing proof that a business will in fact cease to exist or be forced into bankruptcy for such an eventuality to be considered irreparable harm,” *id.* at \*5, the district court found that plaintiff had presented “concrete evidence that it will in fact be forced out of business and/or into bankruptcy due to the defendant’s failure to release

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<sup>3</sup> Although monetary losses generally are insufficient to support an emergency order, economic losses can satisfy the rule’s irreparable injury requirement. *West Penn Power Co. v. Pennsylvania Public Utility Commission*, 615 A.2d 951 (Pa. Cmwlth. 1992); *appeal denied* 655 A.2d 520 (Pa. 1993); *cert. denied* 115 S. Ct. 311 (U. S. 1994).

payments,” *id.* at \*6, to the plaintiff and, thus had established irreparable harm. Further, as herein the district court considered that the plaintiff company was a vital supplier, which factor bolstered the court’s finding of irreparable injury.

In *Goldhaber v. Foley*, 519 F. Supp. 466 (E.D.Pa. 1981), the district court found that the plaintiffs had established irreparable injury since they were being denied their public employment positions without clear evidence that they would have a damages remedy available to them if they succeeded on the merits. Herein, Complainants have equally been denied due process.

**VIII. The need for relief is immediate.**

Besides the fact that BKF’s Plant is currently bleeding with pumping, the testimony, including PAWC’s, demonstrates that the DEP is clamoring for BKF to connect as a potential spill could be devastating to the local wetlands and waterways. Moreover, any violation of statutory right re a municipal service justifies immediate relief and enforcement of the Commission’s Tariff’s etc. justifies immediate relief. Section 3.1 defines Emergency as “a situation which presents a clear and present danger to life or property or which is uncontested and requires action prior to the next scheduled public meeting. Respectfully, Exhibit 19 alone meets this test but, then again, so does enforcement of the Commonwealth and its’ subdivisions laws and regulations.

**IX. The injury would be irreparable if relief is not granted.**

BKF’s unchallenged testimony was that at nearly eight times the costs, continued operations utilizing bulk waste haulers will do what Covid could not and permanently shutter the plant. But there also is the irreparable damage that comes when one overlooks knowing

violations of state law, regulations, and Tariffs. And, of course, the Pennsylvania Department of Environmental Protection's concerns of a spill that would taint wetlands and a nearby stream.

PAWC, conversely, will be well protected with a reasonable Bond to ensure that BKF timely remits prospective charges pending the outcome of its complaints before the Commission.<sup>4</sup>

**X. The relief requested is not injurious to the public interest.**

Enforcement of the Commonwealth's laws, a political subdivisions Code, and the Commission's Tariffs and rules and regulations not only presents no harm to the public interest, it champions it. PAWC is the nation's largest privately held water company, BKF is a small, Orthodox Kosher Poultry processing facility. The Pennsylvania Utilities Commission was created in 1907 when the legislature created the Pennsylvania State Railroad Commission.

Since then, with Act 114 of 1986, when the PUC added the Office of Trial Staff from the Law Bureau Rates Division which included attorneys to represent the public interest in all electric, natural gas, telephone, water and other fixed utility rate cases, it has a strong legacy of balancing the scales between public service companies and the consumer. And, herein, that is all BKF is asking for, that this Court restore service to its plant pending the outcome of its complaints before the Commission, subject to reasonable bond, as it otherwise stands alone before a mega-conglomerate armed with cash and lawyers.

Respectfully submitted this 8<sup>th</sup> day of June, 2021.

/s/ Joseph A. O'Keefe  
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<sup>4</sup> In fact, DEP has informed BKF that BKF needs to have sufficient wastewater storage tanks for three days of wastewater by July 15, 2021, unless reconnected to the sewer.

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