



June 29, 2021

VIA E-FILING

David P. Zambito

Direct Phone 717-703-5892
Direct Fax 215-989-4216
dzambito@cozen.com

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.

Main Brief of Pennsylvania-American Water Company

Dear Secretary Chiavetta:

Enclosed for filing with the Pennsylvania Public Utility Commission, please find Pennsylvania-American Water Company's Main Brief in the above-referenced proceeding. A copy of this document has been served in accordance with the attached Certificate of Service.

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

Sincerely,

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

DPZ/kmg
Enclosure

cc: Honorable Jeffrey A. Watson
Nicholas 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 25th day of June 2021 served a true copy of the foregoing **Main Brief of Pennsylvania-American Water Company** 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

Erin K. Fure, Esq.
Office of Small Business Advocate
555 Walnut Street
Forum Place, 1st Floor
Harrisburg, PA 17101
*Counsel for Office of Small Business
Advocate*
efure@pa.gov

Gina L. Miller, Esq.
Pennsylvania Public Utility Commission
Bureau of Investigation and Enforcement
Commonwealth Keystone Building
400 North Street, 2nd Floor West
Harrisburg, PA 17120
*Counsel for Bureau of Investigation
and Enforcement*
ginmiller@pa.gov

Christine Maloni Hoover, Esq.
Erin L. Gannon, Esq.
Harrison W. Breitman, Esq.
Senior Assistant Consumer Advocate
Office of Consumer Advocate
555 Walnut Street
Forum Place, 5th Floor
Harrisburg, PA 17101-1923
Counsel for Office of Consumer Advocate
CHoover@paoca.org
EGannon@paoca.org
HBreitman@paoca.org

Vincent M. Pompo, Esq.
Lamb McErlane, PC
24 E. Market Street
P.O. Box 565
West Chester, PA 19381
*Counsel for Pottstown Borough Authority
and Borough of Pottstown*
vpompo@lambmcerlane.com

Gregg I. Adelman, Esq.
Kaplin Stewart Meloff Reiter & Stein, P.C.
Union Meeting Corporate Center
910 Harvest Drive
P.O. Box 3037
Blue Bell, PA 19422-0765
Counsel for *Shadeland Development Corporation*
GAdelman@KAPLAW.com

James J. Rodgers, Esq. (PA ID 21635)
Marc A. Feller, Esq. (PA ID 19545)
Elizabeth Preate Havey, Esq. (PA ID 80793)
DILWORTH PAXSON LLP
1500 Market Street, Suite 3500E
Philadelphia, PA 19102
Counsel for *Upper Pottsgrove Township*
jrodgers@dilworthlaw.com
mfeller@dilworthlaw.com
epreatehavey@dilworthlaw.com

Respectfully submitted,



David P. Zambito, Esquire (PA ID 80017)
Jonathan P. Nase, Esquire (PA ID 44003)
Cozen O'Connor
17 North Second Street, Suite 1410
Harrisburg, PA 17101
(717) 703-5892
dzambito@cozen.com
jnase@cozen.com

Attorneys for *Pennsylvania-American Water Company*

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**ADMINISTRATIVE LAW JUDGE
JEFFREY A. WATSON**

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 al.*
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 :

MAIN BRIEF OF PENNSYLVANIA-AMERICAN WATER COMPANY

Elizabeth Rose Triscari, Esq. (PA ID 306921)
Pennsylvania-American Water Company
852 Wesley Drive
Mechanicsburg, PA 17055
Email: elizabeth.triscari@amwater.com
Telephone: (717) 550-1574

David P. Zambito, Esq. (PA ID 80017)
Jonathan P. Nase, Esq. (PA 44003)
Cozen O'Connor
17 North Second Street, Suite 1410
Harrisburg, PA 17101
Email: dzambito@cozen.com
Email: jnase@cozen.com
Telephone: (717) 703-5892

Counsel for *Pennsylvania-American Water
Company*

Date: June 29, 2021

TABLE OF CONTENTS

I. INTRODUCTION 2

 A. Procedural History..... 2

 B. Overview of the Proposed Transaction 2

 C. Legal Standards 2

 1. Burden of Proof..... 2

 2. Legal Standard for Section 1102 Approvals..... 3

 3. Legal Standard for Section 1329 Approvals..... 3

 4. Legal Standard for Section 507 Approvals..... 3

 5. Legal Standard for Approving a Settlement 3

II. THE SETTLEMENT IS IN THE PUBLIC INTEREST 4

 A. Approval of the Application..... 4

 B. Tariff..... 5

 C. Fair Market Value for Ratemaking Rate Base Purposes 5

 D. Fair Market Value Appraisals 5

 E. Engineering Assessment..... 5

 F. Easements, Rights of Ways and Liens 5

 G. Inflow and Infiltration Study 5

 H. Rates 6

 I. Distribution System Improvement Charge..... 6

 J. Claims for Allowance for Funds Used During Construction
 and Deferred Depreciation 6

 K. Transaction and Closing Costs..... 6

 L. Low Income Program Outreach 6

M. Approval of Section 507 Agreements	6
N. Other Necessary Approvals.....	7
O. Miscellaneous.....	7
III. Public Input Hearing Testimony Has Been Addressed.....	7
IV. The Contested Issue	7
V. Conclusion	12
APPENDIX A PROPOSED FINDINGS OF FACT	
APPENDIX B PROPOSED CONCLUSIONS OF LAW	
APPENDIX C PROPOSED ORDERING PARAGRAPHS	

TABLE OF AUTHORITIES

	Page(s)
 <i>Pennsylvania Appellate Cases</i>	
<i>Burleson v. Pa. Pub. Util. Comm'n</i> , 443 A.2d 1373 (Pa. Cmwlth. 1982)	3
<i>Milkie v. Pa. Pub. Util. Comm'n</i> , 768 A.2d 1217 (Pa. Cmwlth. 2001)	3
<i>Mill v. Pa. Pub. Util. Comm'n</i> , 447 A.2d 1100 (Pa. Cmwlth. 1982)	2, 11
<i>Murphy v. Dept. of Public Welfare</i> , 480 A.2d 382 (Pa. Cmwlth. 1984)	2, 11
<i>Norfolk & Western Ry. Co. v. Pa. Pub. Util. Comm'n</i> , 489 Pa 109 (1980)	2, 11
<i>Pa. Pub. Util. Comm'n v. C.S. Water and Sewer Assocs.</i> , 74 Pa. P.U.C. 767 (1991)	4
<i>Pa. Pub. Util. Comm'n v. York Water Co.</i> , Docket No. R-00049165 (Order entered October 4, 2004)	4
<i>Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n</i> , 578 A.2d 600 (Pa. Cmwlth. 1990)	2
<i>Se-Ling Hosiery, Inc. v. Margulies</i> , 364 Pa. 45 (1950)	2
 <i>Pennsylvania State Statutes</i>	
66 Pa. C.S. § 315(b)	10
66 Pa. C.S. § 502	10
66 Pa. C.S. § 503	10
66 Pa. C.S. § 507	3, 6, 7, 9 and 10
66 Pa. C.S. § 703(g)	10
66 Pa. C.S. § 1102	2

66 Pa. C.S. § 1329.....3, 11 and 12

Pennsylvania Regulations

52 Pa. Code § 5.2313
52 Pa. Code § 5.501(a).....1
52 Pa. Code § 69.4013

AND NOW COMES Pennsylvania-American Water Company (“PAWC”), pursuant to 52 Pa. Code § 5.501(a) and the Prehearing Conference Order issued by Administrative Law Judge Jeffrey A. Watson (the “ALJ”) on May 21, 2021 (as revised by the ALJ’s Interim Order Revising Litigation Schedule and the ALJ’s Second Interim Order Revising Litigation Schedule),¹ to file this Main Brief. PAWC incorporates by reference, in their entirety:

(a) the Joint Petition for Approval of Non-Unanimous Settlement of All Issues (the “Settlement”) between PAWC, Upper Pottsgrove Township (“Upper Pottsgrove”), the Office of Consumer Advocate (“OCA”), the Office of Small Business Advocate (“OSBA”), the Bureau of Investigation and Enforcement (“I&E”) of the Pennsylvania Public Utility Commission (“Commission”) and Shadeland Development Corporation (“Shadeland”) (together, the “Joint Petitioners”), filed on June 25, 2021;

(b) PAWC’s Statement in Support of the Settlement, filed on June 25, 2021; and

(c) the Joint Stipulation of Proposed Findings of Fact, Proposed Conclusions of Law and Proposed Ordering Paragraphs (the “Stipulation”) between the Joint Petitioners, also filed on June 25, 2021.

The Settlement resolves all issues in this proceeding except one: The claim of Pottstown Borough Authority (“PBA”) and the Borough of Pottstown (“BP”), Montgomery County, Pennsylvania (together, “PBA/BP”) that the Commission should not approve the Application before PBA/BP consent to the assignment of the Sewage Treatment Service Agreement (“STSA”) from Upper Pottsgrove to PAWC (the “Contested Issue”). Consequently, this Main Brief will

¹ As directed by the ALJ, PAWC is using the same outline for this Main Brief as was used for the Statements in Support, except that PAWC has added a Section IV to discuss the single contested issue in this proceeding.

focus on that issue (and, in fact, will argue that the Settlement resolves that issue, even though PBA/BP are not parties to the Settlement).

To promote brevity, this Main Brief will cross-reference the relevant provisions of the Settlement, PAWC's Statement in Support and the Stipulation, rather than repeating those documents at length here. All capitalized terms used herein have the definitions set forth in the Settlement, unless otherwise noted.

I. INTRODUCTION

A. Procedural History

PAWC incorporates by reference the Settlement ¶¶ 1-24.

B. Overview of the Proposed Transaction

PAWC incorporates by reference Proposed Findings of Fact 6-7.

C. Legal Standards

1. Burden of Proof

PAWC must establish its case by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 578 A.2d 600 (Pa. Cmwlth. 1990). That is, PAWC's evidence must be more convincing, by even the smallest amount, than the evidence presented by the other parties. *Se-Ling Hosiery, Inc. v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950). Any finding of fact necessary to support the Commission's decision must be supported by substantial evidence that a reasonable mind might accept as adequate to support a conclusion. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & Western Ry. Co. v. Pa. Pub. Util. Comm'n*, 489 Pa 109, 413 A.2d 1037 (1980); *Murphy v. Dept. of Public Welfare*, 480 A.2d 382 (Pa. Cmwlth. 1984); *Mill v. Pa. Pub. Util. Comm'n*, 447 A.2d 1100 (Pa. Cmwlth. 1982).

Once PAWC establishes a *prima facie* case by presenting substantial record evidence in support of the proposed action, the burden of production shifts to the other parties. If the other parties present evidence of co-equal value or weight, the burden of going forward with some additional evidence to rebut the opposing party's evidence then shifts back to PAWC. *Burleson v. Pa. Pub. Util. Comm'n*, 443 A.2d 1373 (Pa. Cmwlt. 1982), *aff'd*, 501 Pa. 433, 461 A.2d 1234 (1983). While the burden of going forward with the evidence may shift back and forth during a proceeding, the burden of proof never shifts; the burden of proof always remains on the party seeking affirmative relief from the Commission. *Milkie v. Pa. Pub. Util. Comm'n*, 768 A.2d 1217 (Pa. Cmwlt. 2001).

PAWC also incorporates by reference the Stipulation, Proposed Conclusion of Law No. 2.

2. Legal Standard for Section 1102 Approvals

PAWC incorporates by reference the Stipulation, Proposed Conclusions of Law Nos. 6-12.

3. Legal Standard for Section 1329 Approvals

PAWC incorporates by reference the Stipulation, Proposed Conclusions of Law Nos. 13-20.

4. Legal Standard for Section 507 Approvals

PAWC incorporates by reference the Stipulation, Proposed Conclusion of Law No. 21.

5. Legal Standard for Approving a Settlement

Commission policy promotes settlements. See 52 Pa. Code § 5.231. Settlements lessen the time and expense that the parties must expend litigating a case and, at the same time, conserve precious administrative resources. The Commission has indicated that settlement results are often preferable to those achieved at the conclusion of a fully-litigated proceeding. See 52 Pa. Code § 69.401. In order to accept a settlement, the Commission must determine that the proposed terms

and conditions are in the public interest. *Pa. Pub. Util. Comm'n v. York Water Co.*, Docket No. R-00049165 (Order entered October 4, 2004); *Pa. Pub. Util. Comm'n v. C.S. Water and Sewer Assocs.*, 74 Pa. P.U.C. 767 (1991).

PAWC also incorporates by reference the Stipulation, Proposed Conclusions of Law Nos. 3-5 and 22.

II. THE SETTLEMENT IS IN THE PUBLIC INTEREST

A. Approval of the Application

PAWC incorporates by reference the Settlement, ¶ 25, PAWC's Statement in Support of the Settlement, pp. 4-8, and the Stipulation, Proposed Findings of Fact Nos. 12-26 and Proposed Conclusions of Law Nos. 6-12 and 22.

PAWC also incorporates by reference Section IV. below, regarding the Contested Issue. As stated in that section, although PBA/BP have not yet consented to the assignment of the STSA, the APA, PAWC's Rebuttal Testimony, and the Settlement provide adequate safeguards that Closing on the Transaction will not occur until after PBA/BP have consented to the assignment of the STSA or a court of competent jurisdiction directs assignment of the STSA. There is simply no danger that PAWC will Close on the Transaction and leave itself and its customers without a source of wastewater treatment services. Consequently, there is no need for the Commission to address the purely hypothetical issue of "what happens if PAWC and Upper Pottsgrove Close on the Transaction without Upper Pottsgrove assigning the STSA to PAWC" when considering the real issues in this case (*e.g.*, whether PAWC is legally, financially and technically fit to own or operate the System and whether the Transaction, as modified by the Settlement, has substantial affirmative public benefits).

B. Tariff

PAWC incorporates by reference the Settlement, ¶ 26, PAWC’s Statement in Support of the Settlement, pp. 12-13 and the Stipulation, Proposed Findings of Fact Nos. 32-33.

C. Fair Market Value for Ratemaking Rate Base Purposes

PAWC incorporates by reference the Settlement, ¶ 27, PAWC’s Statement in Support of the Settlement, pp. 8-9 and the Stipulation, Proposed Finding of Fact No. 27 and Proposed Conclusion of Law Nos. 13-14.

D. Fair Market Value Appraisals

PAWC incorporates by reference the Settlement, ¶ 28, and PAWC’s Statement in Support of the Settlement, pp. 9-10.

E. Engineering Assessment

PAWC incorporates by reference the Settlement, ¶ 29, and PAWC’s Statement in Support of the Settlement, p. 10.

F. Easements, Rights of Ways and Liens

PAWC incorporates by reference the Settlement, ¶¶ 30-31, and PAWC’s Statement in Support of the Settlement, pp. 10-11.

It should be noted that these Settlement provisions ensure the resolution of Shadeland’s dispute with Upper Pottsgrove regarding the ownership of a certain sewer line before Closing on the Transaction. These provisions are substantially similar to the provisions in the Settlement that address the Contested Issue. Settlement ¶¶ 42-43 (*see* Section IV. below).

G. Inflow and Infiltration Study

PAWC incorporates by reference the Settlement, ¶ 32, and PAWC’s Statement in Support of the Settlement, pp. 11.

H. Rates

PAWC incorporates by reference the Settlement, ¶¶ 33-34, PAWC’s Statement in Support of the Settlement, pp. 12-13, and the Stipulation, Proposed Conclusion of Law No. 15.

I. Distribution System Improvement Charge

PAWC incorporates by reference the Settlement, ¶ 35, PAWC’s Statement in Support of the Settlement, p. 13, and the Stipulation, Proposed Conclusion of Law Nos. 16-17.

J. Claims for Allowance for Funds Used During Construction and Deferred Depreciation

PAWC incorporates by reference the Settlement, ¶ 36, PAWC’s Statement in Support of the Settlement, p. 14, and the Stipulation, Proposed Conclusions of Law Nos. 18-19.

K. Transaction and Closing Costs

PAWC incorporates by reference the Settlement, ¶¶ 37-39, PAWC’s Statement in Support of the Settlement, pp. 14-15, and the Stipulation, Proposed Conclusion of Law No. 20.

L. Low Income Program Outreach

PAWC incorporates by reference the Settlement, ¶¶ 40-41, and PAWC’s Statement in Support of the Settlement, p. 16.

M. Approval of Section 507 Agreements

PAWC incorporates by reference the Settlement, ¶¶ 42-43, PAWC’s Statement in Support of the Settlement, pp. 16-17, and the Stipulation, Proposed Conclusion of Law No. 21.

PAWC also incorporates by reference Section IV. below, regarding the Contested Issue. As stated in that section, although PBA/BP has not yet consented to the assignment of the STSA, the APA, PAWC’s Rebuttal Testimony, and the Settlement provide adequate safeguards that Closing on the Transaction will not occur until after PBA/BP have consented to the assignment of the STSA or assignment of the STSA is directed by a court of competent jurisdiction. There is

simply no danger that PAWC will Close on the Transaction and leave itself and its customers without a source of wastewater treatment services. Consequently, there is no need for the Commission to address the purely hypothetical issue of “what happens if PAWC and Upper Pottsgrove Close on the Transaction without Upper Pottsgrove assigning the STSA to PAWC” when considering the real issues in this case (*e.g.*, whether to approve the STSA pursuant to Section 507).

N. Other Necessary Approvals

PAWC incorporates by reference the Settlement, ¶ 44, and PAWC’s Statement in Support of the Settlement, p. 18.

O. Miscellaneous

PAWC incorporates by reference the Settlement, ¶¶ 45-51, and PAWC’s Statement in Support of the Settlement, pp. 17-18.

III. PUBLIC INPUT HEARING TESTIMONY HAS BEEN ADDRESSED

PAWC incorporates by reference the Statement in Support of the Settlement, pp. 18-20.

IV. THE CONTESTED ISSUE

As stated previously, there is only one issue to be litigated in this proceeding: Whether the Commission should approve the Transaction before PBA/BP consent to the assignment of the STSA from Upper Pottsgrove to PAWC or assignment is directed by a court of competent jurisdiction. PAWC respectfully submits that the ALJ should resolve this issue in the affirmative and find that the Contested Issue provides no basis for recommending that the Commission disapprove the Application, as modified by the Settlement.

PBA/BP's entire argument comes down to this: PAWC cannot Close on the Transaction until PBA/BP consent to the assignment of the STSA because the Upper Pottsgrove System is a collection and conveyance system; in the absence of an assignment of the STSA, PAWC will not be able to treat the System's wastewater. PBA/BP Statement No. 1 p. 6.

PAWC and Upper Pottsgrove, however, do not seek Commission approval to Close on the Transaction before PBA/BP consent to the assignment of the STSA or assignment is directed by a court of competent jurisdiction. PAWC, Upper Pottsgrove and PBA/BP have always agreed on the necessity for the STSA to be assigned to PAWC at or before Closing. 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, pp. 1-2 and 5; Joint Reply of Pennsylvania-American Water Company and Upper Pottsgrove Township to the Answer of Pottstown Borough Authority and Borough of Pottstown, Montgomery County to the Joint Preliminary Objections of Pennsylvania-American Water Company and Upper Pottsgrove Township, pp. 2-3.²

The APA, PAWC's rebuttal testimony, and the Settlement contain safeguards to ensure that PAWC and Upper Pottsgrove will not close on the Transaction until BPA/BP consent to the

² The alignment of the relief sought by the parties clearly demonstrates that the real purpose of PBA/BP's Protest has nothing to do with the Application before the Commission. Instead, PBA/BP appear to seek to compel a monetary concession from Upper Pottsgrove (or PAWC) to resolve a contract claim arising pursuant to a separate contract (the July 2, 2013 Settlement Agreement and Release between PBA and Upper Pottsgrove (the "Release")). In fact, PBA/BP's witness testified that PBA/BP would consider withdrawing its Protest to the Application if PAWC would pay the disputed amount and meet other, unspecified, conditions. PBA/BP St. No. 1 pp. 6-7. PAWC is not a party to the Release and has no involvement in the dispute. PAWC is unwilling to assume any obligation to pay PBA/BP in order to obtain assignment of the STSA. PAWC St. No. 1-R p. 9. There is no reason for this Commission to compel PAWC's ratepayers to make a monetary payment to PBA/BP to obtain assignment of the STSA. The Commission should explicitly disapprove of PBA/BP's abuse of the Commission's litigation process. PAWC and the other parties to this proceeding have been required to pay considerable counsel fees to litigate this proceeding when the parties have no real dispute and the only issue is an unrelated contract matter over which the Commission lacks jurisdiction. ALJ's "Interim Order Granting in Part and Denying in Part Preliminary Objections of Pennsylvania-American Water Company and Upper Pottsgrove Township to the Joint Protest of Pottstown Borough Authority and the Borough of Pottstown" at p. 12.

assignment of the STSA or assignment is directed by a court of competent jurisdiction. In the APA, the Township agreed to obtain assignment of the STSA before Closing. **Appendix A-24-a** § 13.02(d); Schedule 4.05. The APA gives PAWC the contractual right to refuse to Close until Upper Pottsgrove has obtained assignment of the STSA. *Id.* § 12.01(a).

The APA allows PAWC to waive the requirement that Upper Pottsgrove obtain assignment before Closing, *id.* Article XII (introduction), but PAWC made a commitment in its Rebuttal Testimony that it would not waive this requirement:

Q. DOES THE APA GIVE PAWC THE RIGHT TO WAIVE THIS CONDITION PRIOR TO CLOSING?

A. Yes, but by this rebuttal testimony, PAWC commits that it will not close the Transaction without assignment of the STSA. At the current time, PAWC will need bulk treatment services from PBA/BP for the Upper Pottsgrove System. If PAWC seeks to waive this condition of Closing, PAWC will file a petition with the Commission setting forth the proposed waiver and permitting Parties and the Commission an opportunity to evaluate whether the waiver would materially alter PAWC's Application as approved by the Commission. In the event that such a petition is filed, PAWC agrees that Closing cannot occur until the Commission has finally resolved the petition. Consequently, the public interest will not be adversely affected by the fact that PBA/BP have not yet consented to the assignment of the STSA.

PAWC Statement No. 1 p. 11.

The Settlement further addresses the Contested Issue and removes PAWC's ability to waive assignment of the STSA as a condition precedent of Closing. The Settlement, at ¶¶ 42-43, provides:

42. Pursuant to 66 Pa. C.S. § 507, the Commission shall issue Certificates of Filing or approvals for the following agreements between PAWC and a municipal corporation: (1) the Sanitary Sewer Asset Purchase Agreement By and Between Upper Pottsgrove Township, Montgomery County as Seller and Pennsylvania-American Water Company as Buyer, dated as of April 28, 2020; (2) the Sewage Treatment Service Agreement between Upper Pottsgrove Township, Borough of Pottstown and Pottstown Borough Authority; and, (3) the Joint Sewage Transportation Agreement between Upper Pottsgrove Township and Lower Pottsgrove Township.³

43. The contracts listed in Schedule 4.13 of the APA including but not limited to the Sewage Treatment Service Agreement referenced in Paragraph 42, which are subject to approval by the Commission under 66 Pa. C.S. § 507, are material to the Commission’s approval of the Transaction (singularly, a “Material Agreement”) and that PAWC will require, subject to 66 Pa. C.S. § 703(g), Upper Pottsgrove to obtain assignment of all Material Agreements as a condition of Closing.

³ The OCA does not join in this paragraph but does not oppose PAWC’s request.

Putting these provisions into a Settlement, which would be approved by the Commission, gives the Commission considerable authority to enforce these provisions. *See, e.g.*, 66 Pa. C.S. §§ 315(b), 502, 503. If the Commission would approve the Settlement, PAWC could only Close on the Transaction if (a) Upper Pottsgrove obtains PBA/BP’s consent at, or prior to, Closing, (b) a court of competent jurisdiction directs assignment of the STSA at, or prior to, Closing, or (c) PAWC files a petition pursuant to 66 Pa. C.S. § 703(g) (“Rescission and amendment of orders”) specifically asking the Commission to revise its order approving the Application to allow PAWC to Close on the Transaction without assignment of the STSA. If PAWC would seek to Close on the Transaction without satisfying these conditions, any party to this proceeding could file a petition with the Commission seeking to enforce the Commission’s order.

Under these circumstances, there is simply no danger that PAWC will Close on the Transaction and leave itself and its customers without a source of wastewater treatment services. As such, PBA/BP’s refusal to consent to the assignment to date is no reason for the ALJ to recommend that the Commission disapprove the Transaction, as modified by the Settlement.

It is significant to note what PBA/BP do not say -- they do not contend that they will never consent to the assignment.³ The dispute between Upper Pottsgrove and PBA/BP is simply a

³ PBA/BP may not have a choice on whether or not to consent to the assignment; Upper Pottsgrove has filed an action in the Montgomery County Court of Common Pleas seeking a judicial directive that PBA/BP consent to the assignment. Upper Pottsgrove Statement No. 1-R pp. 8-9.

monetary dispute. PAWC is confident that Upper Pottsgrove and PBA/BP can and will resolve their differences; at which point, the Transaction can move forward to Closing.

There is no evidence in the record whatsoever that Closing on the Transaction will be unreasonably delayed by the requirement that Upper Pottsgrove obtain assignment of the STSA before Closing. The Commission's decision in this matter must be based on substantial evidence of record, not on speculation about the length of time that might pass between its decision in this proceeding and Closing. *Norfolk & Western Ry. Co. v. Pa. Pub. Util. Comm'n*, 489 Pa 109, 413 A.2d 1037 (1980); *Murphy v. Dept. of Public Welfare*, 480 A.2d 382 (Pa. Cmwlth. 1984); *Mill v. Pa. Pub. Util. Comm'n*, 447 A.2d 1100 (Pa. Cmwlth. 1982).

The Commission frequently approves applications in acquisition and other Commission proceedings, recognizing that many events will need to occur before closing can occur on the transaction under consideration (*e.g.*, obtaining other necessary governmental approvals, obtaining the transfer of relevant permits, and negotiating additional transaction documents). These other events may take time, yet the Commission frequently approves applications despite these post-Commission approval requirements. PBA/BP has introduced no evidence explaining why the ALJ and the Commission should treat this case any differently from the scores of other transactions that the Commission has approved under similar circumstances.

Finally, the ALJ should see PBA/BP's Protest for what it is – an attempt by PBA/BP to use this proceeding to compel payment of a disputed amount over which the Commission has no jurisdiction. The Commission should take this opportunity to send a strong message discouraging such abuses of the Commission's litigation process, which impose substantial costs on ratepayers.⁴

⁴ Section 1329(d)(1)(iv), 66 Pa. C.S. § 1329(d)(1)(iv), permits an acquiring public utility to recover transaction and closing costs incurred. The parties (other than PBA/BP) were able to reach a timely settlement in this proceeding, including a reasonable resolution of the STSA assignment issue. PBA/BP's use of the Commission's process to

V. CONCLUSION

WHEREFORE, for the reasons set forth above, Pennsylvania-American Water Company respectfully requests that Administrative Law Judge Jeffrey A. Watson recommend that the Pennsylvania Public Utility Commission approve the Application, as modified by the Settlement, despite the fact that the Pottstown Borough Authority and the Borough of Pottstown, Montgomery County, are -- at this time -- refusing to consent to the assignment of the Sewage Treatment Service Agreement pending payment of disputed monies by Upper Pottsgrove Township. The Settlement between all parties (other than the Pottstown Borough Authority and the Borough of Pottstown), as well as the fact that Pennsylvania-American Water Company cannot provide service without assignment, provide adequate assurance that Closing will not occur without assignment of the Sewage Treatment Service Agreement. A resolution of the assignment will occur, either by negotiation or court order, and Closing can then timely proceed without the parties' having to go back to the Commission to litigate a new Section 1329 proceeding – thereby unnecessarily wasting the time and resources of the Commission and parties. This case should not be litigated twice.

attempt to force concessions in a civil matter over which the Commission lacks jurisdiction has unnecessarily increased transaction costs.

Respectfully submitted,



Elizabeth Rose Triscari, Esq. (PA ID 306921)
Pennsylvania-American Water Company
852 Wesley Drive
Mechanicsburg, PA 17055
Email: elizabeth.triscari@amwater.com
Telephone: (717) 550-1574

David P. Zambito, Esq. (PA ID 80017)
Jonathan P. Nase, Esq. (PA 44003)
Cozen O'Connor
17 North Second Street, Suite 1410
Harrisburg, PA 17101
Email: dzambito@cozen.com
jnase@cozen.com
Telephone: (717) 703-5892

Counsel for *Pennsylvania-American Water
Company*

Dated: June 29, 2021

APPENDIX A PROPOSED FINDINGS OF FACT

PAWC incorporates by reference the Settlement and the Stipulation, Proposed Findings of Fact Nos. 1-37. In addition, PAWC proposes the following Findings of Fact:

1. Section 10.10 of the STSA between PBA, BP and Upper Pottsgrove states that Upper Pottsgrove will not assign the STSA without the consent of PBA/BP, except to a municipal authority incorporated by Upper Pottsgrove. PBA/BP St. No. 1, Exhibit A.

2. PBA/BP have not yet consented to the assignment of the STSA. PBA/BP St. No. 1 p. 6.

3. Upper Pottsgrove has filed an action in the Court of Common Pleas of Montgomery County, Pennsylvania (the “Court”), asking that the Court order PBA/BP to consent to the assignment. PAWC St. No. 1-R p. 10; Upper Pottsgrove St. No. 1-R pp. 8-9.

4. Pursuant to Section 13.02(d) of the APA, **Appendix A-24-a**, Upper Pottsgrove has a contractual duty to obtain all necessary consents prior to Closing on the Transaction.

5. PAWC’s obligation to Close on the Transaction is conditioned on Upper Pottsgrove obtaining all necessary consents prior to Closing. **Appendix A-24-a**, Section 12.01(a). Thus, PAWC has the contractual right to refuse to Close on the Transaction until Upper Pottsgrove has received PBA/BP’s consent to the assignment of the STSA or assignment is directed by a court of competent jurisdiction. This condition may be waived. *Id.*, Article XII (introduction); PAWC St. No. 1-R p. 11.

6. In its Rebuttal Testimony, PAWC committed that it will not Close on the Transaction without assignment of the STSA. If PAWC seeks to waive this condition of Closing, PAWC will file a petition with the Commission setting forth the proposed waiver and permitting the Parties and the Commission an opportunity to evaluate whether the waiver would materially

alter PAWC's Application as approved by the Commission. In the event that such a petition is filed, PAWC agrees that Closing cannot occur until the Commission has finally resolved the petition. PAWC St. No. 1-R p. 11.

APPENDIX B PROPOSED CONCLUSIONS OF LAW

PAWC incorporates by reference the Stipulation, Proposed Conclusions of Law Nos. 1-22.

In addition, PAWC proposes the following Conclusions of Law:

1. An applicant must establish its case by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 578 A.2d 600 (Pa. Cmwlth. 1990). That is, the applicant's evidence must be more convincing, by even the smallest amount, than the evidence presented by the other parties. *Se-Ling Hosiery, Inc. v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950).

2. Any finding of fact necessary to support the Commission's decision must be supported by substantial evidence that a reasonable mind might accept as adequate to support a conclusion. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & Western Ry. Co. v. Pa. Pub. Util. Comm'n*, 489 Pa 109, 413 A.2d 1037 (1980); *Murphy v. Dept. of Public Welfare*, 480 A.2d 382 (Pa. Cmwlth. 1984); *Mill v. Pa. Pub. Util. Comm'n*, 447 A.2d 1100 (Pa. Cmwlth. 1982).

3. Once the applicant establishes a *prima facie* case by presenting substantial record evidence in support of the proposed action, the burden of production shifts to the other parties. If the other parties present evidence of co-equal value or weight, the burden of going forward with some additional evidence to rebut the opposing party's evidence then shifts back to the applicant. *Burleson v. Pa. Pub. Util. Comm'n*, 443 A.2d 1373 (Pa. Cmwlth. 1982), *aff'd* 501 Pa. 433, 461 A.2d 1234 (1983).

4. While the burden of going forward with the evidence may shift back and forth during a proceeding, the burden of proof never shifts; the burden of proof always remains on the party seeking affirmative relief from the Commission. *Milkie v. Pa. Pub. Util. Comm'n*, 768 A.2d 1217 (Pa. Cmwlth. 2001).

5. The Commission has authority to enforce a settlement that has been approved by the Commission. 66 Pa. C.S. §§ 315, 502, 503.

APPENDIX C PROPOSED ORDERING PARAGRAPHS

PAWC incorporates by reference the Stipulation, Proposed Ordering Paragraphs 1-21. In addition, PAWC proposes the following Proposed Ordering Paragraphs:

1. That the Protest of Pottstown Borough Authority and the Borough of Pottstown, Montgomery County, Pennsylvania, be denied.