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June 29, 2021

VIA E-FILING

The Honorable Jeffrey A. Watson
Administrative Law Judge
Pennsylvania Public Utility Commission
Piatt Place
301 5th Avenue, Suite 220
Harrisburg, PA 15222

**Re: Pennsylvania-American Water Company – Wastewater Division Upper
Pottsgrove Township Wastewater System Section 1329 Application / Docket
No. A-2020-3021460**

Dear Judge Watson:

I represent Petitioner Upper Pottsgrove Township in the above-listed matter, and I attach for filing the Main Brief of Upper Pottsgrove Township in the above-captioned proceeding.

As evidenced by the enclosed Certificate of Service, all known parties will be served, as indicated.

Respectfully,

/s/ James J. Rodgers

James J. Rodgers

**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 UPPER POTTS GROVE TOWNSHIP

Upper Pottsgrove Township (“Upper Pottsgrove” or “the Township”) files this Main Brief in Support of Approval of the Application of Pennsylvania-American Water Company (“PAWC”) in the above-captioned matter. Upper Pottsgrove incorporates herein by reference (a) the Joint Stipulation of Non-Unanimous Settlement filed June 25, 2021,¹ (b) Upper Pottsgrove’s Statement in Support of the Settlement, filed on June 25, 2021, and the Joint

¹ The Settlement is presented by all parties to this proceeding with the exception of the Pottstown Borough Authority (“PBA”) and the Borough of Pottstown (“BP”) (collectively, the “Non-Settling Parties” or “the Pottstown Parties”). The position of the Pottstown Parties, and the reasons why their position presents no valid impediment to the approval of the Settlement and the proposed transaction, will be addressed below. The Pottstown Parties will have the opportunity to file a formal objection to the Settlement.

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 focus on this issue.

In the interest of brevity, this Main Brief will incorporate the relevant provisions of the Settlement, the Township’s Statement in Support and the Stipulation without repeating the content of those documents here.

I. INTRODUCTION

A. Procedural History

Upper Pottsgrove incorporates by reference the Settlement ¶¶ 1-24.

B. Overview of the Proposed Transaction

Upper Pottsgrove incorporates by reference Proposed Findings of Fact 6-7.

Upper Pottsgrove incorporates by reference Proposed Findings of Fact 6-7.

C. Legal Standards

1. Burden of Proof

Upper Pottsgrove incorporates by reference the Stipulation, Proposed Conclusion of Law No. 2.

2. Legal Standard for Section 1102 Approvals

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

3. Legal Standard for Section 1329 Approvals

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

4. Legal Standard for Section 507 Approvals

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

5. Legal Standard for Approving a Settlement

Upper Pottsgrove also incorporates by reference the Stipulation, Proposed Conclusions of Law Nos. 3-5 and 22. Upper Pottsgrove also incorporates by reference its Statement in Support of the Settlement.

II. THE SETTLEMENT IS IN THE PUBLIC INTEREST

A. APPROVAL OF THE APPLICATION

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

Upper Pottsgrove 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 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

Upper Pottsgrove incorporates by reference the Settlement, ¶ 26, and the Stipulation, Proposed Findings of Fact Nos. 32-33.

C. Fair Market Value for Ratemaking Rate Base Purposes

Upper Pottsgrove incorporates by reference the Settlement, ¶ 27, and the Stipulation, Proposed Finding of Fact No. 27 and Proposed Conclusion of Law Nos. 13-14.

D. Fair Market Value Appraisals

Upper Pottsgrove incorporates by reference the Settlement, ¶ 28,

E. Engineering Assessment

Upper Pottsgrove incorporates by reference the Settlement, ¶ 29

F. Easements, Rights of Ways and Liens

Upper Pottsgrove incorporates by reference the Settlement, ¶¶ 30-31. 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.

G. Inflow and Infiltration Study

Upper Pottsgrove incorporates by reference the Settlement, ¶ 32.

H. Rates

Upper Pottsgrove incorporates by reference the Settlement, ¶¶ 33-34 and the Stipulation, Proposed Conclusion of Law No. 15.

I. Distribution System Improvement Charge

Upper Pottsgrove incorporates by reference the Settlement, ¶ 35, and the Stipulation, Proposed Conclusion of Law Nos. 16-17.

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

Upper Pottsgrove incorporates by reference the Settlement, ¶ 36, and the Stipulation, Proposed Conclusions of Law Nos. 18-19.

K. Transaction and Closing Costs

Upper Pottsgrove incorporates by reference the Settlement, ¶¶ 37-39 and the Stipulation, Proposed Conclusion of Law No. 20.

L. Low Income Program Outreach

Upper Pottsgrove incorporates by reference the Settlement, ¶¶ 40-41

M. Approval of Section 507 Agreements

Upper Pottsgrove incorporates by reference the Settlement, ¶¶ 42-43 and the Stipulation, Proposed Conclusion of Law No. 21.

Upper Pottsgrove 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

Upper Pottsgrove incorporates by reference the Settlement, ¶ 44.

O. Miscellaneous

Upper Pottsgrove incorporates by reference the Settlement, ¶¶ 45-51.

III. PUBLIC INPUT HEARING TESTIMONY HAS BEEN ADDRESSED

Upper Pottsgrove incorporates by reference its Statement in Support of the Settlement.

IV. THE CONTESTED ISSUE

As stated previously, there is only one issue remaining 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. Upper Pottsgrove 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 consents 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.

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 consents to the 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. The APA gives PAWC the contractual right to refuse to Close until Upper Pottsgrove has obtained assignment of the STSA. *Id.* § 12.01(a).

While the APA allows PAWC to waive the requirement that Upper Pottsgrove obtain assignment before Closing, *id.* Article XII (introduction), PAWC made a commitment in its Rebuttal Testimony that it would not waive this requirement. 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 approves the Settlement, PAWC could only Close on the Transaction if (a) Upper Pottsgrove obtains the Pottstown Parties' 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, Pottstown Parties' 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 Pottstown Parties do not say -- they do not contend that they will never consent to the assignment.² The dispute between Upper Pottsgrove and Pottstown Parties is simply a monetary dispute. The Pottstown Parties assert that they are owed substantial sums by Upper Pottsgrove constituting reimbursement to the Pottstown Parties for expenses incurred in the construction of a project that was incurred for the benefit of, inter alia, Upper Pottsgrove, but the Township believes the amounts demanded are excessive, unreasonable and supported neither by the provisions of the Public Utility Code or any definitive agreement between the Pottstown Parties and the Township. In the Township's view, the Pottstown Parties are attempting to utilize these proceedings before the Commission to exercise maximum leverage

² Upper Pottsgrove is seeking judicial intervention by the Montgomery County Court of Common Pleas directing that the Pottstown Parties consent to the assignment. Upper Pottsgrove Statement No. 1-R pp. 8-9. In the interim, the Township has begun settlement discussions with the Pottstown Parties.

over the Township to coerce the Township to submit to the financial demands of the Pottstown Parties so that the condition of Closing with PAWC, i.e., the assignment of the Agreement, can be satisfied.

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. The Pottstown Parties have 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 the Pottstown Parties' Protest for what it is – an attempt by the Pottstown Parties 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.³

V. CONCLUSION

WHEREFORE, for the reasons set forth above, Upper Pottsgrove Township 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 before this Commission.

³ 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.

Respectfully submitted,

/s/ James J. Rodgers

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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 Code, 66 Pa. C.S. § 1102(a), for approval :
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related to its wastewater collection and conveyance : Docket No. A-2020-3021460, *et al.*
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 :

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing Main Brief of Upper Pottsgrove Township upon the parties, listed below, in accordance with the requirements of §1.54 (relating to service by a party).

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Dated: June 29, 2021

/s/ James J. Rodgers

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