

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

In Re:	:	Application Docket
	:	
APPLICATION OF PENNSYLVANIA-AMERICAN	:	No. A-2020-3021460
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 POTTS GROVE TOWNSHIP'S ASSETS,	:	
PROPERTIES AND RIGHTS RELATED TO ITS	:	
WASTE WATER COLLECTION AND CONVEYANCE	:	
SYSTEM TO PENNSYLVANIA-AMERICAN WATER	:	
COMPANY AND (2) THE RIGHTS OF PAWC TO	:	
BEGIN TO OFFER TO FURNISH WASTEWATER	:	
SERVICE TO THE PUBLIC IN UPPER POTTS GROVE	:	
TOWNSHIP, MONTGOMERY COUNTY AND	:	
PORTIONS OF DOUGLASS TOWNSHIP, BERKS	:	
COUNTY, PENNSYLVANIA.	:	

**MAIN BRIEF OF POTTS TOWN BOROUGH AUTHORITY
AND BOROUGH OF POTTS TOWN**

LAMB McERLANE PC
Vincent M. Pompo, Esquire
PA I.D. No. 37714
Maureen M. McBride, Esquire
PA I.D. No. 57668
William R. Christman III, Esquire
PA I.D. No 318827
24 E. Market Street
West Chester, PA 19381
(610) 430-8000
vpompo@lambmcerlane.com

*Attorneys for the Pottstown Borough
Authority and Borough of Pottstown*

Dated: June 29, 2021

TABLE OF CONTENTS

I. INTRODUCTION

 A. Procedural History.....1

 B. Overview of the Proposed Transaction.....4

II. STATEMENT OF QUESTIONS PRESENTED.....8

III. LEGAL STANDARDS.....10

 A. Burden of Proof.....10

 B. Legal Standard for Section 1102 Approvals.....10

 C. Legal Standard for Section 1329 Approvals.....11

 D. Legal Standard for Section 507 Approvals.....12

IV. SUMMARY OF ARGUMENT.....13

V. ARGUMENT.....14

 A. Section 1102 Approvals.....14

 1. Fitness.....14

 2. Public Benefits.....19

 3. Easements, Rights of Way and Liens.....21

 B. Section 1329 Approvals.....21

 1. Ratemaking Rate Base.....21

 2. DSIC, AFDUC and Deferred Depreciation.....21

 3. Rates.....21

 C. Section 507 Approvals.....21

 D. Conditions Precedent to Closing.....22

VI. CONCLUSION.....23

Appendix A: List of Sponsored Testimony and Exhibits

Appendix B: Proposed Findings of Fact

Appendix C: Proposed Conclusions of Law

Appendix D: Proposed Ordering Paragraphs

TABLE OF AUTHORITIES

	Page(s)
Statutes	
66 Pa.C.S. § 1102.....	10
66 Pa.C.S. § 315.....	10
66 Pa.C.S. § 332.....	10
66 Pa.C.S. § 1329.....	11
66 Pa.C.S. § 507.....	12, 21
2 Pa.C.S. § 704.....	10
66 Pa. C.S. § 1103.....	11, 19
 Regulations	
52 Pa. Code §5.501.....	1
 Cases	
<i>Se-Ling Hosiery v. Margulies</i> , 70 A.2d 854 (Pa. 1950).....	10
<i>In Re Byerly</i> , 270 A.2d 186 (Pa. 1970).....	10
<i>Mill v. Comm., Pa. P.U.C.</i> , 447 A.2d 1100 (Pa. Cmwlth. 1982).....	10
<i>Edan Transportation Corp. v. Pa. P.U.C.</i> , 623 A.2d 6 (Pa. Cmwlth. 1993).....	10
<i>City of York v. Pa. P.U.C.</i> , 295 A.2d 825 (Pa. 1972).....	11, 19
<i>Popowski v. Pa. P.U.C.</i> , 937 A.2d 1040 (Pa. 2007).....	11, 19-20
<i>Middletown Township v. Pa. P.U.C.</i> , 85 Pa. Cmwlth. Ct. 191, 482 A.2d 674 (1984).....	11
<i>Joint Application of Peoples Natural Gas Company LLC, Peoples TWP LLC, and Equitable Gas Company, LLC</i> , Docket No. A-2013-2353647, 309 P.U.R. 4th 213 (2013).....	11
<i>Re Byerly</i> , 270 A.2d 186 (Pa. 1970).....	11
<i>Morgan Drive-Away, Inc., v. Pa. P.U.C.</i> , 293 A.2d 895 (Pa. Cmwlth. Ct. 1972).....	11
<i>Yellow Cab Company of Pittsburgh v. Pa. P.U.C.</i> , 673 A.2d 1015, 1019 (Pa. Cmwlth. 1996)....	14
<i>Susquehanna Area Regl. Airport Auth. v. Pa. P.U.C.</i> , 911 A.2d 612, 617 (Pa. Cmwlth. 2006).....	22

I. INTRODUCTION

Pursuant to the procedural schedule established and in accordance with Commission Regulations at 52 Pa. Code §5.501, the Pottstown Borough Authority (“the Authority”) and the Borough of Pottstown (“the Borough”) hereby jointly submit this Main Brief in opposition of the Application of Pennsylvania-American Water Company (“PAWC”), filed with the Public Utility Commission (“Commission”) pursuant to Sections 507, 1102, and 1329 of the Public Utility Code (the “Application”), that is the subject of this proceeding. The Authority and the Borough respectfully request that the Commission deny the Application, or in the alternative, defer the Application pending resolution of the dispute between the Authority, the Borough, and Upper Pottsgrove Township, which relates to reimbursement of costs incurred for the expansion of Upper Pottsgrove Township’s wastewater system (as explained in further detail below).

A. Procedural History

This proceeding concerns PAWC’s Application, accepted as filed with the Commission on April 14, 2021, under Sections 1102 and 1329 of the Pennsylvania Public Utility Code, seeking approval of: (1) the transfer, by sale, of substantially all of the wastewater system assets, properties and rights of Upper Pottsgrove Township related to its wastewater collection and conveyance system; (2) the right of PAWC 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; and (3) the use for ratemaking purposes of the lesser fair market value or the negotiated purchase price of the Upper Pottsgrove Township assets related to its wastewater collection and treatment system. The Application was assigned Docket No. A-2020-3021460.

On April 14, 2021, a Secretarial Letter was issued requiring the publishing of Notice in the Pennsylvania Bulletin on May 1, 2021 and setting a deadline to file Protests by May 17, 2021. On

April 15, 2021, the Commission issued a Telephonic Prehearing Conference Notice scheduling a prehearing conference for 10:00 a.m. on May 19, 2021. On April 15, 2021, a Prehearing Conference Order was issued scheduling a Prehearing Conference for May 19, 2021, at 10 a.m.

On April 26, 2021, a Petition to Intervene was filed by Upper Pottsgrove Township (“the Township”). No objections were filed to this Petition to Intervene. On May 14, 2021, Shadeland Development Corporation filed a Petition to Intervene in the proceeding. Joint Preliminary Objections to Shadeland Development Corporation’s Petition to Intervene were filed by PAWC and Upper Pottsgrove Township on May 18, 2021.

On May 14, 2021, the Authority and the Borough filed a joint Protest in the proceeding. Joint Preliminary Objections to the Authority and the Borough’s Protest were filed by PAWC and Upper Pottsgrove Township on May 18, 2021.

On May 18, 2021, the Parties submitted an email to ALJ Jeffrey A. Watson providing a proposed litigation schedule. A prehearing conference was held on May 19, 2021 as scheduled. PAWC, Upper Pottsgrove Township, the Authority, the Borough, the Bureau of Investigation and Enforcement, the Office of Consumer Advocate, the Office of Small Business Advocate, and Shadeland Development Corporation were represented by counsel.

On May 21, 2021, the Commission issued a Telephonic Public Input Hearing Notice scheduling a public input hearing for 6:00 p.m. on June 2, 2021. On May 21, 2021, a Prehearing Conference Order was issued setting forth a stipulated Litigation Schedule for these proceedings.

On May 24, 2021, the Authority, the Borough, and Shadeland Development Corporation filed separate Answers to PAWC and Upper Pottsgrove Township’s joint Preliminary Objections.

On May 27, 2021, the Commission issued a Telephonic Hearing Notice scheduling call-in telephonic evidentiary hearings for June 10-11, 2021. On May 27, 2021, an Interim Order was

entered granting in part and denying in part PAWC and Upper Pottsgrove Township's joint Preliminary Objections to the Authority and the Township's Protest. The Commission granted PAWC and Upper Pottsgrove Township's joint Preliminary Objections with respect to the Authority and the Borough's request that the Commission condition any approval of the Application on the full reimbursement of \$470,184.22 in Authority costs advanced towards the Project, plus interest and costs¹. The Commission denied PAWC and Upper Pottsgrove Township's joint Preliminary Objections requesting dismissal of the Authority and the Borough's Protest leaving open the issue of whether PAWC can demonstrate its ability to serve Upper Pottsgrove Township's current customers due to the Authority and the Borough's objection to the assignment of the STSA. The Commission also entered an Interim Order on May 27, 2021 denying PAWC and Upper Pottsgrove Township's joint Preliminary Objections to Shadeland Development Corporation's Petition to Intervene.

On June 9, 2021, the parties to this action submitted a Joint Stipulation for the Admission of Evidence whereby the parties stipulated to the authenticity of the statements and exhibits listed in the Stipulation and requested that they be admitted into the record of this proceeding. On June 10, 2021, the Commission entered an Order granting the Joint Stipulation for the Admission of Evidence and cancelled the evidentiary hearings scheduled for June 10-11, 2021. The testimony of Justin M. Keller, Manager for the Borough and Manager for the Authority (including Exhibits A through F) was submitted as PBA/BP Statement No. 1 on behalf of the Authority and the Borough.

¹ This Main Brief will address the Authority and the Borough's claim for reimbursement of costs out of an abundance of caution to protect the Authority and the Borough's appeal rights.

B. Overview of the Proposed Transaction

The existing wastewater system subject to PAWC's Application flows to an interceptor for treatment at the Authority's sewage treatment plant (the "STP") in which Upper Pottsgrove Township has purchased 670,100 gpd of bulk wastewater treatment capacity pursuant to a Sewage Treatment Service Agreement dated September 13, 2004 between Upper Pottsgrove Township, the Authority and the Borough (the "STSA"). Direct Testimony of Justin M. Keller ("Statement No. 1"), p. 2:31/34; Statement No. 1, Exhibit A). The Application proposes that Upper Pottsgrove will assign the STSA to PAWC upon closing. (Statement No. 1, p. 2:14/21). Section 10.10 of the STSA prohibits the assignment of the STSA to PAWC without the consent of the Authority and the Borough, and only allows assignment without consent to a municipal authority created by Upper Pottsgrove. (Statement No. 1, p. 5:37/40). Thus, PAWC will be without an agreement to treat its collected wastewater absent the consent of the Authority and the Borough.

By way of background, in November of 2010 and August 2011, the Authority and Upper Pottsgrove Township had a dispute regarding alleged sanitary sewer flow meter readings, which exceeded the amount of sanitary sewer capacity purchased by Upper Pottsgrove Township pursuant to the STSA ("the Overflow Dispute"). (Statement No. 1, pp. 2:40-3:4). As a result of the Overflow Dispute, Upper Pottsgrove Township and the Authority entered into a Settlement Agreement and Release dated July 2, 2013 ("the Settlement Agreement"). (Statement No. 1, p. 3:4/6; Statement No. 1, Exhibit B). As a condition of the Settlement Agreement, the Authority and Upper Pottsgrove Township agreed to upgrade the sewer conveyance system, replace existing pipe and install new siphon boxes and pipe located in the Borough of Pottstown on Hanover Street ("the Project"). (Statement No. 1, p. 3:6/9). The Project, while located within the Borough of Pottstown, was necessary to increase the conveyancing capacity of the Upper Pottsgrove Township

wastewater system to the Authority's treatment plant for a new residential development, built by Arcadia at Coddington View, LP ("Arcadia") located within Upper Pottsgrove Township and known as Coddington View. (Statement No. 1, p. 3:9/13).

The Settlement Agreement stated that Upper Pottsgrove Township would make a \$259,000.00 payment to the Authority, which would be ultimately expended for the Project. (Statement No. 1, p. 3:29/30). Arcadia also contributed \$345,000.00 towards the Project. (Statement No. 1, p. 3:31). The Settlement Agreement further provided that the Authority "shall not be required to contribute any additional funds to and/or for the Project." (Statement No. 1, p. 3:18/19). The Settlement Agreement also expressed "[t]he parties agree that [the Authority] will be entitled to reimbursement, as permitted by the Authority's Act, for any funds expended by [the Authority] to construct the Project for which the parties contemplate the execution of a mutually acceptable reimbursement agreement." (Statement No. 1, p. 3:20/21).

As a result of cost overruns, the Project cost the Authority a total of \$1,073,537.00 causing the Authority to advance \$473,539.00 in additional Authority funds on the Project beyond the funds contributed for the Project by Upper Pottsgrove Township and Arcadia. (Statement No. 1, p. 3:30/32). Consistent with the Settlement Agreement, on February 17, 2015, Upper Pottsgrove Township adopted Resolution No. 656 amending its sewer tapping fees by imposing a tapping fee reimbursement part/component of \$292.98 per EDU on future connections to its sewer system in order to reimburse the Authority and Arcadia for their respective contributions to the Project. (Statement No. 1, p. 4:7/15). Upper Pottsgrove Township based the reimbursement part/component of its tapping fee on a total Project cost of \$1,073,537.00, and contributions of \$259,000.00 from Upper Pottsgrove Township, \$345,000.00 from Arcadia, and \$473,539.00 from the Authority. (Statement No. 1, p. 3:29/32).

On or about March 4, 2015, the Authority and the Borough billed Upper Pottsgrove Township \$473,407.00 for the Project. (Statement No. 1, p. 3:42/43; Statement No. 1, Exhibit C). On or about September 22, 2017, the Borough received \$3,222.78 to apply to the Project balance, leaving a present principal balance of \$470,184.22. (Statement No. 1, p. 4:8/9). On or about November 20, 2020, Upper Pottsgrove Township tendered to the Borough by check the amount of \$25,350.05 towards the balance along with a letter from the Township's solicitor stating its position that once the system is sold to PAWC, the re-payments for the Project costs would cease. The Borough has not yet cashed the \$25,350.05 check since, after inquiry, the Township would not agree that such action would be without prejudice to the Authority and the Borough's position that the proposed sale to PAWC would not relieve the Township of its obligation. (Statement No. 1, p. 4:8/23; Statement No. 1, Exhibit F).

On April 20, 2020, Upper Pottsgrove Township enacted Ordinance No. 508, which ordinance authorizes and approves the execution, delivery and performance of the Asset Purchase Agreement with PAWC and the assignment of the STSA to PAWC, among other actions. (Statement No. 1, p. 4:28/31). Following the enactment of Ordinance No. 508, Upper Pottsgrove Township has advised the Authority and the Borough that after the closing of the sale of its wastewater system assets to PAWC, Upper Pottsgrove Township will no longer honor its obligation to reimburse the additional funds advanced by the Authority and the Borough for completion of the Project since it will no longer have the legal authority to charge any sewer tapping fees. (Statement No. 1, p. 4:16/19; Statement No. 1, Exhibit F, p. 2).

Upper Pottsgrove Township may not unilaterally avoid its contractual obligations to the Borough and the Authority by adopting Ordinance No. 508, approving the sale of the sewer system, and then implementing the Ordinance by proceeding to closing, as to do so would breach the

Settlement Agreement, and would also violate Article I, § 10 of the United States Constitution and Article I, § 17 of the Pennsylvania Constitution by impairing its contractual obligations to the Authority and the Borough. The Application, if approved, could, as Upper Pottsgrove Township asserts, extinguish Upper Pottsgrove Township's obligation to reimburse the Authority and the Borough for the Project costs. If Upper Pottsgrove Township is absolved of its contractual and financial obligations, the ratepayers of the Borough and the Authority would be substantially harmed as those ratepayers would be forced to satisfy the financial obligations of the Upper Pottsgrove Township. Furthermore, until Upper Pottsgrove Township satisfies its contractual and financial obligations pursuant to the Settlement Agreement, the Authority and the Borough will not consent to the assignment of the STSA to PAWC, therefore rendering PAWC unable to provide adequate wastewater collection, treatment or disposal capacity to meet present and future customer demands.

II. STATEMENT OF QUESTIONS PRESENTED

Question No. 1: Should the ALJ and the Commission reject and deny the Application because PAWC fails to meet its burden in showing that it is able to provide adequate wastewater collection, treatment or disposal capacity to meet present and future customer demand?

Proposed Answer: Yes. Because the Authority and the Borough do not consent to the assignment of the STSA from Upper Pottsgrove Township to PAWC, PAWC is unable to provide adequate wastewater collection, treatment or disposal capacity to meet present and future customer demand.

Question No. 2: Should the ALJ and the Commission reject and deny the Application because approval of the Application would absolve Upper Pottsgrove Township of its contractual obligation to reimburse the Authority and the Borough for the Project costs, thus, requiring the ratepayers in the Borough to bear Upper Pottsgrove Township's financial obligations?

Proposed Answer: Yes. Requiring the ratepayers located within the Borough to assume the unreimbursed costs of the Project is not supported by affirmative public benefits and is not in the public interest.

Question No. 3: In the alternative, should the ALJ and the Commission stay and defer the Application pending resolution of the dispute between the Authority, the Borough, and Upper Pottsgrove Township related to reimbursement of costs incurred for the expansion of Upper Pottsgrove Township's wastewater system?

Proposed Answer: Yes. Section 5.483(a) of the Commission's regulations provides Presiding Officers the authority to regulate the course of a proceeding. 52 Pa. Code § 5.483(a). Furthermore, Section 1.2 provides that the Commission's rules shall be "liberally construed to secure the just, speedy and inexpensive determination of every action or proceeding." 52 Pa.

Code § 1.2(a). On May 18, 2021, Upper Pottsgrove Township filed a Complaint in the Montgomery County Court of Common Pleas (Docket No. 2021-06750) against the Borough and the Authority seeking an injunction and order requiring the Borough and the Authority to consent to the assignment of the STSA to PAWC. The dispute between the Authority, the Borough, and Upper Pottsgrove Township related to reimbursement of costs for the Project has a direct impact on the Application, and staying/deferring the Application pending resolution of the Montgomery County action will ensure the avoidance of duplicative litigation and unnecessary expense.

III. LEGAL STANDARDS

A. Burden of Proof

The Public Utility Code requires Commission approval via the issuance of a Certificate of Public Convenience in order for a public utility to acquire property that is used or useful in the public service. 66 Pa. C.S. §§ 1102(a)(1) and 1102(a)(3). Under Section 315(c) and 332 of the Public Utility Code, the burden of proof rests with the applicant. The Pennsylvania Supreme Court has held that “burden of proof” means a duty to establish a fact by a preponderance of the evidence, meaning that the party has presented evidence more convincing than the evidence by the opposing party. *Se-Ling Hosiery v. Margulies*, 70 A.2d 854 (Pa. 1950). Once a presumption as to a particular fact is established, the burden of proof shifts to the opposing party to rebut the presumption. *In Re Byerly*, 270 A.2d 186 (Pa. 1970).

Additionally, any finding of fact necessary to support an adjudication of the Commission must be based upon substantial evidence, which is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Mill v. Comm., Pa. P.U.C.*, 447 A.2d 1100 (Pa. Cmwlth. 1982); *Edan Transportation Corp. v. Pa. P.U.C.*, 623 A.2d 6 (Pa. Cmwlth. 1993); 2 Pa.C.S. § 704. “Substantial evidence” requires more than a mere trace of evidence or a suspicion of the existence of the fact sought to be established. *Norfolk and West Ry. v. Pa. P.U.C.*, 489 Pa. 109, 413 A.2d 1037 (1980).

B. Legal Standard for Section 1102 Approvals

Section 1102 of the Code requires Commission approval through the issuance of a Certificate of Public Convenience for a public utility to expand its service territory and to acquire property used or useful in the public service. 66 Pa. C.S. §§ 1102(a)(1) and 1102(a)(3). The Commission will only issue a CPC if the “Commission shall find or determine that the granting of

such certificate is necessary or proper for the service, accommodation, convenience, or safety of the public.” 66 Pa. C.S. § 1103(a); *City of York v. Pa. P.U.C.*, 295 A.2d 825 (Pa. 1972).

In *Popowski v. Pa. P.U.C.*, 937 A.2d 1040 (Pa. 2007), the Pennsylvania Supreme Court addressed the *City of York* decision and clarified that those seeking Commission approval must demonstrate more than the mere absence of any adverse effect upon the public. The *Popowski* Court also held that, in the context of a Section 1102 application, “public interest” in the context of a certificate of public convenience requires consideration of benefits and detriments on all affected Pennsylvania parties, not merely on one particular group or geographic subdivision. See *Middletown Township v. Pa. P.U.C.*, 85 Pa. Cmwlth. Ct. 191, 482 A.2d 674 (1984).

Additionally, the party receiving the assets and service obligations must to be found to be technically, legally and financially fit by the Commission. *Joint Application of Peoples Natural Gas Company LLC, Peoples TWP LLC, and Equitable Gas Company, LLC*, Docket No. A-2013-2353647, 309 P.U.R. 4th 213 (2013). An existing provider of a public utility service is presumed fit; the burden of proof to rebut the presumption is on the protestants to the application. *Re Byerly*, 270 A.2d 186 (Pa. 1970); *Morgan Drive-Away, Inc., v. Pa. P.U.C.*, 293 A.2d 895 (Pa. Cmwlth. Ct. 1972).

C. Legal Standard for Section 1329 Approvals

Section 1329 of the Code addresses the valuation of the assets of municipally or authority owned water and wastewater systems that are acquired by investor-owned water and wastewater utilities or entities. For ratemaking purposes, the valuation is the lesser of the fair market value (i.e., the average of the buyer’s and seller’s independently conducted appraisals) or the negotiated purchase price. If the parties agree to the Section 1329 process, the acquiring public utility and the selling municipality each select a Utility Valuation Expert (“UVE”) from a list of experts

maintained by the Commission. The UVEs perform independent fair market value appraisals of the system in compliance with the Uniform Standards of Professional Appraisal Practice, employing the cost, market and income approaches.

D. Legal Standard for Section 507 Approvals

Section 507 specifies the requirements associated with contracts between municipalities and public utilities. In order for any contract between a public utility and municipal corporation to be valid, the contract must first be filed with the Commission at least thirty (30) days prior to its effective date. Upon notice to the municipal authorities, and the public utility concerned, the Commission may, prior to the effective date of such contract or agreement, institute proceedings to determine the reasonableness, legality or any other matter affecting the validity thereof. Upon the institution of such proceedings, such contract or agreement shall not be effective until the commission grants its approval thereof. 66 Pa.C.S. § 507.

IV. SUMMARY OF ARGUMENT

The Authority and the Borough's joint Protest asserts that, without their consent to the assignment of the STSA, PAWC is not technically or legally fit because PAWC cannot provide adequate wastewater collection, treatment or disposal capacity to meet present and future customer demands. The Application fails to satisfy fitness requirements of Section 1102. Furthermore, without the Authority and the Borough's consent to the assignment of the STSA to PAWC, PAWC will not be permitted to obtain Certificates of Filing or Approvals from the Commission pursuant to Section 507. The Application should be denied.

The Authority and the Borough's joint Protest protects the public interest. Specifically, the Authority and the Borough desire to protect the Borough's ratepayers' financial interests. If the transaction is approved, Upper Pottsgrove Township may be permitted to avoid its contractual obligations for reimbursement of the Project costs, thus requiring the ratepayers of the Borough to assume Upper Pottsgrove Township's financial debt. Thus, the Application fails to satisfy the affirmative public benefit and public interest requirements of Section 1102 and should be denied.

On May 18, 2021, Upper Pottsgrove Township filed a Complaint in the Montgomery County Court of Common Pleas (Docket No. 2021-06750) against the Borough and the Authority seeking an injunction and order requiring the Borough and the Authority to consent to the assignment of the STSA to PAWC. The Commission should defer to the Montgomery County Court of Common Pleas to adjudicate those claims and stay/defer action on the Application until Upper Pottsgrove Township's claims pending before the Montgomery County Court of Common Pleas are finally adjudicated.

V. ARGUMENT

A. Section 1102 Approvals

1. Fitness

PAWC must prove, by a preponderance of the evidence, that it is legally, financially, and technically fit. Technical fitness means that PAWC must have “sufficient technical and operating knowledge, staff and facilities to provide the proposed service.” *Yellow Cab Company of Pittsburgh v. Pa. P.U.C.*, 673 A.2d 1015, 1019 (Pa. Cmwlth. 1996). Critical to the fitness analysis in the instant matter is the question of whether PAWC has sufficient facilities to provide the proposed service.

PAWC seeks approval to purchase Upper Pottsgrove Township’s sanitary sewer collection system. The sewer collection system does not treat or dispose of the wastewater collected from Upper Pottsgrove Township’s customers. The STSA executed by the Authority, the Borough, and Upper Pottsgrove Township permits the Township to convey all of its wastewater to the Authority for treatment at the Authority’s plant. Without assignment of the STSA, PAWC will not be permitted to utilize the Authority’s sewage treatment plant and will have no means to treat and dispose of the wastewater collected from Upper Pottsgrove Township’s customers.

The Authority and the Borough will not agree to an assignment of the STSA unless and until Upper Pottsgrove Township satisfies its obligations under the Settlement Agreement. The Authority and the Borough contend that without the assignment of the STSA they have met their burden of proof to rebut any presumption of fitness. PAWC is not technically fit to furnish wastewater service to the public in Upper Pottsgrove Township, Montgomery County, Pennsylvania and portions of Douglass Township, Berks County, Pennsylvania. Therefore,

PAWC fails to demonstrate that it is technically fit to service Upper Pottsgrove Township's wastewater customers.

Moreover, PAWC does not have the legal ability to assume and perform certain significant obligations under the STSA, which only Upper Pottsgrove Township, a municipal corporation, has the legal ability to perform. For example, the following italicized provisions in the STSA may only be undertaken by a municipality:

1.01 Corrective Action Plan Definition

"Corrective Action Plan (CAP)" shall mean a Plan required to address the planning, design, financing, construction and operation of the Sewage Facilities that may be necessary to provide a Requested Capacity that will meet anticipated demands for a reasonable time in the future and resulting in a project that is consistent with this Agreement and *applicable official Plans approved under the Pennsylvania Sewage Facilities Act (Act 537)*. A CAP shall include, but not be limited to, setting forth steps to be taken by the contributing Municipality to prevent the Requested Capacity from being exceeded, and a Schedule showing the dates each step toward compliance with the Agreement shall be completed. If necessary, to address exceedance of the Requested Capacity, it will include limitations on, and a program for control of, new connections to the Sewage Facilities. A CAP may include a projection of the anticipated flow reduction. Where flow reduction projections are applicable, they shall be determined by the PBA Engineer. The Municipality will be required to provide data, as requested, to the PBA Engineer to assist in determination of the flow reduction. Upon completion of elements of a CAP, a Municipality shall receive the flow reduction credit associated with the improvements, as listed in the CAP, and the Flow of Record shall be modified for planning purposes. The Modified Flow of Record will remain in effect for a three (3) year period after the completion of the CAP. At the end of the three (3) year period, the Modified Flow of Record calculation, associated with the particular CAP, will be terminated, and the Flow of Record will be recalculated as defined in this Section.

4.01 Planning Module Certifications

On a quarterly basis for each calendar year, the Borough shall advise the Municipality of the current Unused Requested Capacity, based on Flow of Record and Projected Flow. When the Flow of Record plus the Projected Flow is within ninety-three percent (93%) of the Requested Capacity, the Municipality shall, within one hundred twenty (120) days, provide an acceptable CAP to the Borough.

While a CAP is being prepared and/or implemented, and is following the approved and practical time schedule, *the Borough will continue to certify*

Planning Modules for Chapter 94 consistency in accordance with the terms of this Agreement. If Flow of Record plus Projected Flow exceeds the Requested Capacity, further Planning Modules will not be certified by the Borough.

5.10 Long term I/I Plan

The Borough and Township shall develop a Long-Term I/I Plan that shall address, for a minimum five (5) year period, the following:

- (a) Identify the sources of I/I through a comprehensive meter program.
- (b) Ongoing program to address I/I.
- (c) Other items proposed by Municipality.

The first Plan shall be due six (6) months following the execution of this Agreement.

Annual Chapter 94 Reports prepared by the Township shall include steps taken under the Long-Term I/I Plan.

7.09 Remedies in the Event of Default

If any Municipality defaults in the payment of any charge required to be paid hereunder, or otherwise defaults in the performance of the terms hereof, PBA and any or all of the other Municipalities may bring an action in law or equity in the Court of Common Pleas of Montgomery County, Pennsylvania, or other Court or tribunal of competent jurisdiction to obtain any or all of the following: (a) *a writ of mandamus directing the governing body of the defaulting Municipality to collect by special taxation an amount sufficient to pay the amount in arrears and any expected future deficiencies, in a lump sum or in annual installments, from such special taxes during subsequent years as the Court may require;* (b) *a temporary restraining order, preliminary and/or permanent injunction and any other appropriate equitable relief;* (c) *appointment of a special trustee or receiver to collect, segregate and distribute the revenues of the defaulting Municipality and/or to enter and take possession of the facilities thereof;* (d) *set off against the amounts due the Borough and PBA hereunder any sums otherwise required to be remitted to the Townships under Section 7.08;* (e) *obtain a money judgment against the violating Municipality and liquidate same as may be authorized by law; and/or, (f) any other relief deemed just and appropriate under the circumstances.* The Municipality which is determined by final judgment to have violated this Agreement agrees to pay the costs and expenses, including legal fees, of any such legal action.

8.02 & 8.05 Ordinances

The Township shall enact or cause to be enacted *an ordinance*, in a form acceptable to the Borough, and will keep *such ordinance* in full force and effect at all times, prohibiting, and providing adequate penalties for, the discharge into its Sewage Collection System of anything violating the above-mentioned effluent quality restrictions of the Borough, and *hereby covenants to enforce, and request the enforcement of, as applicable, the provisions thereof when brought to its attention. Such ordinance shall also prohibit and/or regulate the discharge into its Sewage Collection System by any Person of industrial waste, as defined in the applicable regulations of the Borough. The Township will not permit any discharge into its Sewage Collection System except in the manner and in accordance with the provisions of said ordinance, as applicable.*

If any Sewage discharged by the Township into the Treatment Plant is in violation of the Borough's standards as determined by this Article and requires special treatment or would be harmful to the Treatment Plant, then the Township will pay the entire cost of any special treatment as a separate charge as provided in Section 7.01, and, *the Township, on written notice of violation from the Borough, shall immediately act to enforce or obtain the enforcement of those quality standard Ordinances by connection ban or by providing or requiring pretreatment of such waste in such manner as is provided by said Ordinances or compel disconnection from the Sewage Collection System of the property from which harmful waste is being discharged.* Failure by the Township to compel disconnection or pretreatment upon thirty (30) days written notice to same, shall entitle the Borough to suspend accepting the Township's Sewage under this Service Agreement until it complies with the Borough's request and to recover the Costs of any upgrading, enhancements or other remedial action deemed necessary by the Borough as a result of such discharge and collect the same in the manner provided by Section 7.09. The Borough shall be responsible, to the extent permitted by law, for enforcing Sewage quality standards within the Township for which there is a separate agreement requiring it to do so.

9.01 Mandatory connection ordinance

The Township, in its sole discretion, may adopt an Ordinance in a form satisfactory to the Borough and PBA, requiring all owners of improved property which legally can be required to be connected to such Sewage Collection System to connect therewith, and providing for enforcement of such Ordinance as is permitted by law. The Township also covenants that it will keep, or cause to be kept, such Ordinance or subsequent Ordinance or Ordinances requiring such connections in full force and effect continuously during the term hereof, and to enforce or cause to be enforced the same as may be permitted by law.

9.02 Covenant to adopt user charges by ordinance

The Township covenants that it or a municipal authority incorporated thereby, will adopt an ordinance or a resolution, as applicable, imposing sewerrentals or charges upon owners of improved property which shall be connected to its

Sewage Collection System for use thereof. The Township also covenants to thereafter keep or cause to be kept such ordinance or resolution or a subsequent ordinance or ordinances or a resolution or resolutions imposing such sewer rentals or charges in full force and effect continuously during the term hereof.

9.03 Enforcement of user charges by lien

The Township covenants to enforce or to cause to be enforced any ordinance or resolution in effect at any particular time under Section 9.02 and to collect or cause to be collected all amounts becoming due thereunder. If any amounts becoming due thereunder shall not be paid, in accordance with provisions of such ordinance or resolution at the time in effect, the Township covenants to take or cause to be taken all necessary action to reduce the same to liens and to enforce or cause to be enforced payment of the liens and/or to enforce or cause to be enforced payment of such sewer rentals or charges in any other manner permitted by law.

9.04 Covenant of level of charges

The Township covenants that sewer rentals or charges imposed pursuant to Section 9.02, together with any fees, fines and/or penalties resulting from enforcement of the ordinance or ordinances in effect at the time under Section 9.01, shall be at least such that amounts which reasonably may be collected therefrom in each Fiscal Year, beginning upon accrual of the charges payable hereunder, together with: (a) any sums received periodically by it from any Person pursuant to any agreement between it and such Person whereby Sewage of such Person shall be accepted by it for treatment in the Treatment Plant, if such agreement is permitted under provisions hereof; (b) any sums appropriated by it for the purposes from current revenues, within limits then provided by law, or from other legally available funds; (c) any other sums received by it on account of operation of its Sewage Collection System; and, (d) any other monies required to be deposited in its sewer revenue account pursuant to provisions of the applicable agreement of lease or pursuant to its borrowing documents, will be sufficient to provide funds for the following purposes:

(1) Payment by the Township in such Fiscal Year of debt service, operating expenses and other necessary costs and expenses relating to its Sewage Collection System and/or any capital contribution made hereunder; and,

(2) Payment by the Township to the Borough in such Fiscal Year of the Debt Service Charge, O&M Charge, Transportation Charge and/or any other charges payable hereunder to the extent applicable and appropriate for services rendered in collection herewith.

Upon request of the Borough, the Township will submit a certificate of its consulting engineer confirming the foregoing representation, from time to time.

If such collections, receipts, appropriations and deposits in any such Fiscal Year for the Township shall be less than the sum of requirements of subparagraphs (1) and (2) above, the Township covenants that it promptly will adjust or cause to be adjusted, in manner permitted by law, the sewer rentals or charges so that amounts thereafter to be collected therefrom, together with the other collections, receipts, appropriations and deposits, as aforesaid, shall enable it to comply with requirements of this Section and to eliminate deficiencies of any prior Fiscal Year; and, to the extent necessary, the Township also covenants that if collections, receipts, appropriations and deposits in any such Fiscal Year for the Township shall be less than the sum of requirements of subparagraphs (1) and (2) above, it will provide from its other available current revenues, within limits then provided by Law, or from other legally available funds, an amount which, when added to such collections, receipts, appropriations and deposits, will be sufficient to enable it to meet such requirements.

As the above examples demonstrate, the terms of the STSA present grounds for the Borough and the Authority to meet their burden of proof to rebut any presumption of fitness. PAWC as a regulated public utility does not have the legal ability to simply “step into the shoes” of Upper Pottsgrove Township in assuming all of its rights, title, interest, duties and obligations of the Township under the STSA. Accordingly, even with the consent of the Authority and Borough to an assignment of the STSA, a new agreement would have to be drafted; without it, PAWC has failed to prove that it is legally fit to provide the proposed service.

2. Public Benefits

“A certificate of public convenience shall be granted ... only if the [C]ommission shall find or determine that the granting of such certificate is necessary or proper for the service, accommodation, convenience, or safety of the public.” 66 Pa.C.S. § 1103(a). To grant a certificate of public convenience for this purpose, the Commission must find that the proposed transaction will “affirmatively promote the service, accommodation, convenience, or safety of the public in some substantial way.” *City of York*, 295 A.2d at 828. The standard used to determine whether a transaction is in the public interest is the “affirmative public benefits” test. *Popowsky*, 937 A.2d

at 1052-53, 1055. This standard does not require, as our Supreme Court has explained, the Commission “to secure legally binding commitments or to quantify benefits where this may be impractical, burdensome, or impossible;” rather, the Commission will “make factually-based determinations” applying the preponderance of the evidence standard. *Id.* at 1057.

PAWC has failed to present substantial evidence that the transaction is in the public’s interest with respect to the impact caused to the ratepayers of the Borough. Notwithstanding the Authority and Borough’s argument above that PAWC is not technically or legally fit to service the wastewater customers in Upper Pottsgrove Township (i.e. residents of Upper Pottsgrove Township will not be able to treat and dispose of their wastewater without the assignment of the STSA), the ratepayers residing in the Borough of Pottstown will suffer significant financial hardship if the Commission approves the transaction.

Upper Pottsgrove Township has taken the position that once the Commission approves the transaction and the Township sells its wastewater collection system to PAWC, the Township’s financial obligations to reimburse the Authority and the Borough for the Project will terminate. If the Commission approves the Application and Upper Pottsgrove Township is permitted to sell its wastewater system to PAWC, the Township will be permitted to avoid its contractual and obligations and the residents and ratepayers within the Borough of Pottstown will bear the costs of the Project when they do not benefit from the Project.

Upper Pottsgrove Township states that the Transaction will greatly improve the Township’s financial condition and outlook by providing the Township with funds to pay down debt and fund unfunded pension liabilities which will in turn provide the Township with budgetary relief, which will inure to the benefit of the Township’s residents. However, these benefits will be eliminated or significantly reduced if the Authority and Borough prevail, and the Township is

required to fully reimburse the Authority and the Borough for costs, plus interest, advanced toward the Project. If the Authority and Borough are forced to cover these costs, the detriment to the residents and ratepayers within the Borough in assuming these costs outweighs any purported financial benefit to the residents of the Township.

3. Easements, Rights of Way and Liens

The Authority and the Borough take no position with respect to any existing easements, rights of way, and liens.

B. Section 1329 Approvals

1. Ratemaking Rate Base

The Authority and the Borough take no position with respect to the proposed ratemaking rate base.

2. DSIC, AFDUC and Deferred Depreciation

The Authority and the Borough take no position with respect to DSIC, AFDUC, and deferred depreciation.

3. Rates

The Authority and the Borough take no position with respect to the proposed rates.

C. Section 507 Approvals

66 Pa.C.S.A. § 507 requires the Commission to grant approval of all contracts between a public utility and a municipality. Section 507 also requires approval for the assignment of contracts, originally executed between municipalities (i.e. the Authority, the Borough, and the Township) to a public utility (i.e. PAWC).

Assignment of the STSA to PAWC is material to the Commission's approval of the Application. The Authority and the Borough refuse to consent to the assignment of the STSA to

PAWC unless and until Upper Pottsgrove Township reimburses the Authority and the Borough for the outstanding Project costs. The Commission lacks the power to force the Authority and the Borough to consent to the assignment to PAWC. *Susquehanna Area Regl. Airport Auth. v. Pa. P.U.C.*, 911 A.2d 612, 617 (Pa. Cmwlth. 2006) (The Commission is a creature of statute and as such, may only exercise those powers conferred by statute.). Since PAWC has no rights under the STSA without the Authority and the Borough's consent, PAWC cannot obtain the necessary Section 507 approvals and the Application must be denied.

D. Conditions Precedent to Closing

As stated above, without the Authority and the Borough's consent to the assignment of the STSA to PAWC, PAWC cannot demonstrate its ability to provide adequate wastewater collection, treatment and disposal capacity to meet present and future customer demand. PAWC will not be able to close on the transaction, nor meet current and future customer needs, without the Authority and the Borough's consent to assign the STSA to PAWC.

Furthermore, on May 18, 2021, Upper Pottsgrove Township initiated litigation against the Authority and the Borough in the Montgomery County Court of Common Pleas (Docket No. 2021-06750) requesting that the Court require the Authority and the Borough to consent to the assignment of the STSA to PAWC prior to the closing of the sale of the wastewater system assets. Assuming for the sake of argument that jurisdiction may ultimately be determined by the Montgomery County Court of Common Pleas to be properly before that Court, the Commission should defer to the Montgomery County Court of Common Pleas to adjudicate those claims. As an alternative request for relief herein, the Borough and the Authority request that the Commission stay these proceedings pending final disposition of the Montgomery County Court of Common Pleas action.

VI. CONCLUSION

For all of the reasons set forth herein, the Pottstown Borough Authority and Borough of Pottstown respectfully request that the Commission deny the Application, or in the alternative, defer the Application pending resolution of the dispute between the Authority, the Borough, and Upper Pottsgrove Township related to reimbursement of costs incurred for the expansion of Upper Pottsgrove Township's wastewater system.

Respectfully submitted,

LAMB MCERLANE PC

Dated: June 29, 2021

/s/ Vincent M. Pompo

Vincent M. Pompo

PA I.D. No. 37714

Maureen M. McBride, Esquire

PA I.D. No. 57668

William R. Christman III, Esquire

PA I.D. No 318827

24 E. Market Street

West Chester, PA 19381-0565

(610) 430-8000

vpompo@lambmcerlane.com

*Attorneys for the Pottstown Borough
Authority and Borough of Pottstown*

Appendix A

List of Sponsored Testimony and Exhibits

PBA/BP Statement No. 1 – Testimony of Justin M. Keller, with Exhibits A through F

Appendix B

Proposed Findings of Fact

1. The existing wastewater system subject to PAWC's Application flows to an interceptor for treatment at the Authority's sewage treatment plant (the "STP") in which Upper Pottsgrove Township has purchased 670,100 gpd of bulk wastewater treatment capacity pursuant to a Sewage Treatment Service Agreement dated September 13, 2004 between Upper Pottsgrove Township, the Authority and the Borough (the "STSA"). Direct Testimony of Justin M. Keller ("Statement No. 1"), p. 2:31/34; Statement No. 1, Exhibit A).

2. The Application proposes that Upper Pottsgrove will assign the STSA to PAWC upon closing. (Statement No. 1, p. 2:14/21).

3. Section 10.10 of the STSA prohibits the assignment of the STSA to PAWC without the consent of the Authority and the Borough, and only allows assignment without consent to a municipal authority created by Upper Pottsgrove. (Statement No. 1, p. 5:37/40).

4. PAWC will be without an agreement to treat its collected wastewater absent the consent of the Authority and the Borough.

5. In November of 2010 and August 2011, the Authority and Upper Pottsgrove Township had a dispute regarding alleged sanitary sewer flow meter readings which exceeded the amount of sanitary sewer capacity purchased by Upper Pottsgrove Township pursuant to the STSA ("the Overflow Dispute"). (Statement No. 1, pp. 2:40-3:4).

6. As a result of the Overflow Dispute, Upper Pottsgrove Township and the Authority entered into a Settlement Agreement and Release dated July 2, 2013 ("the Settlement Agreement"). (Statement No. 1, p. 3:4/6; Statement No. 1, Exhibit B).

7. As a condition of the Settlement Agreement, the Authority and Upper Pottsgrove Township agreed to upgrade the sewer conveyance system, replace existing pipe and install new siphon boxes and pipe located in the Borough of Pottstown on Hanover Street (“the Project”). (Statement No. 1, p. 3:6/9).

8. The Project, while located within the Borough of Pottstown, was necessary to increase the conveyancing capacity of the Upper Pottsgrove Township wastewater system to the Authority’s treatment plant for a new residential development, built by Arcadia at Coddington View, LP (“Arcadia”) located within Upper Pottsgrove Township and known as Coddington View. (Statement No. 1, p. 3:9/13).

9. The Settlement Agreement stated that Upper Pottsgrove Township would make a \$259,000.00 payment to the Authority, which would be ultimately expended for the Project. (Statement No. 1, p. 3:29/30).

10. Arcadia also contributed \$345,000.00 towards the Project. (Statement No. 1, p. 3:31).

11. The Settlement Agreement further provided that the Authority “shall not be required to contribute any additional funds to and/or for the Project.” (Statement No. 1, p. 3:18/19).

12. The Settlement Agreement also expressed “[t]he parties agree that [the Authority] will be entitled to reimbursement, as permitted by the Authority’s Act, for any funds expended by [the Authority] to construct the Project for which the parties contemplate the execution of a mutually acceptable reimbursement agreement.” (Statement No. 1, p. 3:20/21).

13. As a result of cost overruns, the Project cost the Authority a total of \$1,073,537.00 causing the Authority to advance \$473,539.00 in additional Authority funds on the Project beyond

the funds contributed for the Project by Upper Pottsgrove Township and Arcadia. (Statement No. 1, p. 3:30/32).

14. Consistent with the Settlement Agreement, on February 17, 2015, Upper Pottsgrove Township adopted Resolution No. 656 amending its sewer tapping fees by imposing a tapping fee reimbursement part/component of \$292.98 per EDU on future connections to its sewer system in order to reimburse the Authority and Arcadia for their respective contributions to the Project. (Statement No. 1, p. 4:7/15).

15. Upper Pottsgrove Township based the reimbursement part/component of its tapping fee on a total Project cost of \$1,073,537.00, and contributions of \$259,000.00 from Upper Pottsgrove Township, \$345,000.00 from Arcadia, and \$473,539.00 from the Authority. (Statement No. 1, p. 3:29/32).

16. On or about March 4, 2015, the Authority and the Borough billed Upper Pottsgrove Township \$473,407.00 for the Project. (Statement No. 1, p. 3:42/43; Statement No. 1, Exhibit C).

17. On or about September 22, 2017, the Borough received \$3,222.78 to apply to the Project balance, leaving a present principal balance of \$470,184.22. (Statement No. 1, p. 4:8/9).

18. On or about November 20, 2020, Upper Pottsgrove Township tendered to the Borough by check the amount of \$25,350.05 towards the balance along with a letter from the Township's solicitor stating its position that once the system is sold to PAWC, the re-payments for the Project costs would cease.

19. The Borough has not yet cashed the \$25,350.05 check since, after inquiry, the Township would not agree that such action would be without prejudice to the Authority and the Borough's position that the proposed sale to PAWC would not relieve the Township of its obligation. (Statement No. 1, p. 4:8/23; Statement No. 1, Exhibit F).

20. On April 20, 2020, Upper Pottsgrove Township enacted Ordinance No. 508 which ordinance authorizes and approves the execution, delivery and performance of the Asset Purchase Agreement with PAWC and the assignment of the STSA to PAWC, among other actions. (Statement No. 1, p. 4:28/31).

21. Following the enactment of Ordinance No. 508, Upper Pottsgrove Township has advised the Authority and the Borough that after the closing of the sale of its wastewater system assets to PAWC, Upper Pottsgrove Township will no longer honor its obligation to reimburse the additional funds advanced by the Authority and the Borough for completion of the Project since it will no longer have the legal authority to charge any sewer tapping fees. (Statement No. 1, p. 4:16/19; Statement No. 1, Exhibit F, p. 2).

Appendix C

Proposed Conclusions of Law

1. The Commission has jurisdiction over the subject matter of, and the parties to, this application proceeding. 66 Pa. C.S. §§ 1102, 1103, 1329.

2. Pennsylvania-American Water Company has the burden of proof in this proceeding. 66 Pa. C.S. § 332(a).

3. The Commission may issue a certificate of public convenience upon a finding that “the granting of such certificate is necessary or proper for the service, accommodation, convenience, or safety of the public.” 66 Pa. C.S. § 1103(a) (“Procedure to obtain certificates of public convenience”).

4. A certificate of public convenience is required for “any public utility to begin to offer, render, furnish or supply within this Commonwealth service of a different nature or to a different territory than that authorized” 66 Pa. C.S. § 1102(a)(1).

5. A certificate of public convenience is required for “any public utility . . . to acquire from . . . any person or corporation, including a municipal corporation, by any method or device whatsoever . . . the title to, or possession or use of, any tangible or intangible property used or useful in the public service.” 66 Pa. C.S. § 1102(a)(3).

6. An applicant for a certificate of public convenience must demonstrate that it is technically, financially, and legally fit to own and operate the acquired public utility assets. *Seaboard Tank Lines v. Pa. Pub. Util. Comm’n*, 502 A.2d 762, 764 (Pa. Cmwlth. 1985); *Warminster Twp. Mun. Auth. v. Pa. Pub. Util. Comm’n*, 138 A.2d 240, 243 (Pa. Super. 1958). PAWC has not demonstrated that it is technically, financially and legally fit.

7. An applicant for a certificate of public convenience must demonstrate that the transaction will “affirmatively promote the service, accommodation, convenience or safety of the public in some substantial way.” *City of York v. Pa. Pub. Util. Comm’n*, 449 Pa. 136, 151, 295 A.2d 825, 828 (1972). PAWC has not demonstrated that the transaction will affirmatively promote the service, accommodation, convenience or safety of the public in any way.

8. A contract between a municipality and a public utility (other than a contract to furnish service at regular tariff rates) must be filed with the Commission at least 30 days before the effective date of the contract. The Commission may approve it by issuing a certificate of filing or institute proceedings to determine whether there are any issues with the reasonableness, legality, or any other matter affecting the validity of the contract. 66 Pa. C.S. § 507.

9. Upper Pottsgrove may not unilaterally avoid its contractual obligations to the Borough and the Authority by adopting Ordinance No. 508, approving the sale of the sewer system, and then implementing the Ordinance by proceeding to closing, as to do so would breach the Settlement Agreement, and would also violate Article I, § 10 of the United States Constitution and Article I, § 17 of the Pennsylvania Constitution by impairing its contractual obligations the Authority and the Borough.

10. The Application, if approved, could, as Upper Pottsgrove Township asserts, extinguish Upper Pottsgrove Township’s obligation to reimburse the Authority and the Borough for the Project costs.

11. If Upper Pottsgrove Township is absolved of its contractual and financial obligations, the ratepayers of the Borough and the Authority would be substantially harmed as those ratepayers would be forced to satisfy the financial obligations of the Upper Pottsgrove Township.

12. Until Upper Pottsgrove Township satisfies its contractual and financial obligations pursuant to the Settlement Agreement, the Authority and the Borough will not consent to the assignment of the STSA to PAWC, therefore rendering PAWC unable to provide adequate wastewater collection, treatment or disposal capacity to meet present and future customer demands.

Appendix D

Proposed Ordering Paragraphs

1. That the Honorable Administrative Law Judge Jeffrey A. Watson recommend denial of, and the Commission deny, this Settlement as submitted, including all terms and conditions thereof.
2. That the Application filed by PAWC on November 24, 2020, be denied.
3. That the Commission refuse to issue Certificates of Public Convenience under 66 Pa. C.S. §§ 1102(a) and 1103(a) evidencing Commission denial of: (i) the transfer, by sale, of Upper Pottsgrove Township's assets, properties and rights related to its wastewater collection and treatment system to PAWC as provided in the Application, and (ii) PAWC's right to begin to offer, render, furnish and supply wastewater collection and treatment service in the areas served by Upper Pottsgrove as indicated in the Application.
4. That the Commission deny, under 66 Pa. C.S. § 1329(c), a rate base addition of \$13,750,000 associated with the acquisition of the System.
5. That, if PAWC does not recoup all of its \$90,000 engineering fee/legal fee deposit from Upper Pottsgrove as referenced in Section 3.01 of the APA, then PAWC will not seek to recover any unrecouped portion of the deposit from its ratepayers in any proceeding.
6. That, pursuant to 66 Pa. C.S. § 507, the Commission deny 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 Pottsgrove and Pottstown Borough Authority; and, (3) the Joint Sewage Transportation Agreement between Upper Pottsgrove Township and Lower Pottsgrove Township.