



July 1, 2021

**VIA E-FILING**

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Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street  
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**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.**

**Reply 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 Reply 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 1<sup>st</sup> day of July 2021 served a true copy of the foregoing **Reply 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).

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**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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**ADMINISTRATIVE LAW JUDGE  
JEFFREY A. WATSON**

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Application of Pennsylvania-American Water :  
Company under Section 1102(a) of the :  
Pennsylvania Public Utility Code, 66 Pa. C.S. § :  
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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 :

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**REPLY BRIEF OF  
PENNSYLVANIA-AMERICAN WATER COMPANY**

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Date: July 1, 2021

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AND NOW COMES Pennsylvania-American Water Company (“PAWC”), pursuant to 52 Pa. Code § 5.502(c) 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), to file this Reply Brief responding to the Main Brief filed by the Pottstown Borough Authority (“PBA”) and the Borough of Pottstown (“BP”), Montgomery County, Pennsylvania (together, PBA/BP”). PBA/BP’s Main Brief was filed on June 29, 2021.

## **I. INTRODUCTION AND OVERVIEW**

This case involves PAWC’s application (the “Application”) requesting that the Pennsylvania Public Utility Commission (“Commission”) approve PAWC’s acquisition of substantially all of the assets, properties and rights of Upper Pottsgrove (the “Transaction”) related to Upper Pottsgrove’s wastewater collection and conveyance system (the “System”), and to set the fair market value of the acquisition for rate-base ratemaking purposes. The Transaction has been modified as set forth in the Settlement. PBA/BP’s Main Brief, however, rarely, if ever, mentions the Settlement. The Transaction as described in the Application cannot be considered separately from the Settlement that modifies the Transaction.

In its Main Brief, PBA/BP state that this case involves three questions. PAWC will address each of PBA/BP’s questions. For ease of discussion, this Reply Brief will address PBA/BP’s questions in reverse order: Question 3, then Question 2, and finally Question 1. Finally, PAWC will discuss the “elephant in the room” that PBA/BP fails to mention: the Settlement.<sup>1</sup>

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<sup>1</sup> In addition, PAWC specifically objects to Proposed Conclusion of Law 12 on the grounds that it states a fact that is not in the record.

## **II. A STAY OF THIS PROCEEDING WOULD BE UNLAWFUL AND OTHERWISE INAPPROPRIATE.**

PBA/BP poses the following question in its Main Brief: “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?” PAWC respectfully requests that the ALJ answer this question in the negative.

The instant proceeding was filed pursuant to Sections 507, 1102 and 1329 of the Code. Section 1329(d)(2) unequivocally states: “The commission shall issue a final order on an application submitted under this section within six months of the filing date of an application meeting the requirements of subsection(d)(1).” There is no exception to this statutory mandate. The Application was finally accepted for filing on April 14, 2021. Consequently, the deadline for the Commission to issue a final order is October 14, 2021. PAWC has not waived, and arguably cannot waive, this deadline for Commission action.

The Commission is a creation of the General Assembly. As such, it has only such power and authority as the General Assembly has given it, either explicitly or implicitly. *Feingold v. Bell Tel. Co. of Pa.*, 383 A.2d 791 (Pa. 1977). Section 1329(d)(2) requires the Commission to decide this case by entering a final order within six months of the date that the application was finally accepted for filing. The Commission lacks authority to stay this case past the six-month statutory deadline. PBA/BP’s Brief fails to even acknowledge this statutory deadline, let alone explain how the Commission is empowered to ignore it.

“If statutory language is plain and unambiguous and conveys a clear and definite meaning, there is no occasion to resort to the rules of statutory construction; the language must be given its

plain and obvious meaning.” *Davis v. Sulcove*, 205 A.2d 89, 92 (1964). There is no ambiguity in Section 1329(d)(2); the statute uses mandatory language in requiring the Commission to make a final decision within six months (the Commission “shall” issue a final order on an application within six months). The plain language therefore controls, and the Commission lacks authority to issue an indefinite stay in this proceeding.

This case is distinguishable from *Application of Aqua Pennsylvania Wastewater Inc. – Delaware County Regional Water Quality Control Authority*, Docket Nos. A-2019-3015173 *et al.*, (Opinion and Order entered March 30, 2021), in that PAWC has not purported to waive the six-month deadline for Commission action. That case is currently before the Commonwealth Court of Pennsylvania, *County of Delaware v. Pa. Pub. Util. Comm’n*, 455 C.D. 2021, on the issue of whether the Commission can waive the statutory mandate of 66 Pa. C.S. 1329(d)(2). Since a stay is unwarranted here, the ALJ and the Commission can avoid the possibility of appellate litigation in this proceeding.

As the party requesting the stay, PBA/BP has the burden of proof. 66 Pa. C.S. § 332(a). It has failed even to attempt to carry that burden here. The Commission evaluates requests for stays using the standards set forth in *Pa. Pub. Util. Comm'n v. Process Gas Consumers Group*, 467 A.2d 805 (Pa. 1983). According to those standards, a stay will be granted if:

- a. The petitioner makes a strong showing that he is likely to prevail on the merits;<sup>2</sup>
- b. The petitioner has shown that without the requested relief, he will suffer irreparable injury;
- c. The issuance of a stay will not substantially harm other interested parties in the proceedings; and
- d. The issuance of a stay will not adversely affect the public interest.

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<sup>2</sup> The party asking for a stay need not demonstrate that it will win the case; it need only demonstrate that it has raised significant legal issues and made a substantial case on the merits. *Process Gas*, 467 A.2d at 809.

All four parts of this test must be satisfied for a stay to be granted.

PBA/BP's Main Brief makes no effort to demonstrate that these standards are satisfied; it does not discuss *Process Gas* and it cites no record evidence to demonstrate that any elements of that test have been met. PBA had the opportunity to put evidence into the record to support its request – PBA/BP first requested a deferral of this case in its May 21, 2021, Answer to the Joint Preliminary Objections of PAWC and Upper Pottsgrove (“Answer to Preliminary Objections”), and submitted its Direct Testimony on May 26, 2021. That Testimony, however, contains nothing to support PBA/BP's request for relief.

PBA/BP's Main Brief and Direct Testimony explain the basis for its dispute with Upper Pottsgrove, but there is little information in the record regarding PBA/BP's litigation with Upper Pottsgrove (and absolutely no information regarding PBA/BP's filings in it), so it is impossible to conclude that PBA/BP has made a substantial case on the merits. PBA/BP alleges that it will suffer an injury, but PBA/BP's testimony only contains evidence of a potential monetary injury. Such damages are generally not considered irreparable injury, but can constitute irreparable injury under appropriate circumstances. *West Penn Power Co. v. Pa. Pub. Util. Comm'n*, 615 A.2d 951, 959 (Pa. Cmwlth. 1992). There is insufficient evidence here to conclude that PBA/BP would suffer an irreparable injury from the Commission's approval of the Transaction, as modified by the settlement. Even if the Commission approves the Transaction, as modified by the Settlement, PBA/BP will still be able to pursue its remedies in a civil court, and that court can provide PBA/BP with monetary or other relief in the event that PBA/BP is successful in its litigation. PAWC and other Parties (including but not limited to Upper Pottsgrove, the other party to the Transaction), will be substantially harmed if a stay is granted, because their statutory right to an expeditious decision on its application will be denied. The public interest also will be harmed because the

Transaction, as modified by the Settlement (which the substantial evidence of record demonstrates is in the public interest<sup>3</sup>) will be delayed in even being considered by the Commission. Thus, PAWC requests that the ALJ deny the requested relief because PBA/BP has not carried its burden of proving that it meets all four prongs of the *Process Gas* test.

Finally, the Commission should deny the requested relief on policy grounds. A stay would set a terrible precedent that a transaction can be delayed (and possibly stopped) simply because a protestant claims to have an unrelated dispute with a party to the transaction involving purely monetary damages.<sup>4</sup> Such a holding would encourage frivolous litigation, both in the Commission and the courts. It is worth noting that PBA/BP has never filed a lawsuit against Upper Pottsgrove to resolve the parties' dispute; PBA/BP simply filed a Protest in this proceeding, forcing Upper Pottsgrove to file a court action to resolve the dispute.

The Commission should not permit Section 1329's mandate for speedy resolution of proceedings to be so easily defeated. That would completely undermine the Legislature's purpose in enacting the statute.<sup>5</sup> Instead, the Commission should reject PBA/BP's request for relief and render an expeditious decision in this proceeding.

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<sup>3</sup> This is overwhelmingly demonstrated by the Statements in Support submitted by PAWC, Upper Pottsgrove, the OCA, the OSBA, I&E and Shadeland.

<sup>4</sup> Again, this case is distinguishable from *Application of Aqua Pennsylvania Wastewater Inc. – Delaware County Regional Water Quality Control Authority*, in which municipal entities filed lawsuits against the seller of the system seeking more than monetary relief (e.g., seeking an injunction preventing it from closing on the transaction). *See*, Recommended Decision issued January 12, 2021 at 19.

<sup>5</sup> Those public policy goals include facilitating the acquisition of municipal water and wastewater systems by investor-owned utilities. Achieving this goal helps achieve the Commission's goal of regionalizing and consolidating water and wastewater systems. PAWC St. No. 1 pp. 14, 16.

**III. THE RECORD DOES NOT DEMONSTRATE THAT COMMISSION APPROVAL OF THE APPLICATION, AS MODIFIED BY THE SETTLEMENT, WOULD ABSOLVE UPPER POTTS GROVE OF ANY LEGAL OBLIGATION TO PBA/BP**

PBA/BP also poses the following question in its Main Brief: “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 obligation?” PAWC objects to the consideration of this question on two grounds. First, PBA/BP’s Main Brief takes a position that is directly contrary to the testimony of PBA/BP’s own witness.<sup>6</sup> PAWC submits that this is improper and should not be condoned by the Commission. The Commission should therefore disregard Question 2.

In his direct testimony on behalf of PBA/BP, Justin M. Keller, the Borough Manager for BP and the Manager of the PBA specifically addressed this issue:

**Q. Do you agree with Upper Pottsgrove Township’s position that after the closing of the sale of its wastewater system to Pennsylvania-American Water Company, Upper Pottsgrove Township will be absolved of its obligation to reimburse the Authority for the advance costs paid for the Project?**

**A.** Absolutely not. That would be a breach of the 2013 Settlement Agreement and Release. Additionally, Upper Pottsgrove Township, as a governmental entity, is not permitted to unilaterally enact Ordinance No. 508 and enter into an agreement

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<sup>6</sup> The Commission should note other discrepancies between the testimony of PBA/BP’s witness and the pleadings of its counsel. For example, in PBA/BP’s Answer to Preliminary Objections, page 2, counsel argued that his client should be permitted to participate in this proceeding to make the Commission aware of “the likely failure of Upper Pottsgrove to ever obtain the necessary consent to assign the STSA to PAWC in order to complete the transaction.” The evidence that was subsequently introduced falls well short of this representation; PBA/BP’s witness Justin M. Keller simply testified that PBA/BP has not yet consented to the assignment of the STSA. PBA/BP St. No. 1 p. 6. PBA/BP’s Objections, p. 7 state: “The Authority and Borough have made clear that they will not consent to the assignment of the STSA unless and until: (1) the parties reach acceptable terms and conditions of assignment or (2) they are directed to consent to the assignment in a final, unappealable order by a court of competent jurisdiction.” There is no citation to record evidence supporting this statement and PAWC can find nothing in the record to support it. Finally, in PBA/BP’s Main Brief, page 7, counsel represents that “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.” See also Proposed Conclusion of Law 12. Again, there is no citation to record evidence and PAWC is not aware of anything in the record to support it. It is well-established that a witness’ testimony is record evidence, whereas a counsel’s pleading is not. The Commission must base its decision on record evidence. If the Commission does so, it will quickly reject the arguments of PBA/BP.

with Pennsylvania-American Water Company in a manner that would impair or eliminate Upper Pottsgrove Township's contractual obligation to the Authority. Such an act would violate the United States Constitution and the Pennsylvania Constitution.

PBA/BP Statement No. 1 p. 6.

Based on this testimony, all other parties to this proceeding had a certain understanding of PBA/BP's position, and prepared and presented their cases, and entered into the Settlement, accordingly. Now, for the first time, PBA/BP's Main Brief takes the exact opposite position. PBA/BP's Main Brief fails to acknowledge and explain this discrepancy. If PBA/BP's witness subsequently realized that his Direct Testimony was erroneous, PBA/BP had an obligation to revise and update that testimony. It did not do so. PBA/BP must therefore abide by the position espoused by its witness.

The Commission should not permit a party to argue a position in briefs that is directly contrary to its own witness's testimony. Such surprise tactics completely undermine the purpose of introducing evidence, undermining the ALJ's and the Commission's ability to render a decision based on substantial evidence. Such surprise tactics also deny the other parties to the case due process by prejudicing their ability to introduce evidence that effectively addresses the issues in a case. Consequently, the Commission should disregard PBA/BP's Question 2.

Second, PAWC objects to the consideration of Question 2 because of the relief requested – that the Commission reject and deny the Application, as modified by the Settlement. This request is contrary to the relief requested in all of PBA/BP's prior pleadings in this proceeding. By not requesting this relief before the briefing stage, PBA waived the right to do so. *Red Lion Municipal*

*Auth. v. Pa. Pub. Util. Com'n*, 2019 WL 5561416 (Pa. Cmwlth. 2019) at \*10.<sup>7</sup> PAWC therefore urges the Commission to disregard Question 2 completely.

In their Protest, PBA/BP requested that the Commission “condition any approval of the Application on the full reimbursement of the \$470,184.22 in Authority costs advanced towards the Siphon Project, plus interest and costs.” Protest, p. 6. Since PBA/BP filed their protest after the ALJ cancelled his directive to file Prehearing Memoranda (based on the settlement in principle among all the parties to the case at that time), PBA/BP did not file a Prehearing Memorandum stating its position on the issues. This did not give PBA/BP license to change their position in the case.

Subsequently, in their Answer to Preliminary Objections, at page 2, PBA/BP stated that they filed their Protest “to further urge the Commission to condition any approval on full and complete satisfaction of Upper Pottsgrove’s outstanding obligations.” At page 4 of their Answer to Preliminary Objections, PBA/BP stated: “By way of further response, in addition to the relief requested in the Protest, Protestants request that the Commission expressly condition any approval of the transaction on a completed assignment of the [Sewage Treatment Service Agreement (“STSA”)] prior to closing, and further request that Protestants be permitted to participate as parties to this proceeding.” Finally, on page 6 of that Answer, PBA/BP requested the following relief:

Should it be ultimately determined by the Montgomery County Court of Common Pleas that jurisdiction on whether Upper Pottsgrove is in violation of the Settlement Agreement is properly before the Court of Common Pleas, the Commission should defer to the Court to adjudicate those claims, and either defer action on the Application until Upper Pottsgrove’s claims before the Court are finally adjudicated, or alternatively condition any approval of the Application on a final resolution of Upper Pottsgrove’s claims before that Court.

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<sup>7</sup> This is an unreported panel decision which may be cited for its persuasive value. 210 Pa. Code § 69.414(a).

PBA/BP subsequently filed their Direct Testimony, which included nothing to indicate that PBA/BP intended to ask the Commission to deny the Application. To the contrary, PBA/BP indicated their willingness to withdraw their Protest in these proceedings if certain conditions were met (including PAWC assuming Upper Pottsgrove's financial obligation to reimburse PBA for the outstanding unreimbursed funds). PBA/BP St. No. 1 p. 6.

PBA/BP's Main Brief, however, completely changed course by asking the Commission to deny the Application, as modified by the Settlement. Surprising PAWC by asking for relief contrary to what was requested in its previous filings violates PAWC's due process rights. If PAWC had realized that PBA/BP intended to oppose the Application, rather than requesting that the Commission attach conditions to its approval of the Application, PAWC would have introduced additional evidence and would not have waived hearings and the opportunity to cross-examine PBA/BP's witness. PAWC certainly would not have agreed to file Reply Briefs within 48 hours of receiving Main Briefs if it had known that the parties were free to change their previously-stated positions on the ultimate issue in the case. PBA/BP's failure to disclose their real position in this proceeding substantially prejudiced PAWC's ability to develop and present its case.

If a party can change its position at any time during litigation, PBA/BP could conceivably change its position again in subsequent filings after the ALJ issues his Recommended Decision, undermining the Commission's ability to render a decision. For all of the above reasons, PAWC respectfully requests that the ALJ disregard Question 2.

If, however, the Commission decides to consider PBA/BP's argument, the Commission should deny it on the merits. PBA/BP's Main Brief cites no record evidence in support of its version of the facts; it simply asks the Commission to assume that approval of the Application

would absolve Upper Pottsgrove of its contractual obligations. The Commission, of course, cannot make such an assumption. 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). The record in this case does not contain substantial evidence demonstrating that approval of the Application would have an adverse financial impact on PBA/BP, their ratepayers and residents. Likewise, there simply is no evidence that PBA/BP would not continue to have recourse to the civil courts (where the monetary dispute properly resides) if the Commission were to approve the Application, as modified by the Settlement.

Moreover, the relevant question for the Commission is whether the Transaction affirmatively promotes the service, accommodation, convenience or safety of the public in some substantial way. *City of York v. Pa. Pub. Util. Comm'n*, 295 A.2d 825, 828 (Pa. 1972). PAWC – together with the other signatories to the Settlement – established a *prima facie* case that the Transaction, as modified by the Settlement, benefits a wide range of stakeholders: the public-at-large, Upper Pottsgrove Township, Upper Pottsgrove's customers and PAWC's water and wastewater customers. PBA/BP failed to rebut that *prima facie* case by presenting evidence of co-equal weight; PBA/BP merely introduced evidence of a dispute that, depending on how that dispute is resolved, might possibly have an adverse financial impact on the ratepayers of PBA and the residents of BP. Such speculation about possible future events hardly matches the weight of

the evidence presented by PAWC, Upper Pottsgrove, and the other signatories to the Settlement that the Transaction is in the public interest.

An acquisition provides an affirmative public benefit if the benefits of the transaction outweigh the adverse impacts of the transaction. *Application of CMV Sewage Co., Inc.*, 2008 Pa. PUC LEXIS 950. When looking at the benefits and detriments of a transaction, the focus of the analysis must be on all affected parties, not merely a particular group or a particular geographic area. *Middletown Tp. v. Pa. Pub. Util. Comm'n*, 482 A.2d 674 (Pa. Cmwlth. 1984). PBA/BP focus exclusively on the potential impact of the Transaction on one group -- themselves and their ratepayers and residents.<sup>8</sup> This is exactly the kind of analysis *Middletown* rejects – particularly where, as here, any perceived harm would be properly rectified by the civil courts and not the Commission. Considering all the benefits and detriments, to all affected parties, the preponderance of the evidence clearly demonstrates that the Transaction, as modified by the Settlement, promotes the service, accommodation, convenience or safety of the public in some substantial way. The Commission should therefore approve the Transaction, as modified by the Settlement.

#### **IV. THE SETTLEMENT ENSURES THAT PAWC WILL BE ABLE TO PROVIDE WASTEWATER SERVICE IN THE PUBLIC INTEREST**

Finally, PBA/BP pose the following issue: “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

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<sup>8</sup> In their Objections, PBA/BP focus their analysis even more narrowly. They contend that the Settlement should be rejected because they would be exposed to risk under one particular scenario (*i.e.*, where: a court issues an unfavorable decision on their dispute with Upper Pottsgrove, PBA/BP appeals that decision but does not obtain a stay, PAWC and Upper Pottsgrove Close on the Transaction, and then the appellate court issues a ruling favorable on PBA/BP’s dispute with Upper Pottsgrove). Such a narrow analysis is inconsistent with *Middletown*.

customer demand?” Again, PAWC objects to the consideration of Question 3 because of the relief requested; PBA/BP completely changed their position on the relief it is requesting from the Commission. After the evidence was stipulated into the record and the hearing cancelled, PBA/BP for the first time asked the Commission to “reject and deny” the Application, rather than asking the Commission to approve it subject to a condition or to defer consideration of the matter. As discussed above, this is improper, constitutes waiver, and the Commission should not consider Question 3. *See Red Lion Municipal Auth., supra.*

If the Commission considers Question 3, it should find PBA/BP’s position lacks merit.

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 Main Brief p. 8. Consequently, the Parties introduced evidence of the need for assignment of the STSA by PBA/BP. PBA/BP St. No. 1 pp. 5-6; PAWC St. No. 1-R pp. 8-9; Upper Pottsgrove St. No. 1-R pp. 7-8. Since PBA/BP has not yet consented to the assignment of the STSA or been ordered by a court of competent jurisdiction to assign the STSA, PAWC’s Main Brief and Statement in Support of the Settlement explained how the APA, PAWC’s Rebuttal Testimony, and the Settlement, ¶¶ 42-43, ensure that, if the Commission approves 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”). PAWC Main Brief pp. 8-11; PAWC’s Statement in Support of Settlement, pp. 16-17.

In its Main Brief, for the first time, PBA/BP claims that assignment of the STSA requires more than just a simple consent to the assignment; it also requires the renegotiation of large portions of the STSA because those provisions contain obligations that can only be performed by a municipality. According to PBA/BP's Main Brief, these provisions must be re-drafted if the STSA is assigned to a public utility like PAWC. PBA Main Brief pp. 15-19.

The ALJ should reject PBA/BP's argument because there is no record support for it. The STSA is in the record, but PBA/BP's Direct Testimony contains no explanation of why any particular provision must be renegotiated prior to assignment. PBA/BP's Main Brief quotes the contract provisions that PBA/BP's counsel believes need to be renegotiated, and italicizes language that purportedly supports that assertion, but italicized font in a brief is no substitute for testimony and exhibits. As stated above, it is well-established that counsel's representations in a pleading are not record evidence. The ALJ and the Commission should reject PBA/BP's position due to the lack of any evidentiary support for it.

Additionally, by failing to introduce testimony regarding the alleged need to renegotiate portions of the STSA in order to assign it from a municipality to a public utility, PBA/BP is again surprising the other Parties and prejudicing their rights.<sup>9</sup> If PAWC had been aware of this issue, it would have introduced testimony regarding discussions its staff had with PBA/BP staff regarding this issue and it would have introduced into the records copies of e-mails and draft documents exchanged by the parties. In addition, PAWC would have introduced evidence of numerous

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<sup>9</sup> The only testimony whatsoever regarding the alleged need to revise the STSA is Mr. Keller's testimony that PBA/BP would withdraw its Protest if PAWC paid Upper Pottsgrove's financial obligations under the STSA, "with the understanding there are other outstanding items regarding the terms of the consent and assignment to Pennsylvania-American Water Company and the terms of a support agreement with Upper Pottsgrove." This testimony hardly put the Parties on notice of PBA/BP's claim that the Commission cannot approve the existing STSA pursuant to Section 507 of the Code.

similar contracts that PAWC has assumed from municipalities, submitted to the Commission for approval pursuant to Section 507, and for which PAWC received Commission approval. Finally, if PBA/BP would have introduced evidence raising this issue before briefs were filed, PAWC could have amended its Application to include a petition requesting that, upon assignment of the STSA to PAWC, the Commission modify the relevant portions of the STSA pursuant to Section 508 of the Code.<sup>10</sup> PBA/BP's failure to clearly raise this issue before filing Main Briefs prejudiced PAWC's ability to prepare and present its case.

To be clear, PAWC is asking the Commission to approve, pursuant to Section 507, the STSA in its present form (after PBA/BP consents to the assignment or a court of competent jurisdiction directs assignment of the STSA). If the STSA is renegotiated in the future, PAWC will submit that new version of the STSA to the Commission for Section 507 approval. If the Parties conclude that the STSA needs to be revised, but are unable to reach an agreement on the revised agreement, PAWC reserves the right to file a Section 508 Petition in the future asking that the Commission establish just, reasonable and equitable terms in the agreement upon assignment to PAWC.

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<sup>10</sup> Section 508 provides:

The commission shall have power and authority to vary, reform, or revise, upon a fair, reasonable, and equitable basis, any obligations, terms, or conditions of any contract heretofore or hereafter entered into between any public utility and any person, corporation, or municipal corporation, which embrace or concern a public right, benefit, privilege, duty, or franchise, or the grant thereof, or are otherwise affected or concerned with the public interest and the general well-being of this Commonwealth. Whenever the commission shall determine, after reasonable notice and hearing, upon its own motion or upon complaint, that any such obligations, terms, or conditions are unjust, unreasonable, inequitable, or otherwise contrary or adverse to the public interest and the general well-being of this Commonwealth, the commission shall determine and prescribe, by findings and order, the just, reasonable, and equitable obligations, terms, and conditions of such contract. Such contract, as modified by the order of the commission, shall become effective 30 days after service of such order upon the parties to such contract.

66 Pa. C.S. § 508 (regarding "Power of commission to vary, reform and revise contracts).

Given that any renegotiated provisions of the STSA would be subject to Commission Section 507 approval, and any provisions that cannot be renegotiated can be modified by the Commission under Section 508, the Commission should have no hesitancy in approving assignment of the STSA in its current form. The potential need for prospective revision of certain provisions of the contract should not be the basis for holding up a Transaction that is clearly in the public interest.<sup>11</sup>

## **V. THE SETTLEMENT**

PBA/PA's Main Brief rarely, if ever, mentions the Settlement, which modified the Transaction in significant ways. For example, as discussed at length in PAWC's Main Brief and in its Statement in Support of the Settlement, the Settlement provides adequate safeguards that Closing on the Transaction will not occur until after PBA/BP has consented to the assignment of the STSA or assignment of the STSA is directed by a court of competent jurisdiction. The Settlement's provisions provide additional public benefits for the Transaction, above and beyond those stated in the Application.

PAWC's Replies to Objections will address PBA/BP's concerns with the Settlement. Suffice it to say here that the Transaction, as modified by the Settlement, satisfies all of the relevant

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<sup>11</sup> If the Commission grants PBA/BP's request that the Transaction be disapproved because certain provisions of the STSA have not yet been renegotiated, the Commission would be granting absolute leverage to PBA/BP in negotiations with PAWC regarding the STSA. The Commission would allow PBA/BP to supplant itself for the Commission as the ultimate arbiter of whether the Transaction is in the public interest by allowing PBA/BP to determine -- without restraint -- if and when it would like to renegotiate the terms and conditions of the STSA. The Commission must guard its statutory authority to modify public utility contracts under Section 508 when necessary to promote the public interest; the Commission has been vested by the Legislature with that responsibility. Otherwise, PBA/BP (as well as other similarly-situated municipal entities and non-public counter-parties to bulk agreements) would have no incentive -- other than a sense of integrity -- to negotiate agreements with an acquiring public utility in good faith. The effect could be an extreme chilling effect on acquisitions of water and wastewater systems throughout the Commonwealth; thereby hindering the Pennsylvania Legislature's and the Commission's policies of promoting regionalization and consolidation of water and wastewater systems and allowing timely relief to financially-distressed municipalities that need to monetize assets in order to meet other critical public needs.

legal tests. PAWC's Main Brief pp. 2-4. It provides affirmative public benefits of a substantial nature because the benefits of the transaction outweigh the alleged adverse impacts of the transaction when looking at the benefits and detriments on all affected parties. The ALJ should waste no time in rejecting PBA/BP's argument that the Transaction, as modified by the Settlement, is not in the public interest because one particular group might possibly suffer some adverse financial impact in one conceivable scenario – particularly where there is no record evidence to substantiate the purported harm. PAWC incorporates by reference its Replies to Objections pp. 5-7.

## **VI. CONCLUSION AND REQUEST FOR RELIEF**

WHEREFORE, for the reasons stated above, and in PAWC's Replies to Objections, PAWC's Main Brief, and PAWC's Statement in Support of the Settlement, PAWC respectfully requests that the Honorable Administrative Law Judge Jeffrey A. Watson:

- (1) deny and dismiss the Protest of PBA/BP, and
- (2) recommend that the Commission approve the Transaction as modified by the Settlement.

Respectfully submitted,



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