



COMMONWEALTH OF PENNSYLVANIA  
PENNSYLVANIA PUBLIC UTILITY COMMISSION  
COMMONWEALTH KEYSTONE BUILDING  
400 NORTH STREET, HARRISBURG, PA 17120

BUREAU OF  
INVESTIGATION  
&  
ENFORCEMENT

July 1, 2021

**Via Electronic Filing**

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street  
Harrisburg, PA 17120

Re: Section 1329 Application of Pennsylvania-American Water Company –  
Wastewater Division for the Acquisition of Upper Pottsgrove Township's  
Wastewater System Assets  
Docket No.: A-2020-3021460  
**I&E Reply Brief**

Dear Secretary Chiavetta:

Enclosed for electronic filing please find the **Reply Brief of the Bureau of Investigation and Enforcement (I&E)** for the above-captioned proceeding.

Copies are being served on parties per the attached Certificate of Service. *Due to the temporary closing of the PUC's offices, I&E is only providing electronic service.* Should you have any questions, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read 'Gina L. Miller', is written over a light blue horizontal line.

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GLM/ac  
Enclosures

cc: Honorable Jeffrey A. Watson – Office of Administrative Law Judge (*via email*)  
Nick Miskanic, Legal Assistant – Office of Administrative Law Judge (*via email*)  
Per Certificate of Service

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Application of Pennsylvania-American :  
Water Company for Approval of its :  
Acquisition of Upper Pottsgrove : Docket No.: A-2020-3021460  
Township's Wastewater Assets, inter :  
alia, Pursuant to Sections 507, 1102 and :  
1329 of the Public Utility Code :

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**REPLY BRIEF  
OF THE  
BUREAU OF INVESTIGATION AND ENFORCEMENT**

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Dated: July 1, 2021

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## I. STATEMENT OF THE CASE

### A. Overview

The Bureau of Investigation & Enforcement (“I&E”) incorporates, by reference, its full *Statement in Support of the Joint Petition for Approval of Non-Unanimous Settlement* including the procedural history, summary of applicable legal standards, and the comprehensive explanation of why the settlement terms appropriately resolve this case in its entirety. For reference, I&E’s Statement in Support of the Joint Petition is contained in “Attachment E” to the Joint Petition for Approval of Non-Unanimous Settlement of All Issues<sup>1</sup> that the Joint Petitioners<sup>2</sup> filed the Settlement on June 25, 2021.

On June 29, 2021, Pottstown Borough Authority/Borough of Pottstown (“PBA/BP”), the sole opponent of the Settlement, filed both an Objection to the Settlement and a Main Brief. On the same date, PAWC and Upper Pottsgrove each filed a Main Brief. I&E did not submit a Main Brief because, as indicated in a letter it filed on June 29, 2021, I&E addressed all issues in this case, including those that were timely raised by PBA/BP, through its Statement in Support of the Joint Petition. However, in its letter, I&E also reserved the right to file a Reply Brief in this case, and it is now exercising that option in order to reply to the extra-record and unsupported arguments of PBA/BP.<sup>3</sup> I&E avers that PBA/BP’s brand-new positions are not only unsupported in the record, but they also otherwise fail to warrant the relief requested.

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<sup>1</sup> “Joint Petition” or “Settlement.”

<sup>2</sup> The Joint Petitioners are Pennsylvania-American Water Company (“PAWC”), I&E, the Office of Consumer Advocate (“OCA”), the Office of Small Business Advocate (“OSBA”), Upper Pottsgrove Township (“Upper Pottsgrove”), and Shadeland Development Corporation (“Shadeland”).

<sup>3</sup> I&E notes that while PBA/BP also filed Objections to the Settlement, those Objections align with the arguments made in PBA/BP’s Main Brief and for purposes of efficiency, I&E has elected to address them in the context of a reply to PBA/BP’s Main Brief.

## **B. Upper Pottsgrove's Unassigned Contract with PBA/BP**

At the outset of this case, PAWC's Application clearly and openly acknowledged that Upper Pottsgrove had not yet attained approval to assign its sewerage treatment contract with PBA/BP ("PBA/BP contract").<sup>4</sup> Because PAWC expressly disclosed that the assignment had not been granted, I&E's investigation in this case examined that failure of assignment and determined that it was a defect that would need to be cured before any closing of this transaction should occur. To be sure, PBA owns a wastewater treatment facility and BP leases and operates that facility which Upper Pottsgrove depends upon for treatment of its wastewater.<sup>5</sup> There can be no credible dispute that wastewater treatment is essential for the operation of the Upper Pottsgrove system, and PAWC concedes that if the acquisition proceeds to closing, it will need treatment services from PBA/BP.<sup>6</sup> However, PBA/BP is unwilling to consent to assignment of its Upper Pottsgrove contract to PAWC unless and until it receives payment of an outstanding obligation that Upper Pottsgrove has allegedly incurred, estimated to be \$470,184.22.<sup>7</sup> Upper Pottsgrove disputes the obligation and its dispute with PBA/BP remains unresolved.

Nevertheless, I&E avers that in this case, Upper Pottsgrove committed to transferring to PAWC all contracts necessary to operate the system;<sup>8</sup> accordingly, it is clear that this transaction was predicated, and negotiated, with the expectation that Upper

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<sup>4</sup> PAWC Application, Appendix A-24-a, Schedule 4.13.

<sup>5</sup> PBA/BP St. No. 1, p. 2.

<sup>6</sup> PAWC St. No. 1-R, p. 11.

<sup>7</sup> PBA/BP St. No. 1, p. 6.

<sup>8</sup> PAWC Application, Appendix A-24(a), pp. 15-16, Section 2.01.

Pottsgrove’s treatment contract with PBA/BP would be assigned to PAWC. Fortunately, through the Settlement,<sup>9</sup> and as established in its testimony,<sup>10</sup> PAWC has voluntarily committed to conditioning any closing of its transaction upon obtaining the assignment of the contract with PBA/BP. To that end, I&E submits, and the evidentiary record supports, the conclusion that the only portion of PBA/BP’s opposition that survives the Settlement are those for monetary and other contractually-based claims that are outside of the Commission’s jurisdiction.<sup>11</sup>

## II. BURDEN OF PROOF AND APPLICABLE STANDARDS

PAWC, as the proponent of the Application, bears the burden of proof to establish that it is entitled to receive the approvals being sought in the Application.<sup>12</sup> To be sure, PAWC recognizes its formidable burden,<sup>13</sup> which I&E avers also includes the obligation to establish a preponderance of evidence which is substantial and legally credible.<sup>14</sup> In order to meet its burden of proof, PAWC must “present evidence more convincing, by even the smallest amount, than that presented by any opposing party.”<sup>15</sup> To satisfy its burden, PAWC must demonstrate, by a preponderance of the evidence, that its proposed transaction complies with Pennsylvania law and should be approved.<sup>16</sup> Specific to this

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<sup>9</sup> Joint Petition, ¶ M.

<sup>10</sup> PAWC St. No. 1-R, p. 11.

<sup>11</sup> Interim Order Denying the Preliminary Objections of PAWC and Upper Pottsgrove to the PBA/BP Protest, p. 12 (entered on May 27, 2021).

<sup>12</sup> 66 Pa. C.S. § 332(a).

<sup>13</sup> PAWC Main Brief, pp. 2-3.

<sup>14</sup> *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600, 602 (Pa. Cmwlth. 1990).

<sup>15</sup> *Se-Ling Hosiery v. Margulies*, 70 A.2d 854 (Pa. 1950).

<sup>16</sup> *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600, 602 (Pa. Cmwlth. 1990).

case, PAWC has the burden of proving that the proposed transaction is in compliance with Sections 507, 1102, 1103, and 1329 of the Code.<sup>17</sup>

Importantly, and as PBA/BP fail to acknowledge, it is well-settled that in order to ensure that a transaction is in the public interest, the Commission may impose conditions on granting a certificate of public convenience as it may deem to be just and reasonable.<sup>18</sup> In this case, as a result of PAWC's willingness to adhere to the terms and conditions of the Settlement, PAWC must and will meet its burden because its Application will not proceed to closing unless and until it complies with all of the applicable sections of the Code. Although it appears that PBA/BP either somehow does not understand or refuses to acknowledge PAWC's memorialized commitment that it will not proceed to closing absent assignment of the PBA/BP contract at issue, the Settlement still enshrines that commitment as a condition precedent to closing. I&E submits that this outcome will serve to ensure that PAWC's Application, as modified by the Settlement, will comply with all applicable laws and standards.

### III. STATEMENT OF QUESTIONS INVOLVED

1. Has PBA/BP failed to support its newfound position that PAWC's Application should be denied?

**Suggested Answer: Yes.** Although PBA/BP espouses this position for the first time in its Main Brief, it was unsupported during the evidentiary phase of this case and it remains unsupported now.

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<sup>17</sup> I&E notes that each of these applicable standards are fully articulated in the Joint Stipulation of Proposed Findings of Fact, Proposed Conclusions of Law and Proposed Ordering Paragraphs and I&E herein incorporates them here.

<sup>18</sup> I&E Main Brief, p. 18, citing to 66 Pa. C.S. § 1103(a).

2. Is PBA/BP's claim that approval of PAWC's Application would absolve Upper Pottsgrove of its contractual reimbursement obligations contradictory, inaccurate, and unsupported?

**Suggested Answer: Yes.** Not only does this newfound position contradict PBA/BP's direct testimony, but it also highlights the fact that PBA/BP is attempting to use this forum to resolve a non-jurisdictional contractual dispute with Upper Pottsgrove that cannot be resolved in this case.

3. Is PBA/BP's alternative request for the ALJ and the Commission to stay this proceeding pending the resolution of its dispute with Upper Pottsgrove unnecessary and unreasonable in light of the terms and conditions of the Settlement?

**Suggested Answer: Yes.** As I&E will demonstrate, PBA/BP's novel request for an indeterminate stay is not only unnecessary in light of PAWC's Settlement commitments that already impose a de facto stay on any closing of the transaction, but it will continue the waste of resources that PBA/BP has already needlessly caused the parties, the ALJ, and the Commission.

#### **IV. ARGUMENT**

##### **A. PBA/BP failed to support its newfound position that PAWC's Application Should be Denied**

At the outset, it is important to note that PBA/BP's position that PAWC's Application should be denied was articulated to I&E for the first time via PBA/BP's Main Brief.<sup>19</sup> A review of PBA/BP's direct case makes no such recommendation. Instead, the only divivable relief PBA/BP's lone piece of direct testimony appears to request is for PAWC to assume the financial obligation that Upper Pottsgrove allegedly owes to PBA/BP.<sup>20</sup> To that end, I&E fundamentally rejects the notion that PAWC's ratepayers should be compelled to pay Upper Pottsgrove's alleged debt to PBA/BP in

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<sup>19</sup> PBA/BP Main Brief, p. 13.

<sup>20</sup> PBA/BP St. No. 1, pp. 6-7.

order to close this transaction. Accordingly, I&E agrees with PAWC's position that it is improper for PBA/BP to use the Commission process to get monetary concessions from a public utility.<sup>21</sup> Fortunately, PAWC has acted to protect its ratepayers from such an outcome by willfully agreeing to permit PBA/BP and Upper Pottsgrove to resolve their monetary dispute outside of this case, where ratepayers are not held hostage and subjected to funding protracted litigation, and to condition any closing of the transaction upon PBA/BP's assignment of the contract to PAWC.<sup>22</sup>

Now, for the first time in its Main Brief, PBA/BP's recommendation to deny PAWC's Application is predicated upon its novel allegation that PAWC is not legally and technically fit to service Upper Pottsgrove's customers.<sup>23</sup> Tellingly, PBA/BP never made these claims in its testimony. In fact, during the entire evidentiary phase of this case, it never attempted to rebut PAWC's of-record claims that it is legally, technically, and financially fit to acquire the Upper Pottsgrove system and to serve its customers.<sup>24</sup> This is a clear violation of Commission regulations which prohibit the introduction of evidence in the rebuttal phase that should have been included in the party's case-in-chief.<sup>25</sup> "The clear purpose of it is to avoid trial by ambush and the prevention of surprise can only be achieved if the parties are confined to the scope of their direct case."<sup>26</sup> Trial by ambush is precisely what occurred given that PBA/BP sat silently and

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<sup>21</sup> PAWC St. No. 1-R, p. 9.

<sup>22</sup> Joint Petition, pp. 16-17, Section M, Approval of Section 507 Agreements.

<sup>23</sup> PBA/BP Main Brief, pp. 14-15.

<sup>24</sup> PAWC St. No. 2, pp. 6-8; PAWC St. No. 1, pp. 8-9, 12-14.

<sup>25</sup> 52 Pa. Code § 5.243(e).

<sup>26</sup> *Pa. PUC v. UGI Utilities, Inc.*, 1994 Pa. PUC LEXIS 138, 85.

waited to make extra-record fitness arguments for the first time in its Main Brief served on June 29, 2021,<sup>27</sup> which hinge on PAWC's inability to meet fitness requirements absent assignment of the PBA/BP contract. I&E is unable to discern why PBA/BP attempts to make this untimely fitness argument, which is wholly premised upon PAWC closing the transaction without obtaining assignment of the PBA/BP contract, when the Settlement and PAWC's testimony make it clear that PAWC will not and cannot close this transaction absent such assignment.<sup>28</sup> To be sure, I&E's initial position in this case mirrored PBA/BP's: the transaction should not close without the assignment because PAWC will not be able to meet its obligation to provide safe, adequate and reliable service to acquired customers absent use of PBA/BP's treatment services.<sup>29</sup> However, this position has been expressly resolved, and PBA/BP's baffling attempt to resurrect it and convert it to its own use now has needlessly caused parties, and ultimately PAWC's ratepayers, to waste resources. Any further waste of resources can be avoided by the rejection of PBA/BP's meritless position.

**B. Approval of PAWC's Application, under the terms of the Settlement, will not absolve Upper Pottsgrove of any contractual reimbursement it may have with PBA/BP**

In its Main Brief, PBA/BP indicates that Upper Pottsgrove has advised PBA/BP that after the closing of the sale of its system to PAWC, it will no longer honor financial

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<sup>27</sup> Evidentiary hearings were set to conclude in this matter on June 11, 2021. Like all other parties, PBA/BP waived cross-examination of ant witnesses and supported cancellation of the hearings.

<sup>28</sup> Joint Petition, ¶ M; PAWC St. No. 1-R, p. 11.

<sup>29</sup> I&E Statement in Support of Joint Petition, pp. 26-27, referencing PAWC's obligation pursuant to 66 Pa. C. S. § 1501.

obligations that PBA/BP alleges arise under contract.<sup>30</sup> In response, PBA/BP avers that Upper Pottsgrove may not unilaterally avoid its contractual obligations to PBA/BP through its transaction with PAWC because doing so would breach a settlement agreement it previously entered with PBA/BP and it would violate the United States Constitution.<sup>31</sup> Tellingly, in its direct testimony, PBA/BP also previously took the position that Upper Pottsgrove and PAWC cannot unilaterally deprive it of its contractual claims by simply proceeding to closing of the transaction.<sup>32</sup> Consequently, the contradictory position PBA/BP now espouses in its Main Brief, that Upper Pottsgrove and PBA may now somehow unilaterally absolve Upper Pottsgrove of its alleged obligation to PBA/BP, is unsupported and contradicted by its own testimony. Aside from that clear defect, I&E submits that PBA/BP's newfound contractually-based position highlights the limits of jurisdictional relief available in this case, and the fact that the Settlement addresses PBA/BP's concerns to the extent available in this forum.

Here, the Commission is empowered to enforce the Settlement commitment of PAWC, a jurisdictional entity, to secure assignment of the PBA/BP as a condition precedent to closing. Accordingly, that is the only relief available here, and it is already accounted for in the Settlement.<sup>33</sup> On the other hand, PBA/BP's argument regarding enforcement of a settlement agreement or a contract between itself and Upper Pottsgrove,

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<sup>30</sup> PBA/BP Main Brief, pp. 6-7.

<sup>31</sup> Id; PBA/BP Protest ¶ 4.

<sup>32</sup> PBA/BP St. No. 1, p. 6.

<sup>33</sup> Joint Petition, ¶M.

two non-jurisdictional entities, is not properly within the scope of the Commission's jurisdiction, as ALJ Watson has already aptly determined.<sup>34</sup>

While PBA/BP is apparently unsatisfied with the lack of available remedies for its contractual claim against PBA/BP in this forum, I&E submits that the unavailability of PBA/BP's remedy of choice only serves to highlight that this proceeding is not the appropriate venue for resolution PBA/BP's dispute with Upper Pottsgrove. Importantly, PBA/BP has failed to demonstrate that anything in PAWC's Application, as modified by the Settlement, constrains it from taking any legal action it may choose to enforce any Upper Pottsgrove's contractual obligations may owe. To be sure, as I&E will explain below, a proceeding regarding the contract between PBA/BP and Upper Pottsgrove has already been initiated in Montgomery County Court, and I&E submits that PBA/BP may have an opportunity to pursue its claims in that forum where the monetary and contractual relief it is seeking<sup>35</sup> may be available. However, those types of relief are not available here, and any notion that PAWC can act to unilaterally deprive it of contractual rights by way of this case is unsupported and clearly dispelled by explicit Settlement terms.

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<sup>34</sup> Interim Order Denying the Preliminary Objections of PAWC and Upper Pottsgrove to the PBA/BP Protest, p. 12 (entered on May 27, 2021), citing *Allport Water Auth. v. Winburne Water Co.*, 258 Pa. Super. 555, 393 A.2d 673 (Pa. Super. 1978) et al.

<sup>35</sup> PBA/BP St. No. 1.

**C. No basis exists to stay this proceeding since the Settlement requires PAWC to attain assignment of the PBA/BP contract as a condition of closing.**

Like the other arguments raised for the first time in its Main Brief, PBA/BP has failed to identify any of-record or valid basis for its new position that this proceeding should be stayed pending final disposition of the Montgomery County Court of Common Pleas action.<sup>36</sup> For purposes of context, the action PBA/BP is referring to was initiated by Upper Pottsgrove, as it disputes that it owes PBA/BP the amount of money alleged; accordingly, it filed an action in the Court of Common Pleas of Montgomery County asking the Court to order PBA/BP to consent to the assignment.<sup>37</sup> Currently, the dispute is unresolved. If PAWC had not voluntarily agreed to condition any closing of the transaction upon assignment of the PBA/BP contract, I&E would wholeheartedly agree with PBA/BP's position. To be sure, I&E's position since the outset of its investigation has always been, and remains, that this transaction should not and cannot close without PBA/BP's treatment service.

However, PAWC is not attempting to close the transaction without securing the assignment, and it has voluntarily agreed to the requirement that obtaining the assignment be a condition precedent to closing the transaction. In this vein, the Settlement already imposes a de facto stay because it is structured so that no closing can occur without assignment of the PBA/BP contract.<sup>38</sup> Because of this, I&E can see no reason for, or merit in, staying this proceeding where closing *already* cannot occur absent resolution of

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<sup>36</sup> PBA/BP Main Brief, p. 22.

<sup>37</sup> Upper Pottsgrove St. No. 1, pp. 8-9; PBA/BP Main Brief, p. 22.

<sup>38</sup> Joint Petition, ¶M.

the PBA/BP contract dispute with Upper Pottsgrove. On the other hand, staying this proceeding and needlessly protracting it is wholly inconsistent with the Commission's regulation that PBA/BP somehow attempts to rely upon: *52 Pa. Code § 1.2(a)*.<sup>39</sup> While PBA/BP correctly indicated that *52 Pa. Code § 1.2(a)* provides that the Commission's rules should be “*liberally construed to secure the just, speedy and inexpensive determination of every action or proceeding*”<sup>40</sup> its recommendation to stay the proceeding pending a final disposition of the pending County Court litigation is completely at odds with the cited regulation.

Specifically, holding this proceeding open for an indeterminate amount of time will waste the time and resources of the parties, the ALJ, and the Commission, which is directly adverse to any just, speedy, and inexpensive determination of this proceeding. The waste is, on its own, antithetical to the express outcome prescribed *52 Pa. Code § 1.2(a)*, but it is further compounded by the fact that the waste will be incurred needlessly because a resolution of the pending litigation is not necessary to ensure that PAWC will not attempt to close the transaction without assignment of the PBA/BP contract. By way of the Settlement and through its testimony,<sup>41</sup> PAWC has already made this commitment, so while PBA/BP's stay request would only further prolong the waste that has already occurred here, and without any benefit or need. Accordingly, PBA/BP's request for this proceeding to be stay is unsupported, without merit, and it should be denied.

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<sup>39</sup> PBA/BP Main Brief, pp. 8-9.

<sup>40</sup> PBA/BP Main Brief, pp. 8-9.

<sup>41</sup> Joint Petition, ¶ M; PAWC St. No. 1-R, p. 11.

## V. CONCLUSION

WHEREFORE, the Commission's Bureau of Investigation and Enforcement respectfully requests that Administrative Law Judge Jeffrey A. Watson deny the relief requested by the Pottstown Borough Authority/Borough of Pottstown and instead recommend, and the Commission thereafter approve, Pennsylvania-American Water Company's Application as modified by the Joint Petition for Approval of a Non-Unanimous Settlement submitted in this case.

Respectfully submitted,



Gina L. Miller  
Prosecutor  
PA Attorney ID No. 313863

Bureau of Investigation and Enforcement  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
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Dated: July 1, 2021

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Section 1329 Application of Pennsylvania- :  
American Water Company – Wastewater :  
Division for the Acquisition of Upper : Docket No.: A-2020-3021460  
Pottsgrove Township’s Wastewater System :  
Assets :

**CERTIFICATE OF SERVICE**

I hereby certify that I am serving the foregoing **Reply Brief** dated July 1, 2021, in the manner and upon the person listed below:

**Served via Electronic Mail Only**

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