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July 1, 2021

VIA E-FILING

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

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

Dear Judge Watson:

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

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

Respectfully,

/s/ James J. Rodgers

James J. Rodgers

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**Administrative Law Judge
Jeffrey A. Watson**

Application of Pennsylvania-American Water :
Company under Section 1102(a) of the :
Pennsylvania Public Utility Code, 66 Pa. C.S. § :
1102(a), for approval of (1) the transfer, by sale, of :
substantially all of Upper Pottsgrove Township’s :
assets, properties and rights related to its : Docket No. A-2020-3021460, *et al.*
wastewater collection and conveyance system to :
Pennsylvania-American Water Company, and (2) :
the rights of Pennsylvania-American Water :
Company to begin to offer or furnish wastewater :
service to the public in Upper Pottsgrove :
Township, Montgomery County and a portion of :
Douglass Township, Berks County, Pennsylvania :

REPLY BRIEF OF UPPER POTTS GROVE TOWNSHIP

Upper Pottsgrove Township (“Upper Pottsgrove” or “the Township”) submits this Reply Brief in Support of the above-captioned Application of Pennsylvania-American Water Company (“PAWC”) for the Commission’s approval of PAWC’s proposed acquisition of the wastewater collection system of Upper Pottsgrove. Wastewater collected by the Township’s system is conveyed to the treatment facilities maintained by the Pottstown Borough Authority (“PBA”) pursuant to a Sewer Treatment Services Agreement (STSA) between Upper Pottsgrove on one hand and PBA and the Borough of Pottstown (together, the “Pottstown Parties”). All parties agree that essential to the proposed transaction is the assignment of the existing STSA from

Upper Pottsgrove to PAWC to provide continuing access to the PBA treatment facilities for treating wastewater from the existing Township system. Indeed, the Asset Purchase Agreement (APA) expressly makes assignment of the STSA a condition of closing on the transaction.

The Joint Protest of the Pottstown Parties

The Pottstown Parties filed a Joint Protest (“Protest”) to the Application, requesting the Commission to condition approval of the Application not only on the assignment of the STSA, but on the payment of \$470,184.22, plus interest and costs, to the Pottstown Borough Authority. This demand was predicated upon a claimed contractual obligation on the part of the Township to pay to PBA the full amount of costs incurred by PBA in completing a specified construction project (“Project”) pursuant to a “Settlement Agreement” dated July 2, 2013. The Protest did not request denial of the Application, and raised no argument implicating the public interest other than noting the need for the STSA to be assigned by the Township to PAWC.

PAWC and Upper Pottsgrove filed Preliminary Objections to the Protest, which were granted in part by Interim Order of the Administrative Law Judge dated May 27, 2021. That Interim Order specifically dismissed the Pottstown Parties’ “claim for money damages,” noting that “the Commission lacks the authority to award money damages in this proceeding.”

The Non-Unanimous Settlement Agreement

Subsequently, all parties to this proceeding, with the exception of the Pottstown Parties, negotiated the Non-Unanimous Settlement (“Settlement”). The Settlement, if approved by the Commission, would resolve all issues pertinent to the Commission’s consideration (and hopefully approval) of the above-captioned Application, with the exception of the issues now

being pursued by the Pottstown Parties.¹ The Settlement embodied the agreement of all parties (other than the Pottstown Parties) that Approval of the Application, with minor modifications to the conditions of closing, would be in the public interest.

The Pottstown Parties' Brief and Objection

On June 29, 2021, the Pottstown Parties filed, their Brief and their Objection to the Settlement. In addition to arguing that the application should be rejected due to lack of their consent to the assignment of the STSA, the Pottstown Parties formally raised *for the first time* the supposed need to reach an agreement, prior to approval of the transaction by the Commission, with respect to modifications to “terms and conditions” of the STSA. Such changes are supposedly necessitated by the fact that the STSA is being assigned from a municipal to a non-municipal entity. The Pottstown Parties did not raise this argument as an impediment to approval in their previous filings.

The assertion of a need to agree on modified terms and conditions in the STSA prior to approval is a red herring. These are mundane issues that arise in every acquisition of a water or sewer system from a municipal entity by an investor-owned utility such as PAWC. There is no reason to think that parties acting in good faith will have any difficulty in resolving these issues. Indeed, the Commission has the power under §508 of the Public Utility Code² to prescribe such changes as may be necessary after or at the time of assignment.

It is patently unfair and improper for the Pottstown Parties to raise this “terms and conditions” argument after the parties had filed on the nearly unanimous Settlement, and without

¹ The Non-Unanimous Settlement, together with supporting statements from the parties, was filed on June 25, 2020. This filing date was delayed by agreement of the parties and the consent of the Administrative Law Judge in order to facilitate ongoing discussions aimed at achieving unanimity, but those efforts were unsuccessful.

² 66 Pa.C.S. §508.

proffering the support of any record evidence, depriving PAWC and Upper Pottsgrove of the opportunity to offer their own evidence to rebut this specious argument.

The thrust of the Pottstown Parties' Brief is consistent:

1. The Transaction cannot be approved without assignment of the STSA to PAWC,
2. The STSA cannot be assigned without consent of the Pottstown Parties, and
3. The Pottstown Parties will not consent unless their financial demands are met.

The Pottstown Parties have now stated unequivocally that they “will not agree to an assignment of the STSA unless and until Upper Pottsgrove Township satisfied its obligations under the Settlement Agreement” (Brief at 14), which they have already defined in their Protest as the payment of the full amount they demand (plus interest and costs), notwithstanding the lack of any provision of the Public Utility Code, the Municipal Authorities Act, or any contract or subsequent reimbursement agreement that supports such a demand. As the very language they cite from the 2013 Settlement Agreement provides, any reimbursement to PBA was to be “pursuant to a mutually acceptable reimbursement agreement.” (Quoted in Brief at p. 5). No such agreement was ever finalized, although Upper Pottsgrove did make payments to PBA from tapping fees pursuant to a Township's ordinance.

In essence, the Pottstown Parties' Brief posits three questions, paraphrased below:

1. Should the Application be rejected because PAWC is unable to show its ability to provide service after closing without the Pottstown Parties' consent to the assignment of the STSA;

2. Should the Application be rejected because approval would “absolve” Upper Pottsgrove of a contractual obligation, with the consequence of injuring the citizens of Pottstown;
3. Should the Commission defer action on the Application pending resolution of the civil court litigation between the Township and the Pottstown Parties to avoid duplicative litigation and expense.

The “Questions Presented” in the Pottstown Parties’ Brief are phrased differently, but however phrased, the arguments advanced are without merit and provide no basis for rejection of the Settlement or for denial of approval or deferral of Commission action beyond the deadline mandated in Section 1329 of the Public Utility Code.³

The first issue they present ignores the fundamental proposition that eviscerates all of the Pottstown Parties’ arguments, i.e., that the terms of the Asset Purchase Agreement and the proposed Settlement which expressly condition closing of the transaction upon assignment of the STSA. Under this condition, the specter of ratepayers being deprived of sewer service is illusory. The APA and the Settlement provide adequate safeguards that closing on the transaction will not occur until after the Pottstown Parties have consented to the assignment of the STSA or a court of competent jurisdiction directs assignment of the STSA. There is simply no danger that PAWC will close on the transaction and leave itself and its customers without a source of wastewater treatment services. The Pottstown Parties’ protestations that they seek to vindicate the public interest, while attempting to thwart a Settlement joined by all other interested parties that recognizes that the transaction is in the public interest, shows that they would elevate their own interest and that of their ratepayers over the public interest of the people of the Commonwealth. This may be good politics, but it is not good law or regulatory policy.

³ 66 Pa.C.S. §1329.

The second issue as presented by the Pottstown Parties is utterly misleading. The Commission lacks the power to “absolve” Upper Pottsgrove of a contractual obligation, and the approval of the Application will not have such an effect. Neither Upper Pottsgrove nor any other Settling Party suggests that it could. If the Pottstown Parties are correct, they have a contract-based right to payment from Upper Pottsgrove which can be enforced in litigation in the Court of Common Pleas, where that dispute belongs (as the Pottstown Parties appear to concede in their discussion of issue 3. Brief at 13).

The third issue ignores the mandate of Section 1329 of the Public Utility Code that the Commission take action on the Application within a statutorily defined time period. In effect, the Pottstown Parties are inviting the Commission to deny the Application, since it is unlikely that, absent a capitulation to their demands, an agreement will be reached or a final court decision rendered within the time remaining for Commission action under Section 1329. On the other hand, approval of the application, as modified by the Settlement, will fully protect the Pottsgrove Parties, as no closing will take place until there is a resolution, by agreement or litigation, which permits assignment of the STSA. Such an approval is a normal way in which the Commission deals with such issues.

The Pottstown Parties real motivation here is that they want to put whatever roadblocks they can in the way of the closing of the proposed transaction in order to maximize their leverage to extract economic concessions from Upper Pottsgrove. The fact that the APA and the Settlement require assignment of the STSA already confers significant leverage on the Pottstown Parties in negotiating terms on which they would consent to assignment of the STSA. The Pottstown Parties express feigned concern that, if a court directs them to consent, the transaction could close and deprive them of an effective appellate remedy because the egg could not be

unscrambled. This ignores the fact that *if* the Pottstown Parties could show that their position on their right to payment were meritorious *and* that they were not protected by the provisions of a court-imposed bond or escrow (as Upper Pottsgrove will offer) and *if* they could otherwise demonstrate that they could satisfy the test set forth in *Pa. Pub, Util Comm;n v. Process Gas Consumers Group*, 467 A.2d 805 (Pa. 1981), they would be entitled to a stay of the court order, and their interest would thus be protected.⁴ By protracting these proceedings before the Commission, the Pottstown Parties are trying to enhance that leverage.

The Settlement resolves all bona fide issues properly before the Commission in this proceeding. All that remains is the argument of the Pottstown Parties that the Commission should provide the Pottstown Parties with greater leverage to coerce satisfaction of their financial demands, by withholding approval of the transaction until the Pottstown Parties consent to the assignment of the STSA from Upper Pottsgrove to PAWC or assignment is directed by a court of competent jurisdiction. PAWC and Upper Pottsgrove do not seek Commission approval to close on the transaction prior to the assignment of the STSA, whether the Pottstown Parties consent voluntarily or are directed to do so by a court of competent jurisdiction. The APA and the proposed Settlement contain safeguards to ensure that PAWC and Upper Pottsgrove will not close on the transaction until this occurs.

The Pottstown Parties' refusal to consent to the assignment to date is no reason for the ALJ to recommend that the Commission disapprove (or defer consideration of) the Transaction, as modified by the Settlement.

In the Township's view, the Pottstown Parties are attempting to utilize these proceedings before the Commission to exercise maximum leverage over the Township to coerce the

⁴ The Pottstown Parties have not endeavored to show how they could meet the standards for a court or the Commission to stay the relevant proceedings, nor have they provided any evidence to support such an argument.

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

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

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

For the reasons set forth above, Upper Pottsgrove Township respectfully requests that the Non-Unanimous Settlement be approved and the Application approved by the Public Utility Commission, as modified by the Settlement.

Respectfully submitted,

Marc A. Feller

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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Application of Pennsylvania-American Water :
Company under Section 1102(a) of the Pennsylvania :
Public Utility Code, 66 Pa. C.S. § 1102(a), for approval :
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 : Docket No. A-2020-3021460, *et al.*
system to Pennsylvania-American Water Company, :
and (2) the rights of Pennsylvania-American Water :
Company to begin to offer or furnish wastewater :
service to the public in Upper Pottsgrove Township, :
Montgomery County and a portion of Douglass :
Township, Berks County, Pennsylvania :

CERTIFICATE OF SERVICE

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

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Dated: July 1, 2021

/s/ James J. Rodgers

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