



July 1, 2021

VIA E-FILING

David P. Zambito

Direct Phone 717-703-5892
Direct Fax 215-989-4216
dzambito@cozen.com

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

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.

Pennsylvania-American Water Company's Replies to the Objections of the Pottstown Borough Authority and the Borough of Pottstown to the Joint Petition for Approval of Non-Unanimous Settlement

Dear Secretary Chiavetta:

Enclosed for filing with the Pennsylvania Public Utility Commission, please find Pennsylvania-American Water Company's Replies to the Objections of the Pottstown Borough Authority and the Borough of Pottstown to the Joint Petition for Approval of Non-Unanimous Settlement 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

Rosemary Chiavetta, Secretary
July 1, 2021
Page 2

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 1st day of July 2021 served a true copy of the foregoing **Pennsylvania-American Water Company's Replies to the Objections of the Pottstown Borough Authority and the Borough of Pottstown to the Joint Petition for Approval of Non-Unanimous Settlement** on the parties, listed below in accordance with the requirements of 52 Pa. Code §1.54 (relating to service by a party).

Due to the COVID-19 Pandemic, Service is Being Made by E-Mail Only

Erin K. Fure, Esq.
Office of Small Business Advocate
555 Walnut Street
Forum Place, 1st Floor
Harrisburg, PA 17101
*Counsel for Office of Small Business
Advocate*
efure@pa.gov

Gina L. Miller, Esq.
Pennsylvania Public Utility Commission
Bureau of Investigation and Enforcement
Commonwealth Keystone Building
400 North Street, 2nd Floor West
Harrisburg, PA 17120
*Counsel for Bureau of Investigation
and Enforcement*
ginmiller@pa.gov

Christine Maloni Hoover, Esq.
Erin L. Gannon, Esq.
Harrison W. Breitman, Esq.
Senior Assistant Consumer Advocate
Office of Consumer Advocate
555 Walnut Street
Forum Place, 5th Floor
Harrisburg, PA 17101-1923
Counsel for Office of Consumer Advocate
CHoover@paoca.org
EGannon@paoca.org
HBreitman@paoca.org

Vincent M. Pompo, Esq.
Lamb McErlane, PC
24 E. Market Street
P.O. Box 565
West Chester, PA 19381
*Counsel for Pottstown Borough Authority
and Borough of Pottstown*
vpompo@lambmcerlane.com

Gregg I. Adelman, Esq.
Robert Tucker, Esq.
Kaplin Stewart Meloff Reiter & Stein, P.C.
Union Meeting Corporate Center
910 Harvest Drive
P.O. Box 3037
Blue Bell, PA 19422-0765
Counsel for *Shadeland Development Corporation*
GAdelman@KAPLAW.com
RTucker@KAPLAW.com

James J. Rodgers, Esq. (PA ID 21635)
Marc A. Feller, Esq. (PA ID 19545)
Elizabeth Preate Havey, Esq. (PA ID 80793)
DILWORTH PAXSON LLP
1500 Market Street, Suite 3500E
Philadelphia, PA 19102
Counsel for *Upper Pottsgrove Township*
jrodgers@dilworthlaw.com
mfeller@dilworthlaw.com
epreatehavey@dilworthlaw.com

Respectfully submitted,



David P. Zambito, Esquire (PA ID 80017)
Jonathan P. Nase, Esquire (PA ID 44003)
Cozen O'Connor
17 North Second Street, Suite 1410
Harrisburg, PA 17101
(717) 703-5892
dzambito@cozen.com
jnase@cozen.com

Attorneys for *Pennsylvania-American Water Company*

**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 :

**PENNSYLVANIA-AMERICAN WATER COMPANY'S REPLIES TO THE
OBJECTIONS OF THE POTTSTOWN BOROUGH
AUTHORITY AND THE BOROUGH OF POTTSTOWN TO THE
JOINT PETITION FOR APPROVAL OF NON-UNANIMOUS SETTLEMENT**

Elizabeth Rose Triscari, Esq. (PA ID 306921)
Pennsylvania-American Water Company
852 Wesley Drive
Mechanicsburg, PA 17055
Email: elizabeth.triscari@amwater.com
Telephone: (717) 550-1574

David P. Zambito, Esq. (PA ID 80017)
Jonathan P. Nase, Esq. (PA 44003)
Cozen O'Connor
17 North Second Street, Suite 1410
Harrisburg, PA 17101
Email: dzambito@cozen.com
jnase@cozen.com
Telephone: (717) 703-5892

Counsel for *Pennsylvania-American Water
Company*

Date: July 1, 2021

AND NOW COMES Pennsylvania-American Water Company (“PAWC”), pursuant to 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 these Replies to the Objections (“Objections”) of the Pottstown Borough Authority (“PBA”) and the Borough of Pottstown (“BP”) Montgomery County, Pennsylvania (together, “PBA/BP”) to the Joint Petition for Approval of Non-Unanimous Settlement (“Settlement”). The Objections were 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 by a settlement (the “Settlement”) between PAWC, Upper Pottsgrove Township (“Upper Pottsgrove”), the Commission’s Bureau of Investigation and Enforcement (“I&E”), the Office of Consumer Advocate (“OCA”), the Office of Small Business Advocate (“OSBA”), and Shadeland Development Corporation (“Shadeland”). The only parties to this proceeding who did not join the Settlement were PBA/BP.

Commission policy promotes settlements. *See* 52 Pa. Code § 5.231. Settlements lessen the time and expense that the parties must expend litigating a case and, at the same time, conserve precious administrative resources. The Commission has indicated that settlement results are often

preferable to those achieved at the conclusion of a fully-litigated proceeding. *See* 52 Pa. Code § 69.401. In order to accept a settlement, the Commission must determine that the proposed terms and conditions are in the public interest. *Pa. Pub. Util. Comm'n v. York Water Co.*, Docket No. R-00049165 (Order entered October 4, 2004); *Pa. Pub. Util. Comm'n v. C.S. Water and Sewer Assocs.*, 74 Pa. P.U.C. 767 (1991).

PBA/BP contends that the Settlement fails to meet this test, and the Application, as modified by the Settlement, should be rejected and denied because one particular group (PBA/BP, its ratepayers and residents) might possibly suffer some adverse financial impact in one remotely conceivable scenario: PBA/BP loses a court proceeding regarding their financial dispute with Upper Pottsgrove, they appeal that decision but fail to obtain a stay, Closing occurs on the Transaction, and then an appellate court issues a favorable decision on PBA/BP's financial dispute with Upper Pottsgrove. At that point, PBA/BP claims that they, their ratepayers and residents, would be harmed because they cannot "undo" the Transaction.¹ Objections p. 13.

It is truly regrettable that the Parties have had to litigate this issue. The true losers are the ratepayers. Section 1329(d)(1)(iv) of the Pennsylvania Public Utility Code ("Code"), 66 Pa. C.S. § 1329(d)(1)(iv), permits PAWC to recover transaction and closing costs incurred in connection with the Transaction, and PAWC has incurred – and no doubt will continue to incur – significant legal fees because one party is attempting to use the Commission's process to collect disputed amounts from an unregulated entity pursuant to a contract over which the Commission lacks jurisdiction. In addition, the public advocates have had to expend resources in litigating this case – costs that will be passed along to ratepayers through assessments. PAWC hopes that the

¹ It is difficult to see the harm to PBA/BP in this situation. If they win the litigation regarding the financial obligations of Upper Pottsgrove, and presumably receive the disputed sums from Upper Pottsgrove, the harm to PBA/BP from not being able to "undo" Closing on the Transaction is unclear.

Commission's decision in this matter serves to deter future litigants from abusing the Commission's procedures in a similar manner.

I. REPLY TO PBA/BP'S REQUEST FOR RELIEF

On pages 4 and 8 of their Objections, PBA/BP ask the Commission to deny and reject the Application, as modified by the Settlement. PAWC incorporates by reference its Reply Brief, Section III., pp. 7-9 and Section IV., pp. 11-12, in which PAWC objects to this request for relief. It is contrary to the relief that PBA/BP requested in previous filings and testimony (conditional acceptance of the Application or a stay of the proceeding) and PBA/BP's failure to request this relief prior to Main Briefs constituted a waiver of its opportunity to do so.

II. REPLY TO "PROCEDURAL HISTORY"

Of the eleven pages in PBA/BP's Objections, more than 2.5 pages are devoted to a discussion of PBA/BP's contractual dispute with Upper Pottsgrove. The ALJ previously found (correctly) that the Commission lacks jurisdiction over this dispute. ALJ's "Interim Order Granting in Part and Denying in Part Preliminary Objections of Pennsylvania-American Water Company and Upper Pottsgrove Township to the Joint Protest of Pottstown Borough Authority and the Borough of Pottstown" p. 12. Nevertheless, the large portion of the Objections devoted to this dispute is understandable because PBA/BP's protest is primarily an attempt to force a monetary concession from Upper Pottsgrove and/or PAWC.

This is not the first Section 1329 proceeding that PAWC was forced to litigate because a municipal entity sought to use the proceeding to pursue private contractual claims. In *Application of Pennsylvania-American Water Company under Section 507, 1102, and 1329 of the Public*

Utility Code for Approval of its Acquisition of Wastewater System Assets of Exeter Township, Docket A-2018-3004933 (Opinion and Order entered October 3, 2019), a neighboring municipality sought to use the Commission’s proceeding to pursue debt service payments relating to the Exeter wastewater treatment plant. That claim was ultimately denied, but the matter was litigated through Exceptions and Replies to Exceptions. PBA/BP is pursuing a similar strategy in the instant matter and should likewise be denied.

III. REPLY TO “NEED FOR ACCEPTABLE TERMS AND CONDITIONS”

On pages 8-12 of the Objections, PBA/BP contends that PBA/BP cannot simply consent to the assignment of the Sewage Treatment Service Agreement (“STSA”). Instead, they contend that significant portions of the STSA must be renegotiated because those provisions contain obligations that can only be performed by a municipality. According to PBA/BP’s Objections, these provisions must be re-drafted if the STSA is assigned to a public utility.

PAWC incorporates by reference the argument in its Reply Brief, Section IV., pp. 12-15, that PBA/BP’s claim should be denied because there is no evidentiary support for it and because PBA/BP surprised the other Parties by not raising the issue in its Direct Testimony or prior pleadings. In this proceeding, 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.

As a matter of good public policy, the Commission must guard its statutory authority to determine whether a transaction is in the public interest. Under PBA/BP's theory that the Commission cannot approve a transaction until PBA/BP decides to agree to renegotiated terms and conditions in the STSA, PBA/BP would have absolute power to hold up the Transaction for an indefinite period of time – even though the Commission believes that the Transaction is in the overall public interest. To give one party such power would be an abdication of the Commission's responsibility to make a public interest determination and would give ultimate leverage to PBA/BP in contract negotiations at the expense of PAWC and its ratepayers.

The Settlement requires assignment of the STSA prior to Closing. However, once assigned either by consent or court order, the renegotiation of terms and conditions -- while preferable -- is not a necessity. The Commission has the statutory authority to modify the terms and conditions of the STSA under Section 508 of the Code, 66 Pa. C.S. § 508, if such terms are adverse to the public interest and the general well-being of the Commonwealth. As such, the resolution of the terms and conditions of the STSA is not required now and should not delay Commission approval of the Settlement.

IV. REPLY TO “NEED FOR A FINAL UNAPPEALABLE ORDER”

In this objection, PBA/BP ask this Commission to reject and deny the Application, as modified by the Settlement, because PBA/BP, its residents and ratepayers, could possibly suffer some adverse financial consequence in one remotely conceivable situation: PBA/BP receives an unfavorable court decision on their dispute with Upper Pottsgrove, that decision is appealed but

not stayed, Closing occurs on the Transaction, and PBA/BP subsequently receives a favorable appellate decision on their dispute with Upper Pottsgrove. At that point, PBA/BP claim that they will be harmed because they cannot “undo” the Transaction.

PAWC respectfully submits that this objection should be dismissed and denied. There is no evidence regarding the risk to which the Settlement actually exposes PBA/BP. As noted in footnote 1 above, the harm to PBA/BP in this situation is unclear. If they win the litigation regarding the financial obligations of Upper Pottsgrove, and presumably receive the disputed sums from Upper Pottsgrove, how is PBA/BP harmed by its inability to “undo” the Transaction? Assignment of the STSA and Closing on the Transaction simply have no impact on the civil dispute between PBA/BP and Upper Pottsgrove. Even assuming, for the sake of argument, that PBA/BP would be harmed, it is clear that many events would need to happen for PBA/BP to have any exposure to risk, and there is no record evidence concerning the probability of any of those events happening – let alone all of them happening. Moreover, there is no evidence regarding the potential impact on PBA/BP, its ratepayers and residents, even if the stars align and all of these events do occur. PBA/BP’s position, in short, is too speculative to support a Commission decision.

This stands in stark contrast to the overwhelming evidence of the benefits of the Transaction, as modified by the Settlement. *See, e.g.*, PAWC St. No. 1 pp. 14-16, PAWC St. No. 2 pp. 8-18, PAWC St. No. 3 pp. 8-10, Upper Pottsgrove St. No. 1 pp. 3-4, 7-9. The applicable legal standard is whether the Settlement is in the public interest; it is not whether the Settlement provides perfect protection to every stakeholder in every conceivable scenario.

It is beyond question that the Settlement promotes the interests of a wide variety of stakeholders: the public-at-large; Upper Pottsgrove Township; Upper Pottsgrove’s current customers; and PAWC’s water and wastewater customers. The Settlement also provides adequate

safeguards that Closing will not occur on the Transaction until after PBA/BP has consented to the assignment of the STSA or a court of competent jurisdiction directs assignment of the STSA. The provisions of the Settlement reasonably protect PBA/BP's interests – even though PBA/BP is not a signatory to the Settlement. On this record, there can be no reasonable doubt that the Settlement is in the public interest and should be approved.

V. CONCLUSION AND REQUEST FOR RELIEF

WHEREFORE, for the reasons stated above, and in PAWC's Reply Brief, 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 Objections of PBA/BP; and
- (2) recommend that the Commission approve the Transaction as modified by the Settlement.

Respectfully submitted,



Elizabeth Rose Triscari, Esq. (PA ID 306921)
Pennsylvania-American Water Company
852 Wesley Drive
Mechanicsburg, PA 17055
Email: elizabeth.triscari@amwater.com
Telephone: (717) 550-1574

David P. Zambito, Esq. (PA ID 80017)
Jonathan P. Nase, Esq. (PA 44003)
Cozen O'Connor
17 North Second Street, Suite 1410
Harrisburg, PA 17101
Email: dzambito@cozen.com
jnase@cozen.com
Telephone: (717) 703-5892

Counsel for *Pennsylvania-American Water Company*

Dated: July 1, 2021