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December 10, 2021

Via Electronic Filing

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

RE: Docket No. A-2021-3024681 – Application of Pennsylvania-American Water Company to Acquire the Wastewater System Assets of the City of York

Dear Secretary Chiavetta:

We serve as counsel to P qtvj "l qtmDqtqwi j in the above-referenced matter and are submitting, with this letter, the Dqtqwi j 's Protest. This document is also being served on all parties of record via electronic mail.

Very truly yours,

Matthew S. Olesh

cc: The Honorable Steven K. Haas, Administrative Law Judge
All parties of record

BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

In re: Application of Pennsylvania-American Water Company pursuant to Sections 507, 1102, and 1329 of the Pennsylvania Public Utility Code for Approval of (1) the transfer, by sale, to Pennsylvania-American Water Company, of substantially all the assets, properties and rights related to the wastewater collection treatment system owned by the York City Sewer Authority and operated by the City of York, (2) the rights of Pennsylvania-American Water Company to begin to offer or furnish wastewater service to the public in the City of York, Pennsylvania, and to three bulk service interconnection points located in North York Borough, Manchester Township, and York Township, York County, Pennsylvania, and (3) the rights of Pennsylvania-American Water Company to begin to offer and furnish Industrial Pretreatment Program to qualifying industrial customers in Manchester Township, Spring Garden Township, and West Manchester Township, York County, Pennsylvania

A-2021-3024681, *et al.*

PROTEST OF NORTH YORK BOROUGH

Pursuant to 52 Pa. Code §§ 3.502, 5.51, 5.52 and 5.53, North York Borough (“North York” or the “Borough”) hereby files this Protest to the Application (the “Application”) of Pennsylvania-American Water Company (“PAWC”) to acquire the wastewater system assets of the City of York (the “City”) and to begin providing service to the public in the City, and to the bulk service interconnection points located in North York Borough, Manchester Township, and York Township (the “Proposed Transaction”), including its request to modify the intermunicipal sewer agreement between North York and the City to permit PAWC to assume all rights and obligations of the City under the Agreement and modify its rate formula.

In support of this Protest, the Borough states as follows:

1. North York is a borough with its principal place of business located at 350 East Sixth Avenue, York, Pennsylvania 17404.
2. The Borough provides wastewater service to residential, commercial, government, and industrial customers within its boundaries.
3. The Borough collects wastewater from its customers and transports the wastewater to the City's sewage collection system, interceptors, and wastewater treatment plant (the "System") for treatment.
4. The Borough will be represented in this case by, and all documents should be served upon its counsel:

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5. North York transports wastewater to the System for treatment and disposal pursuant to the terms of an intermunicipal sewer agreement entered into by the Borough and the City on December 10, 1976 (the "Agreement"). The Agreement is attached to PAWC's Application as Appendix A-25.3.
6. Under the terms of the Agreement, in the event that the 1976 York City Sewer Authority bonds, as well as any future bonds that may be issued in connection with the System, are retired, then the Agreement automatically terminates and "shall be entirely renegotiated" by the Borough and the City. *See* Appendix A-25.3, Section 12.

7. Prior to the proposed transfer in ownership of the System to PAWC via the Proposed Transaction, all outstanding debt associated with the System must be retired or defeased.

8. Pursuant to the terms of the Asset Purchase Agreement (“APA”) between PAWC and the City, the City agreed to repay the outstanding debts incurred in connection with the System on the date of closing. *See* Appendix A-24-a, section 11.01(b).

9. Thus, at the closing of the Proposed Transaction, and prior to the transfer of the System to PAWC, the Agreement will terminate and *the City* – by the express terms of the Agreement – must renegotiate a new agreement with the Borough. *See* Appendix A-25.3, Section 12; *see also* Direct Testimony of Bernard J. Grundusky, PAWC Statement No. 1, p. 14:4-6, 13-15.

10. If the City fails to agree to terms on a new agreement with the Borough, there will no longer be any active agreement with the Borough to transfer as part of the Proposed Transaction, which will seek to transfer rights that the City has no right to convey and PAWC has no right to receive.

11. Absent a new agreement with the Borough, the Application is irreparably defective. By its own terms, the Application is premised on a valuation that assumes a revenue stream that is not provided for by any agreement or otherwise.

12. Despite understanding its obligation to renegotiate upon retirement of the outstanding debt, the City has never approached the Borough to negotiate the terms of a new intermunicipal agreement, as required by section 12 of the Agreement.

13. Instead, the City took two actions that violate the terms of the Agreement, as well as governing law.

14. First, the City sent the Borough a notice purporting to assign the Agreement to PAWC – notwithstanding that the Agreement does not permit assignment to a regulated utility – and instructing the Borough to negotiate the terms of a new agreement with PAWC.

15. The Agreement, by its clear terms, limits assignment of the City’s rights and obligations to “an agency or municipality.” *See* Appendix A-25.3, Section 21.

16. PAWC is neither an agency or municipality, and as a result the Agreement is not assignable to PAWC.

17. Second, the City introduced and approved Ordinance No. 15 on June 1, 2021 (the “Ordinance”), which purports to arbitrarily set “default” bulk service rates to be charged to the Borough “unless otherwise provided for in a valid intermunicipal sewer service agreement between the City and the wholesale sewer customer” *See* Appendix A-18-b.4.

18. Based on the clear terms of the Agreement, as well as the arbitrary, excessive rates set forth in the Ordinance, the City’s only plausible purpose in passing the Ordinance was to exert leverage over the Borough.

19. PAWC seeks to avoid these clear legal bars to the Proposed Transaction by requesting amendment of the Agreement (along with other similar agreements) through the Commission’s extraordinary authority under Section 508 of the Pennsylvania Public Utility Code.

20. As a threshold matter, PAWC’s Application pursuant to Sections 507, 1102, and 1329 is premature until PAWC’s Petition to modify its intermunicipal sewer agreement with the City to permit PAWC to assume all rights and obligations of the City under the Agreement and modify its rate formula pursuant to Section 508 (the “Petition”) is finally and conclusively decided.

21. As submitted, the Application is, at best, incomplete until all issues relating to the Agreement in PAWC's Section 508 Petition are resolved, as PAWC has no rights under the Agreement at present or any agreement with the Borough, nor would it if the Proposed Transaction were to proceed to closing with no modification to the Agreement. At worst, and more likely, however, the Application is irreparably defective without any new agreement with the Borough. The Application seeks approval of a contract that will not exist at closing and is premised on a valuation that anticipates a revenue stream that will not exist.

22. PAWC submitted its Section 508 Petition in clear recognition of the deficiencies with its Application pertaining to the Agreement, knowing that the only way to rectify them is by asking the PUC to force terms upon the Borough without its consent and against its will.

23. The PUC should decline this invitation to unilaterally modify the Agreement to benefit PAWC, which is not even a current party to it, in clear contravention of the public interest and governing principles of contract law.

24. Indeed, were the PUC to exercise its discretionary Section 508 authority and modify the agreement as requested by PAWC, it would essentially sanction the City's breaches of the Agreement through its phantom assignment and bogus Ordinance. It is flatly contrary to the public interest and the general well-being of this Commonwealth to circumvent the settled expectations of contracting parties by forcing one of those parties – here, a municipality – to bend to the will of a private actor against its wishes, all because apparently renegotiating the Agreement per its clear terms is not convenient for the City.

25. Moreover, North York has the clear right to seek legal recourse for the City's breaches under the Agreement described above. Under the Agreement, the exclusive forum where the Borough may do so is in arbitration. *See* Appendix A-25.3, Section 23. The relief

requested by PAWC's Petition seeks to void these clear legal rights as provided for by the Agreement.

26. In that respect, not only is PAWC's Application premature, but its Petition is as well, as it seeks to circumvent the clear jurisdiction of the American Arbitration Association ("AAA") to hear and decide the Borough's claims regarding the City's breaches of the Agreement.

27. The Borough – along with protestants Spring Garden Township, Manchester Township, West Manchester Township, and York Township – filed its claim against the City in arbitration with AAA on August 20, 2021, which must be decided before any action is taken on the Petition or Application. A true and correct copy of the operative statement of claim filed in arbitration by York Township, Manchester Township, West Manchester Township, North York Borough and Spring Garden Township is attached hereto as Exhibit A.

28. Indeed, PAWC's Petition is premised on its faulty assumption that "[The City of] York will have lawfully assigned the contracts [including the Agreement] to PAWC." *See* Direct Testimony of Bernard J. Grundusky, PAWC Statement. No.1, p. 16:15. Thus, in seeking to proceed with the Petition, PAWC asks the Commission to accept as gospel and/or tacitly approve its position that assignment of the Agreement is permissible, even though it is plainly not, and even though this is a threshold issue that must be determined in arbitration, and which is being actively litigated in arbitration.

29. PAWC itself acknowledges that issues related to assignment of the Agreement must be resolved prior to closing, and that these issues are subject to arbitration. *See* Direct Testimony of Bernard J. Grundusky, PAWC Statement. No.1, p. 13:7-11. There can thus be no

question that these issues must be conclusively decided in arbitration before the Petition or Application move forward, since assignment of the agreements is a threshold issue to both.

30. Finally, the Borough respectfully submits that the Proposed Transaction will undoubtedly result in rate increases for its customers, and will otherwise not substantially and affirmatively benefit them.

31. To the extent that PAWC seeks the imposition of the rates set forth in the Ordinance, the Borough respectfully submits that those rates are artificially inflated, have no basis in reality whatsoever, and should be rejected by the Commission.

32. There is no legal basis, or any basis, for the imposition of the rates set forth in the Ordinance, which are significantly higher than the rates currently being paid by the Borough's customers.

33. Thus, North York submits this Protest in opposition to the Proposed Transaction for the following reasons:

- A. PAWC's Application is premature, and it should be stayed until such time as all issues raised in the Petition and any protests or other responses thereto are resolved;
- B. Even if not premature, PAWC's Application is defective because by the express terms of the Agreement, the City must renegotiate the terms of the Agreement when all debt associated with the System is retired or discharged (which is an express condition to closing the Proposed Transaction under the APA); therefore, absent renegotiations with the Borough, the Agreement will be a nullity and no longer effective at closing of the Proposed Transaction;

- C. The City had communicated, through its words and actions, that it will not engage in discussions to renegotiate the Agreement; consequently, the Proposed Transaction cannot be approved under 66 Pa.C.S. § 507 because the City will have no ability to convey any rights or obligations under it;
- D. Moreover, even if it did not terminate, the City cannot assign its obligations to treat and dispose of the Borough’s wastewater under the Agreement to PAWC because the City may only assign its rights and obligations to “an agency or municipality”—and, as a regulated public utility corporation, PAWC is neither an agency or municipality (an issue currently being actively litigated in arbitration before AAA);
- E. PAWC’s Petition is premature, and it should be stayed until such time as all issues regarding the Agreement currently pending in arbitration by the Borough are resolved;
- F. Even if not premature, PAWC’s Petition should be denied, as no obligations, terms, or conditions of the Agreement are unjust, unreasonable, inequitable, or otherwise contrary or adverse to the public interest and the general well-being of this Commonwealth;
- G. PAWC’s requested amendments to the Agreement by way of its Petition are unjust, unreasonable, inequitable, or otherwise contrary or adverse to the public interest and the general well-being of this Commonwealth;
- H. Through its Petition, PAWC attempts to unilaterally amend the terms of an agreement that will not exist at the time of closing of the Proposed Transaction;

- I. It is not in the public interest for the City to attempt to force the Borough to renegotiate terms of the Agreement under duress by way of the Ordinance;
- J. The Proposed Transaction is not consistent with the public convenience and necessity for PAWC to acquire the assets and contracts of the City, in violation of 66 Pa C.S. § 1101, *et seq.*;
- K. The acquisition of the City's assets and contracts by PAWC would not provide an affirmative benefit to the public, but instead, the Proposed Transaction would be detrimental to the public, including the Borough and its customers, in violation of the section 1103 requirement that a proposed transaction will promote the service, accommodation, convenience or safety of the public in some substantial way.

34. Counsel consents to the service of documents by electronic mail at the e-mail addresses listed above, as provided in 52 Pa. Code § 1.54(b)(3).

WHEREFORE, North York respectfully requests that the Commission (a) accept this Protest for filing; (b) allow the Borough to become party to this proceeding; (c) stay review of PAWC's Application until all issues with its Petition are resolved; (d) stay review of PAWC's Petition until all arbitration proceedings filed by the Borough are concluded; (e) deny PAWC's Petition; (f) investigate and hold full public input hearings on the Application; and (g) deny PAWC's Application.

Respectfully submitted,

**OBERMAYER REBMANN MAXWELL &
HIPPEL LLP**

/s/ Matthew Olesh

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Dated: December 10, 2021

CERTIFICATE OF SERVICE

I, Matthew Olesh, Esq., hereby certify that I have served a true and correct copy of the foregoing Protest upon the following parties by electronic mail:

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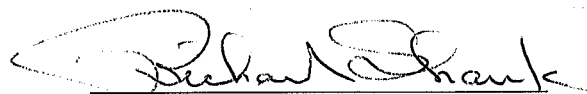
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/s/ Matthew Olesh

Dated: December 10, 2021

VERIFICATION

I, Richard Shank, the Borough Council President for North York Borough, hereby verify that the statements of fact made in the foregoing Protest are true and correct to the best of my knowledge, information and belief and that I expect to be able to prove the same at a hearing held in this matter. I understand the statements made herein are subject to the penalties of 18 Pa. C.S. § 4904 (relating to unsworn falsification to authorities).

A handwritten signature in black ink, appearing to read "Richard Shank", written over a horizontal line.

Richard Shank

Dated: December , 2021