



July 29, 2022

VIA E-FILING

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EXPEDITED CONSIDERATION REQUESTED

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor North
P.O. Box 3265
Harrisburg, PA 17105-3265

Re: Application of Pennsylvania-American Water Company – Wastewater Division for approval of the right to: (1) acquire certain wastewater system assets from Foster Township; and (2) begin to offer, render, furnish or supply wastewater service to the public in portions of Foster Township, Luzerne County, Pennsylvania; Docket No. A-2021-3028676

Petition for Expedited Reconsideration of Pennsylvania-American Water Company

Dear Secretary Chiavetta:

Enclosed for filing with the Pennsylvania Public Utility Commission (“Commission”) is the Petition for Expedited Reconsideration of Pennsylvania-American Water Company in the above-referenced matter. **Please note that PAWC is requesting that the Commission expedite its consideration of the enclosed Petition so as not to unduly delay closing of the acquisition.**

If you have any questions regarding this filing, please contact me. Thank you for your attention to this matter.

Sincerely,

COZEN O'CONNOR

By: David P. Zambito
Counsel for Pennsylvania-American Water Company

DPZ:kmg
Enclosures

cc: Kathryn Sophy, Esq. (*Director, Office of Special Assistants*)
Paul Diskin (*Director, Bureau of Technical Utility Services*)
Renardo Hicks, Esq. (*Chief Counsel*)
Sean Donnelly (*Bureau of Technical Utility Services*)
Teresa K. Harrold, Esq.

VERIFICATION

I, Bernard J. Grundusky, hereby state that the facts set forth above 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 that the statements herein are made subject to the penalties of 18 Pa. C.S. § 4904 (relating to unsworn falsification to authorities).

Date: July 29, 2022

A handwritten signature in black ink, appearing to read "Bernard J. Grundusky", is written over a horizontal line.

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Application of Pennsylvania-American Water :
Company – Wastewater Division for approval of :
the right to: (1) acquire certain wastewater system :
assets from Foster Township; and (2) begin to : Docket No. A-2021-3028676
offer, render, furnish or supply wastewater service :
to the public in portions of Foster Township, :
Luzerne County, Pennsylvania :

PETITION FOR EXPEDITED RECONSIDERATION OF
PENNSYLVANIA-AMERICAN WATER COMPANY

NOW COMES Pennsylvania-American Water Company (“PAWC”), pursuant to Section 703(g) of the Pennsylvania Public Utility Code (“Code”), 66 Pa. C.S. § 703(g), and Section 5.572(c) of the Rules of Practice and Procedure of the Pennsylvania Public Utility Commission (“Commission”), 52 Pa. Code § 5.572(c), to request that the Commission reconsider portions of the Order entered in this matter on July 14, 2022 (the “Order”). For the reasons that follow, PAWC respectfully requests that the Commission: (1) acknowledge that PAWC had a procedural due process right to be informed of and an opportunity to respond to potential approval conditions before the Commission entered its final order; (2) delete Ordering Paragraph 7 of the Order; (3) modify Ordering Paragraph 2 of the Order; and, (4) clarify the requirements of Ordering Paragraph 10 of the Order. PAWC respectfully requests that the Commission expedite its review of the instant Petition so as not to unduly delay closing on the acquisition (“Closing”)

In support whereof, PAWC avers and argues as follows:

I. PROCEDURAL HISTORY

1. On September 23, 2021, PAWC filed its Application to acquire certain assets of the Foster Township, Luzerne County, Pennsylvania wastewater collection and conveyance system (“Foster System”) and begin wastewater service in Foster Township.

2. No parties filed Protests or Notices to Intervene.

3. The Commission’s Bureau of Technical Utility Services (“TUS”) served PAWC with two sets of data requests, to which PAWC provided timely responses and supplemental responses.

4. TUS did not provide PAWC with notice or opportunity to be heard on certain approval conditions that it included in its proposed order to the Commission.

5. The Commission entered the Order on July 14, 2022.

II. LEGAL STANDARDS

6. The Code provides that “[t]he commission may, at any time, after notice and after opportunity to be heard . . . , rescind or amend any order made by it.” 66 Pa. C.S. § 703(g). Such a request must be made by a petition which complies with 52 Pa. Code § 5.572. The Commission’s established standard for determining whether to grant a petition for reconsideration is set forth in *Duick v. Pennsylvania Gas and Water Co.*, in which the Commission stated:

A Petition for Reconsideration, under the provisions of 66 Pa. C.S. § 703(g), may properly raise any matters designed to convince the Commission that it should exercise its discretion under this Code to rescind or amend a prior order in whole or in part. In this regard we agree with the court in the Pennsylvania Railroad Company case, wherein it was said that “[p]arties . . . cannot be permitted by a second motion to review and reconsider, to raise the same questions which were specifically considered and decided against them” What we expect to see raised in such petitions are new and novel arguments, not previously heard, or considerations which appear to have been overlooked or not addressed by the Commission.

Duick, 56 Pa. P.U.C. 553, 559, 1982 Pa. PUC LEXIS 4 (1982). Additionally, a petition for reconsideration is properly before the Commission where it pleads newly discovered evidence, alleges errors of law, or a change in circumstances. *Id.*

7. Procedural due process involving administrative action requires notice and an opportunity to be heard in a situation where the administrative action is adjudicatory in nature and involves substantial property rights. *See Conestoga Nat'l Bank of Lancaster v. Patterson*, 275 A.2d 6, 9 (Pa. 1971). “[D]ue process is flexible and calls for such procedural protections as the particular situation demands.” *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). “[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.” *Cafeteria & Restaurant Workers v. McElroy*, 367 U.S. 886, 895 (1961). An administrative agency must determine the private interest at stake, the value of any additional procedural safeguards, and the government's interest in proceeding without providing such procedures. *See Matthews v. Eldridge*, 424 U.S. 319 (1976).

8. A Commission decision must be based upon substantial evidence that supports the necessary findings of fact. *See Retail Energy Supply Ass'n v. Pa. Pub. Util. Comm'n*, 185 A.3d 1206, 1220 (Pa. Cmwlth. 2018).

9. Pursuant to Section 1103 of the Code, 66 Pa. C.S. § 1103, the acquiring public utility must show that it is technically, legally, and financially fit to own and operate the assets it will acquire. *Seaboard Tank Lines v. Pa. Pub. Util. Comm'n*, 502 A. 2d 762 (Pa. Cmwlth. 1985); *Warminster Twp. Mun. Auth. v. Pa. Pub. Util. Comm'n*, 138 A.2d 240 (Pa. Super. 1958). However, there is a rebuttable presumption that a certificated public utility possesses the requisite fitness. *South Hills Movers, Inc. v. Pa. Pub. Util. Comm'n*, 601 A.2d 1308 (Pa. Cmwlth. 1992).

10. An acquiring public utility must demonstrate that the acquisition will result in an affirmative public benefit of a substantial nature. *City of York v. Pa. Pub. Util. Comm'n*, 295 A.2d 825, 828 (Pa. 1972); 66 Pa. C.S. § 1103.

11. Administrative agencies are creatures of the legislature and have only those powers which have been conferred by statute. *Day v. Pub. Service Comm'n*, 167 A. 565 (Pa. 1933); *Community College of Delaware County v. Fox*, 342 A.2d 468 (Pa. Cmwlth. 1975); *City of Pittsburgh v. Milk Marketing Bd.*, 299 A.2d 197 (Pa. Cmwlth. 1973). An administrative agency cannot by mere contrary usage acquire a power not conferred by its organic statutes. *Cmwlth. v. American Ice Co.*, 178 A.2d 768 (Pa. 1962). It is settled that jurisdiction of a court cannot be extended or conferred by agreement. *Calabrese v. Collier Township Municipal Auth.*, 240 A.2d 544 (Pa. 1968); *Appeal of Kramer*, 282 A.2d 386 (Pa. 1971); *McConnell v. Schmidt*, 339 A.2d 578 (Pa. Super. 1975); *Employees of Oil City Hosp. v. Serv. Employees International Union, Local 227, AFL-CIO*, 335 A.2d 537 (Pa. Cmwlth. 1975). It must follow, *a fortiori*, that an administrative agency cannot acquire jurisdiction by agreement. Nor is it for the agency to seek to create or assure its own jurisdiction by insisting that applicants subscribe to the agency's view of what public policy requires. *Drexelbrook Assocs. v. Pa. Pub. Util. Comm'n*, 212 A.2d 237 (Pa. 1965).

12. The Commission is powerless to impose a condition on the grant of a certificate of public convenience ("Certificate") where such condition is beyond the lawful authority of the Commission. See *Western Pa. Water Co. v. Pa. Pub. Util. Comm'n*, 471 Pa. 347, 370 A.2d 337 (1977) ("It follows that the Commission, in attempting to insert the disputed jurisdictional condition into the certificate of public convenience, was engaging in a futile act. If the Commonwealth Court to the contrary, the legislature has in fact endowed the Commission with the power it claims, then the condition would be a truism. If the Commission has no such

jurisdiction, then the attempt to create such jurisdiction by agreement with the Water Company would be invalid. We are of the view that the Commission's attempt to resolve a dispute of statutory jurisdiction by imposition in a certificate of a condition supportive of its view is an error of law.”) (holding that the Commission could not condition the grant of a Certificate upon the public utility’s agreement to extend its service to additional customers).

III. REQUEST FOR RECONSIDERATION: PAWC SATISFIES THE *DUICK* STANDARD

13. PAWC meets the *Duick* standard because the Commission -- in adopting TUS’s proposed order without modification -- committed clear errors of law by: (a) violating PAWC’s procedural due process rights by failing to give notice and an opportunity to be heard on TUS’s proposed conditions on approval; (b) imposing an environmental reporting condition on its approval that is beyond the scope of the Commission’s statutory authority; and, (c) imposing an environmental reporting condition that exceeds the Commission’s limited scope of review for a Section 1102/1103 application and is not based upon substantial evidence of record. PAWC’s request for reconsideration also raises issues that have not been addressed by the Commission and arguments not previously considered; as TUS never even informed PAWC of some of the proposed approval conditions or afforded PAWC an opportunity to make arguments and submit evidence on why certain conditions may or may not be appropriate. PAWC further seeks clarification with regard to future rate case filing requirements based on changed circumstances. Specifically, PAWC cites the following errors of law and change of circumstances that warrant reconsideration of the Order by the Commission:

A. As set forth in Section IV.A. below, PAWC’s procedural due process rights were violated in this proceeding because it had no notice of, or opportunity to comment on,

the Pennsylvania Department of Environmental Protection's ("DEP's") email regarding alleged violations of National Pollution Discharge Elimination System ("NPDES") permits at two locations unrelated to the instant application. TUS never notified PAWC of, or gave PAWC an opportunity to respond to, the two alleged environmental incidents identified in DEP's email. The Commission did not previously consider these denials of PAWC's constitutional due process rights and, therefore, reconsideration is appropriate.

B. As set forth in Section IV.A., PAWC disputes the Commission's authority to require a utility to create a report pertaining to a matter subject to the jurisdiction of another regulatory agency. Instead, the Code, 66 Pa. C.S. § 504, gives the Commission authority to require a regulated utility to file with the Commission a copy of a report filed with another regulatory agency. The Order does not indicate that the Commission previously considered this statutory issue and, therefore, reconsideration is appropriate.

C. As set forth in Section IV.A., the Commission's scope of review in this Section 1102/1103 application proceeding is limited to whether PAWC is legally, financially, and technically fit to own and operate the assets and whether the acquisition will result in an affirmative public benefit of a substantial nature. PAWC, as a certificated public utility, is presumed to be fit and there is no evidence in the record to suggest that the two alleged environmental incidents identified in the DEP email are sufficient to overcome a presumption of PAWC's fitness such that an environmental reporting requirement condition is necessary for Commission approval. PAWC met the standard for approval of its application without conditions and, therefore, reconsideration should be granted.

D. As set forth in Section IV.B., Ordering Paragraph 2 imposes two conditions precedent (one related to the filing of an industrial pretreatment program ordinance and one related to DEP’s approval of an updated Act 537 plan) on the Commission’s issuance of a Certificate. While PAWC acknowledges that those two items must be obtained prior to Closing, the conditioning of Certificate issuance upon obtaining those items could unnecessarily delay Closing because the Certificate is instrumental in achieving other items and approvals required for Closing. Reconsideration is appropriate because filing of those items should be conditions to Closing – not conditions to issuance of the Certificate.

E. Paragraph 10 of the Order requires PAWC to include certain items in its next base rate case that proposes to include the assets of this acquisition. The items in this paragraph are appropriate for the first base rate case in which PAWC includes the Foster System. Reconsideration is appropriate because the Commission overlooked the facts that (a) PAWC included the Foster System in its pending rate case, and (b) PAWC’s rate filing included most of the requirements of this Ordering Paragraph.

IV. REQUEST FOR RECONSIDERATION: THE COMMISSION SHOULD DELETE ORDERING PARAGRAPH 7 AND MODIFY ORDERING PARAGRAPHS 2 AND 10

A. The Commission Should Delete Ordering Paragraph 7

14. Ordering Paragraph 7 requires PAWC to file a report within sixty days of the entry of the Order addressing alleged violations that DEP identified at the Saw Creeks Wastewater Treatment Plant (the “Saw Creeks Plant”) and the Lake Scranton Water Filter Plant (the “Lake Scranton Plant”). It is worthy to note that the Saw Creeks Plant and the Lake Scranton Plant are wholly unrelated to PAWC’s wastewater collection and conveyance service in Foster Township.

15. The Order states that DEP sent Commission staff an email on November 2, 2021 alleging that PAWC is in violation of one NPDES permit at the Saw Creeks Plant and another NPDES permit at its Lake Scranton Plant. PAWC was never provided with a copy of the DEP email by TUS staff.

16. Following receipt of the DEP email, Commission staff sent PAWC two sets of data requests, but none of those data requests requested information about the Saw Creeks Plant and the Lake Scranton Plant. PAWC had no knowledge of the Commission's concern about this issue or potential inclusion of an approval condition related to the two alleged environmental violations until the Order was entered.

17. Procedural due process requires notice and an opportunity to be heard; the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *See Conestoga, supra; see also East Rockhill Tp. v. Pa. Pub. Util. Comm'n*, 540 A.2d 600, 605 (Pa. Cmwlth. 1988). In this case, PAWC had no notice of DEP's email and had no opportunity to be heard concerning it until the PUC Order was entered. Such adjudication by ambush does not serve a legitimate governmental interest and is therefore unconstitutional.

18. Ordering Paragraph 7 should be deleted in its entirety from the Order because it violates PAWC's procedural due process rights. TUS should have notified PAWC of the DEP email and of TUS's intent to incorporate an approval condition related to environmental reporting on the two unrelated incidents, and PAWC should have been afforded a meaningful opportunity to respond – including an opportunity to submit additional evidence.¹

¹ TUS staff could have afforded PAWC an opportunity to be heard, for example, by issuing data requests to PAWC that disclosed the possible approval conditions and asking for responses. PAWC also notes that TUS had ample time to afford PAWC with an opportunity to respond to the proposed conditions. TUS took nearly 10 months to process this uncontested application. PAWC posits that, absent extraordinary circumstances, an uncontested application should take only three to four months to process – particularly where the applicant is an existing public utility that is presumed to be fit. The approval and closing of the transaction is now further delayed by PAWC's need to request reconsideration of the Order in order to protect its constitutional rights.

19. Ordering Paragraph 7 also exceeds the scope of the Commission's statutory authority. *See Day, supra* (explaining that administrative agencies have only such powers as granted by the legislature). Section 504 of the Code, 66 Pa. C.S. § 504, gives the Commission authority to require a public utility to file with the Commission a copy of any report filed by the public utility with a regulatory body such as DEP. PAWC has no objection to providing the Commission with a copy of any report that has been provided to DEP in circumstances where PAWC is afforded due process,² but PAWC respectfully submits that Section 504 does not give the Commission authority to require a utility to create and file another report regarding the same matter -- which is subject to the jurisdiction of a different regulatory agency. The Commission does not regulate environmental issues, *see Pickford v. Pa. Pub. Util. Comm'n*, 4 A.3d 707 (Pa. Cmwlth. 2010), and lacks the statutory authority to require the creation of environmental reports.³

20. Additionally, the Commission should not require PAWC to create another report about the NPDES violations because no such condition is necessary for the acquisition to meet the applicable legal standard for application approval. The question before the Commission in this proceeding is whether to approve PAWC's uncontested application for the acquisition of the Foster System. The two alleged violations of NPDES permits in other portions of the PAWC system may be relevant to the issue of PAWC's technical and legal fitness to acquire the System but, when placed in the context of the totality of PAWC's water and wastewater systems, these two alleged violations do not call into question the presumption of PAWC's technical or legal fitness and

² The DEP email was dated November 2, 2021. TUS could have included a data request in its Data Request – Set 1 (sent on December 17, 2021), or in its Data Request Set 2 (sent nearly three months later on March 14, 2022), requesting copies of any pertinent reports filed with DEP, rather than including a condition on approval in the Order. Conditions are prospective in nature and the Commission should not impose unnecessary prospective reporting requirements that serve no real purpose other than setting the utility up for an enforcement proceeding and civil penalties in the event of an inadvertent failure to file the report.

³ Aside from the Commission's lack of statutory authority to demand the creation and submission of environmental reports, the Commission should not do so because it is a waste of public utility (and ratepayer) resources. DEP already regulates PAWC's environmental compliance.

PAWC's good record on environmental compliance (as acknowledged by the Commission in numerous other acquisition proceedings). *See South Hills Movers, supra* (explaining that a certificated public utility is presumed to be fit). The acquisition clearly meets the legal standards for approval established in 66 Pa. C.S. § 1103(a) and *City of York, supra*. There is no need for the Commission to impose this condition in order to ensure that the acquisition meets the applicable legal standard. The inclusion of the environmental reporting requirement exceeds the proper scope of Commission review under Section 1103 and should be deleted from the Order. *See Western Pa. Water Co., supra* (holding that the Commission cannot condition an approval upon compliance with a matter that falls outside the jurisdiction of the Commission).

B. The Commission Should Modify Ordering Paragraph 2

21. The Commission also imposed two conditions on issuance of a Certificate set forth in Ordering Paragraph 2, which are unreasonable. Ordering Paragraph 2 requires PAWC to file two documents with the Commission before the Commission issues a Certificate evidencing Commission approval of the acquisition. These documents are: (1) a Foster Township Ordinance establishing an Industrial Pretreatment Program and other Rules Controlling Discharges to the Sewer System, and (2) a copy of a DEP-approved Act 537 Official Sewage Facilities Plan update for Foster Township reflecting the change in ownership of the wastewater system (together, the "Required Documents").

22. PAWC requests that the Commission modify Ordering Paragraph 2 and simply direct PAWC to file the Required Documents prior to Closing, rather than making filing of the Required Documents a condition precedent to the Commission's issuance of a Certificate approving the acquisition. By granting the Application, the Commission held that PAWC's Application satisfies the requirements within Section 1102 and 1103 of the Code and PAWC is technically, legally and financially fit to acquire the Foster System. Once such a determination is

made, a Certificate should be issued directly following the Commission's Order approving the acquisition. Accordingly, PAWC respectfully requests that the Commission make filing of the Required Documents at the Commission a condition prior to Closing, rather than a condition precedent to the Commission's issuance of a Certificate. A Certificate evidencing approval of the transaction should be issued immediately upon the entry of the Commission's order on reconsideration.

23. PAWC also notes, as a practical matter, that issuance of a Certificate facilitates obtaining other required Closing items and approvals. Clarity with regard to Commission approval helps to avoid confusion by persons, from whom PAWC may need contracts or approvals prior to Closing, who may not be familiar with Commission processes and procedures. There is a perceived difference between conditions to approval (*i.e.*, conditions to the issuance of a Certificate) and mere compliance filings before Closing.

C. The Commission Should Modify Ordering Paragraph 10

24. Ordering Paragraph 10 requires PAWC to include certain items in its "next base rate case that proposes to include the assets of this acquisition in rate base." These items include: testimony justifying the amount claimed in rate base in order to evaluate the reasonableness of the original cost, contributions, accumulated depreciation and any utility plant adjustment claims pursuant to 66 Pa. C.S. § 1327(e).

25. PAWC has already filed its first base rate case that includes the assets of this acquisition, Docket Nos. R-2022-3031672 (water) and R-2022-3031673 (wastewater).⁴ PAWC's rate case filing included most of the information required by Ordering Paragraph 10, including a listing of the plant in service of the Foster System acquisition as well as the identification of the

⁴ Inclusion of the Foster System assets in PAWC's pending base rate case was appropriate because PAWC fully anticipates that Closing will occur within the Fully Projected Future Test Year being utilized in the case.

negative Utility Plant Acquisition Adjustment with reference to the A-docket (Exhibit No. 3-C, pages 15 and 72).

26. PAWC respectfully submits that the information required by Ordering Paragraph 10 is appropriate for the initial rate case that includes an acquisition's assets, but has little value in subsequent rate cases.

27. To prevent a duplicative and unnecessary filing in PAWC's next base rate case, the Commission should modify Ordering Paragraph 10 to make clear that the requirements do not apply to PAWC's next base rate case, and that PAWC has already substantially complied with the paragraph. Specifically, the Commission should modify Ordering Paragraph 10 to read:

That, at the time of filing its ~~next~~ first base rate case that proposes to include the assets of this acquisition in rate base, Pennsylvania-American Water Company – Wastewater Division shall, specifically referencing Docket No. A-2021-3028676, ~~provide testimony justifying~~ justify any amount claimed in rate base in order to evaluate the reasonableness of the original cost, contributions, accumulated depreciation, and any utility plant acquisition adjustment claims pursuant to Section 1327 of the Pennsylvania Public Utility Code, 66 Pa.C.S. § 1327.

These minimal changes will provide clarity regarding the fact that PAWC has submitted depreciated original cost information in its current base rate case and that the requirements do not also apply to PAWC's next-following base rate case. Issues surrounding the depreciated original cost and rate base of the Foster System assets will be litigated in the context of the pending base rate case.

V. REQUEST FOR EXPEDITIOUS PROCESSING

28. PAWC respectfully requests that the Commission expeditiously consider and rule on this Petition for Reconsideration.

29. Regulatory approvals took longer than expected. As discussed above, although this was an uncontested application, approval took almost ten months and there was nearly three

months between the two sets of TUS data requests. The Company does not wish to delay Closing further, but it was compelled to file the instant Petition to protect its due process rights and raise other errors of law and procedure.

30. Foster Township is eager to proceed to Closing and transfer to PAWC the obligation to operate the Foster System. As long as Foster Township continues to own and operate the Foster System, the township continues to incur significant expenses, including debt obligations as well as operation and maintenance expenses. In addition, Foster Township wishes to receive the benefit of its bargain by receiving the purchase price for the Foster System.

31. In light of the foregoing factors, expedited review and resolution of this Petition by the Commission is warranted.

VI. CONCLUSION AND REQUESTS FOR RELIEF

WHEREFORE, for all of the reasons set forth above, Pennsylvania-American Water Company respectfully requests that the Pennsylvania Public Utility Commission:

(a) Expeditiously grant reconsideration of the Order entered in this matter on July 14, 2022;

(b) Acknowledge that PAWC had a procedural due process right to be informed of and an opportunity to respond to potential approval conditions before the Commission entered its final order;

(c) Delete Ordering Paragraph 7;

(d) Modify Ordering Paragraph 2 as discussed herein;

(e) Modify Ordering Paragraph 10 as discussed herein; and,

(f) Issue a certificate of public convenience immediately upon the Commission's entry of an order on reconsideration approving the acquisition.

Respectfully submitted,



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Date: July 29, 2022