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August 31, 2022

VIA ELECTRONIC FILING

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

**In re: Application of Pennsylvania-American Water Company for
Approval of the Right to Offer, Render, Furnish and Supply
Wastewater Treatment Service to the Public in an Additional
Portion of Elk Township, Clarion County, Pennsylvania**

Docket No. A-2022-3030364

Dear Secretary Chiavetta:

On behalf of Pennsylvania-American Water Company, please find for filing its Petition for Reconsideration in the above-captioned matter. If you should have any questions, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "T. Harrold".

Teresa K. Harrold

Enclosures

cc: All Parties on the attached Certificate of Service *(via electronic mail)*
Kathryn Sophy, Director *(Office of Special Assistants) (via electronic mail)*
Paul Diskin, Director *(Bureau of Technical Utility Services) (via electronic mail)*
Sean Donnelly *(Bureau of Technical Utility Services) (via electronic mail)*
Renardo Hicks, Director *(Law Bureau)(via electronic mail)*

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Application of Pennsylvania-American Water Company for Approval of the Right to Offer, Render, Furnish and Supply Wastewater Treatment Service to the Public in an Additional Portion of Elk Township, Clarion County, Pennsylvania : : : : : **Docket No. A-2022-3030364**

CERTIFICATE OF SERVICE

I hereby certify that I am this day serving the above-referenced Petition to the persons and in the manner indicated below, which service satisfies the requirements of 52 Pa. Code §1.54 (relating to service by a party).

SERVICE VIA ELECTRONIC MAIL ON AUGUST 31, 2022

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**Attorney for Pennsylvania-American
Water Company**

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Application of Pennsylvania-American Water :
Company – Wastewater Division for approval of :
the right to offer, render, furnish or supply :
wastewater service to the public in an additional : Docket No. A-2022-3030364
portion of Elk Township, Clarion County, :
Pennsylvania :

**PETITION FOR RECONSIDERATION OF
PENNSYLVANIA-AMERICAN WATER COMPANY**

NOW COMES Pennsylvania-American Water Company (“PAWC” or “Company”), 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 (“PUC” or “Commission”), 52 Pa. Code § 5.572(c), to request that the Commission reconsider a portion of the Order entered in this matter on August 25, 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; and (2) delete Ordering Paragraph 3 of the Order.

In support whereof, PAWC avers and argues as follows:

I. PROCEDURAL HISTORY

1. On January 6, 2022, PAWC filed its Application seeking a certificate of public convenience for the Company to offer, render, furnish, or supply wastewater service to the public in an additional portion of Elk Township, Clarion County, Pennsylvania.

2. No parties filed Protests or Notices to Intervene.

3. On April 29, 2022, the Commission's Bureau of Technical Utility Services ("TUS") served PAWC with data requests, to which PAWC provided timely responses.

4. The Commission entered the Order on August 25, 2022 approving the Company's Application; however, the Order included an approval condition that is unrelated to the underlying proceeding.

5. PAWC did not receive notice or opportunity to be heard regarding this approval condition during the pendency of the proceeding.

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, 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, a public utility must show that it is technically, legally, and financially fit to obtain a certificate of public convenience. *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); *McCloskey v. Pa. Pub. Util. Comm'n*, 195 A.3d 1055 (Pa. Cmwlth. 2018).

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 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 of public convenience 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 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 a proposed condition of 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 informed PAWC of its proposed approval condition or afforded PAWC an opportunity to make arguments and submit evidence on why this condition may or may not be appropriate. Specifically, PAWC cites the following errors of law that warrant reconsideration of the Order by the Commission:

A. As set forth in Section IV. 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 an alleged violation of a National Pollutant Discharge Elimination System ("NPDES") permit for an unrelated water treatment plant. TUS never notified PAWC of, or gave PAWC an opportunity to respond to, the alleged 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 further set forth in Section IV., 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., 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 obtain a certificate of public convenience. PAWC, as a certificated public utility, is presumed to be fit and there is no evidence in the record to suggest that the 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.

IV. REQUEST FOR RECONSIDERATION: THE COMMISSION SHOULD DELETE ORDERING PARAGRAPH 3

14. Ordering Paragraph 3 requires PAWC to file a report within sixty days of the entry of the Order addressing alleged violations that DEP identified at the Company's Norristown Water Treatment Plant. It is worthy to note that the Norristown Water Treatment Plant is wholly unrelated to PAWC's wastewater operations in Elk Township, which are the subject of this proceeding.

15. The Order states that DEP sent Commission staff an email on January 26, 2021 alleging, in relevant part, that PAWC is in violation of its NPDES permit for the Norristown Water Treatment 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 data requests to the Company, but none of those data requests requested information about the Norristown Water

Treatment Plant. PAWC had no knowledge of the Commission's concern about this issue or potential inclusion of an approval condition related to an alleged environmental violation 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 3 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 an unrelated incident, and PAWC should have been afforded a meaningful opportunity to respond – including an opportunity to submit additional evidence.

19. Ordering Paragraph 3 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, 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.¹

20. Additionally, the Commission should not require PAWC to create another report about an alleged NPDES violation because no such condition is necessary to meet the applicable legal standard for Application approval. The question before the Commission in this proceeding is whether to grant PAWC a certificate of public convenience to provide additional service in Elk Township. An alleged violation of an NPDES permit may be relevant to the issue of PAWC's technical and legal fitness to obtain a certificate of public convenience but, when placed in the context of the totality of PAWC's water and wastewater systems, this alleged violation does not call into question the presumption of PAWC's technical or legal fitness and PAWC's good record on environmental compliance (as acknowledged by the Commission in numerous other application proceedings). *See South Hills Movers, supra* (explaining that a certificated public utility is presumed to be fit). The Application clearly meets the legal standards for approval established in 66 Pa. C.S. § 1103(a). There is no need for the Commission to impose this condition in order to grant a certificate of public convenience to the Company. 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).

¹ 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 customer) resources. DEP already regulates PAWC's environmental compliance.

V. 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) Grant reconsideration of the Order entered in this matter on August 25, 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; and
- (c) Delete Ordering Paragraph 3.

Respectfully submitted,



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Counsel for *Pennsylvania-American Water Company*

Date: August 31, 2022

VERIFICATION

I, Jed A. Fiscus, hereby state that the facts above set forth in the attached Petition 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 made herein are made subject to the penalties of 18 Pa. Cons. Stat. §4904 relating to unsworn falsification to authorities.

8-30-22

Date



Jed A. Fiscus, P.E.
Engineering Manager, Northwest PA
Pennsylvania-American Water Company