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July 21, 2023

Administrative Law Judge Marta Guhl
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120
mguhl@pa.gov

**RE: *Application of Pennsylvania-American Water
Co. under Section 1102(a) and 1329 of the Pennsylvania
Public Utility Code to acquire the wastewater collection
and treatment system owned by the Butler Area Sewer
Authority and to furnish wastewater service to the public
in Butler County, Pennsylvania
Docket No.: A-2022-3037047***

Dear Judge Guhl:

Attached for electronic filing please find the Response to Motion of Butler Area Sewer Authority to Strike Portions of the Protest and Testimony of Wilfred Adams Filed on Behalf of Municipal Protestant Summit Township.

Copies have been served on the parties as indicated on the Certificate of Service.

Respectfully submitted,

Michael D. Gallagher, Esquire
PA I.D. No. 59237
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MDG:mt
Attachment

cc: Summit Township Supervisors (*by email*)

PENNSYLVANIA PUBLIC UTILITY COMMISSION

APPLICATION OF PENNSYLVANIA-AMERICAN WATER CO. UNDER SECTION 1102(a) AND 1329 OF THE PENNSYLVANIA PUBLIC UTILITY CODE TO ACQUIRE THE WASTEWATER COLLECTION AND TREATMENT SYSTEM OWNED BY THE BUTLER AREA SEWER AUTHORITY AND TO FURNISH WASTEWATER SERVICE TO THE PUBLIC IN BUTLER COUNTY, PENNSYLVANIA

DOCKET NO. A-2022-3037047

RESPONSE TO MOTION OF BUTLER AREA SEWER AUTHORITY TO STRIKE PORTIONS OF THE PROTEST AND TESTIMONY OF WILFRED ADAMS FILED ON BEHALF OF MUNICIPAL PROTESTANT SUMMIT TOWNSHIP

Filed on Behalf of Protestant:

**SUMMIT TOWNSHIP,
BUTLER COUNTY, PENNSYLVANIA**

Counsel of Record for these Parties:

Michael D. Gallagher, Esquire
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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Administrative Law Judge Marta Guhl

In re: Application of Pennsylvania-American Water :
Company under Sections 1102(a) and 1329 of the :
Pennsylvania Public Utility Code, 66 Pa C.S. §§ 1102(a) :
and 1329, for approval of (1) the transfer, by sale, to :
Pennsylvania-American Water Company, of substantially : Docket Nos. A-2022-3037047,
all of the assets, properties and rights related to the : *et al.*
wastewater collection and treatment system owned by the :
Butler Area Sewer Authority, (2) the rights of :
Pennsylvania-American Water Company to begin to offer :
or furnish wastewater service to the public in the City of :
Butler, portions of the Borough of East Butler, and portions :
of the Townships of Butler, Center, Connoquenessing, :
Oakland, and Summit, in Butler County, Pennsylvania :

**RESPONSE TO MOTION OF BUTLER AREA SEWER AUTHORITY TO STRIKE
PORTIONS OF THE PROTEST AND TESTIMONY OF WILFRED ADAMS FILED ON
BEHALF OF MUNICIPAL PROTESTANT SUMMIT TOWNSHIP**

AND NOW, comes Summit Township, by and through its Solicitors, Gallagher Law Group, and files the within Response to Motion of Butler Area Sewer Authority to Strike Portions of the Protest and Testimony of Wilfred Adams Filed on Behalf of Municipal Protestant Summit Township and, in support thereof, avers as follows:

I. BACKGROUND

1. On June 30, 2023, Summit Township (along with nearby Center Township) filed a Protest with the PUC at the above-captioned number. Summit Township asserted in its Protest that a Certificate of Public Convenience should not be granted.

2. The Summit Township Protest does not seek relief for a breach of money damages, a claim for injunctive relief to enforce a contract as a condition of approval, or any relief arising out of a purported breach of contract claim. Instead, the Protest of Summit Township, adopting the position of the OCA (along with asserting many other claims) seeks for the PUC to deny the acquisition of BASA by PAWC.

3. Submitted with the Application of PAWC is a February 20, 1974 Water Pollution Control Agreement [*PAWC Appendix A.25-1*], to which BASA, Center Township, Summit Township and other municipalities are parties. The PUC Application Filing Checklist identifies Appendix A.25-1 as being responsive to Checklist No. 25 as Municipal Contracts to be Assumed as part of the acquisition of BASA by PAWC.

4. In paragraph 11 of the Protest, Summit Township averred that the acquisition process by PUC was neither open nor transparent. In Direct Testimony, as will be set forth more specifically below, Mr. Adams, Chairman of the Summit Township Supervisors, points out, establishes a nexus between the 1974 Agreement and the lack of transparency as probative evidence of bad faith on the part of PAWC, the City of Butler and Butler Township during the purchase process.

5. BASA filed a Motion to both Strike the testimony of Mr. Adams, as described in paragraph 4, above, as well as to Strike any sections of the Protest itself, as seeking to enforce a contractual right through the PUC, which is, as a general rule, outside the jurisdiction of the PUC.

6. As also set forth below, the Motion of BASA attempts to pigeon-hole the Protest into a breach of contract, instead of viewing the broader purpose, wherein the testimony is provided to show that the City of Butler and Butler Township disregarded the Agreement provision requiring notice and involvement with the municipalities.

7. This Court should therefore not hesitate to deny the Motion of BASA as being an overbroad and unwarranted attempt to impede the Protest of Summit Township.

II. ARGUMENT

8. The PUC must act within the boundaries of its jurisdiction. *Feingold v. Bell Tel. Co. of Pa.*, 383 A.2d 791 (Pa. 1977). The appellate courts have shown a hesitancy for the PUC to become involved with contractual matters which can otherwise be resolved by common pleas courts. *T.W. Phillips Gas and Oil Co. v. Peoples Natural Gas Co.*, 492 A.2d 776 (Pa. Cmwlth. 1985); *Bell Tel. Co. v. Pa. PUC*, 417 A.2d 827 (Pa. Cmwlth. 1980).

9. The PUC does have the ability to determine those matters which lie within its jurisdiction. Also, it is well-settled law that evidence that may be inadmissible for one purpose is still admissible for another purpose. *Barrie v. Pa. L.C.B.*, 586 A.2d 1017, 1019 (Pa. Cmwlth. 1991) *citing Bialek v. Pgh. Brewing Co.*, 242 A.2d 231 (Pa. 1968). So even if the Protest and the Direct Testimony of Mr. Adams may possibly be inadmissible for purposes of proving breach of contract in a breach of contract action, those same averments and testimony are admissible to prove a lack of transparency rising to bad faith, which is a contributing factor to the issue of whether a Certificate of Public Convenience should be granted or denied.

10. As stated previously, the issue which arises out of the 1974 Agreement is whether the City of Butler and Butler Township had an obligation to seek the advice and consent of Summit

Township during the negotiations for the sale of BASA, which resulted in an unconscionable piggybank for the sole benefit of the City of Butler and Butler Township.

11. Summit Township does not seek the PUC to issue an injunction or award Summit Township money damages. Indeed, what is done, is done. What Summit Township seeks in its Protest and in the Direct Testimony of Mr. Adams is the introduction of probative evidence that the failure to “let the sun shine in” constitutes a grave lack of transparency and, that the lack of transparency is so great, that it constitutes bad faith. It is not the contract that is at issue, it is the bad faith exhibited by PAWC, the City of Butler and Butler Township that is at issue.

12. And, a lack of transparency is especially relevant to the overriding issue to be determined by the PUC, that a Certificate of Public Convenience is necessary or proper for the service, accommodation, convenience or safety of the public. *Accord, PUC v. Seder*, 139 A.3d 165 (Pa. 2016) (“agreement[] negotiated behind closed doors closed to the public” are viewed with a certain wariness to prevent the public from being taken advantage of).

13. Curiously, what is missing in the submissions of BASA or the City of Butler or Butler Township, other than the general denial by BASA in its Motion [*See, Motion to Strike, fn. 1*], are specific steps undertaken by the sale proponents to seek the advice and consent of Summit Township. Give and take was not sought. Only information was handed out. It is apparent that that information was limited because it was controlled by the PR firm handling the public hearings. Good faith participation with the municipalities requires a meeting between the Protestants and the City of Butler and Butler Township. This never took place, and the proponents of the sale cannot point to any evidence that it did take place.

WHEREFORE, showing these things, Summit Township respectfully requests this Court and the PUC to deny the Motion of Butler Area Sewer Authority to Strike Portions of the Protest and Testimony of Wilfred Adams Filed on Behalf of Municipal Protestant Summit Township.

Respectfully submitted,

GALLAGHER LAW GROUP



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VERIFICATION

I, Willie Adams, Chairman of the Summit Township Board of Supervisors hereby state that the facts above set forth 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: 7-20-2023

Willie Adams
Willie Adams, Chairman

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Application of Pennsylvania-American Water Co. under Section 1102(a) and 1329 of the Pennsylvania Public Utility Code to acquire the wastewater collection and treatment system owned by the Butler Area Sewer Authority and to furnish wastewater service to the public in Butler County, Pennsylvania :
:
:
: Docket No. A-2022-3037047
:
:
:
:
:

CERTIFICATE OF SERVICE

I hereby certify that I have this 21st day of July, 2023 served a true copy of the foregoing Response to Motion of Butler Area Sewer Authority to Strike Portions of the Protest and Testimony of Wilfred Adams Filed on Behalf of Municipal Protestant Summit Township upon the parties listed below in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

VIA ELECTRONIC MAIL ON JULY 21, 2023

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