



**Sydney N. Melillo, Esquire**  
Direct Dial: 215.665.3286  
sydney.melillo@obermayer.com

**Obermayer Rebmann Maxwell & Hippel LLP**  
Centre Square West  
1500 Market Street | Suite 3400  
Philadelphia, PA 19102-2101  
P: 215.665.3000  
F: 215.665.3165

September 21, 2023

**VIA ELECTRONIC FILING**

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street, 2nd Floor  
Harrisburg, PA 17120

**RE: Docket No. A-2022-3037047 – Application of Pennsylvania-American Water Company to Acquire the Wastewater System Assets of the Butler Area Sewer Authority**

Dear Secretary Chiavetta:

We are counsel to the Butler Area Sewer Authority, the Township of Butler, and the City of Butler (collectively, the “Butler Parties”) in the above-referenced matter, and are submitting, with this letter, the Butler Parties’ Exceptions to Administrative Law Judge Marta Guhl’s Recommended Decision dated September 14, 2023.

This document is being served via electronic mail on all parties of record, unless otherwise indicates on the Certificate of Service. This document was also filed electronically with the Public Utility Commission on this date.

Thank you.

Very truly yours,

A handwritten signature in black ink that reads "S. Melillo".

Sydney N. Melillo

CC: All parties of record  
Thomas Wyatt, Esq.  
Matthew S. Olesh, Esq.

**CERTIFICATE OF SERVICE**

I, Sydney N. Melillo, Esq., hereby certify that I have served a true and correct copy of the foregoing document upon the following parties:

***By Electronic Mail:***

The Honorable Administrative Law Judge Marta Guhl  
Pennsylvania Public Utility Commission  
mguhl@pa.gov  
sdelvillar@pa.gov

Elizabeth Triscari, Esq.  
Erin K. Fure, Esq.  
Director, Corporate Counsel  
Pennsylvania American Water Company  
Elizabeth.Triscari@amwater.com  
Erin.Fure@amwater.com

David P. Zambito, Esq.  
Jonathan P. Nase, Esq.  
Cozen O'Connor  
dzambito@cozen.com  
jnase@cozen.com

Steven C. Gray, Esq.  
Office of Small Business Advocate  
sgray@pa.gov

Michael D. Gallagher, Esq.  
Sean M. Gallagher, Esq.  
Gallagher Law Group  
attys@gallagher.legal

Harrison W. Breitman, Esq.  
Erin L. Gannon, Esq.  
ocapawcbutler@paoca.org

Carrie B. Wright, Esq.  
Bureau of Investigation and  
Enforcement  
carwright@pa.gov

Kurt J. Boehm, Esq.  
Jody Kyler Cohn, Esq.  
Boehm, Kurtz, Lowry  
kboehm@BKLLawfirm.com  
jkylercohn@BKLLawfirm.com

William H. Rissmiller  
whr19606@ptd.net

***By First-Class Mail:***

John J. Dolan  
145 N. 7<sup>th</sup> Street  
Indiana, PA 15701

Cynthia L. Spigermeyer  
100 Leo Court  
Lewisberry, PA 17339

/s/ Sydney N. Melillo

Dated: Ugr vgo dgt"43, 2023

**BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION**

In re: Application of Pennsylvania-American Water :  
Company under Section 1102(a) and 1329 of the :  
Pennsylvania Public Utility Code, 66 Pa C.S. § 1102(a), : Docket No. A-2022-3037047  
for approval of (1) the transfer, by sale, of substantially :  
all of the assets, properties and rights related to its :  
wastewater collection and treatment system owned by :  
the Butler Area Sewer Authority, and (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 East Butler, and portions of :  
the Townships of Butler, Center, Connequenessing, :  
Oakland and Summit, in Butler County, Pennsylvania :

**EXCEPTIONS OF THE BUTLER AREA SEWER  
AUTHORITY, THE TOWNSHIP OF BUTLER, AND THE  
CITY OF BUTLER TO THE RECOMMENDED DECISION  
OF ADMINISTRATIVE LAW JUDGE MARTA GUHL**

Matthew S. Olesh, Esquire (PA I.D. 206553)  
Thomas Wyatt, Esquire (PA I.D. 89342)  
Sydney N. Melillo, Esquire (PA I.D. 328031)  
Obermayer Rebmann Maxwell & Hoppel, LLP  
Centre Square West  
1500 Market Street, Suite 3400  
Philadelphia, PA 19102  
Matthew.Olesh@obermayer.com  
Thomas.Wyatt@obermayer.com  
Sydney.Melillo@obermayer.com  
*Attorneys for the Butler Area Sewer Authority, the  
Township of Butler, and the City of Butler*

Dated: September 21, 2023

## I. INTRODUCTION

Pursuant to the procedural schedule established and in accordance with the regulations of the Public Utility Commission (the “Commission”) at 52 Pa. Code Section 5.533, the Butler Area Sewer Authority (“BASA” or the “Authority”), the Township of Butler (the “Township”), and the City of Butler (the “City”) (collectively referred to herein as the “Butler Parties,” unless individually identified) hereby submit these Exceptions to the Recommended Decision of Administrative Law Judge Marta Guhl (“Judge Guhl”), dated September 21, 2023 (the “Recommended Decision”) in connection with the Application of Pennsylvania-American Water Company (“Pennsylvania-American” or “PAWC”) filed with the Commission pursuant to sections 507, 1102, and 1329 of the Public Utility Code (the “Application”) that is the subject of this proceeding.

This proceeding concerns Pennsylvania-American’s application for approval to acquire BASA’s wastewater collection and treatment system (the “System”) pursuant to Sections 507, 1102 and 1329 of the Pennsylvania Public Utility Code, dated February 14, 2023 (the “Proposed Transaction”). The Application was assigned Docket No. A-2022-3037047 by the Commission with Judge Guhl presiding.

On May 26, 2023, the Butler Parties all filed their respective Petitions to Intervene in the proceeding. On June 30, 2023, Summit Township (“Summit”) and Center Township (“Center”) filed their respective protests to the Proposed Transaction (collectively referred to herein as the “Municipal Protestants,” unless individually identified). In support of their protests, Summit Supervisor, Wilfred Adams, and Center Supervisor, Donald Pringle, served testimony (direct, rebuttal, and surrebuttal) in their official capacity as representatives of their respective municipalities. The Butler Parties filed Motions to Strike certain portions of the Municipal

Protestants' direct testimony for relevance and non-jurisdictional issues, and the entirety of the Municipal Protestants' rebuttal testimony as procedurally improper (the "Motions to Strike").<sup>1</sup> On July 3, 2023, Cleveland-Cliffs Steel ("Cleveland-Cliffs") filed a Petition to Intervene in this proceeding.<sup>2</sup>

Judge Guhl scheduled evidentiary hearings in this proceeding for July 28, 2023 and July 31, 2023. However, prior to day 1 of the scheduled evidentiary hearings, Pennsylvania-American, BASA, the Township, the City, the Office of Consumer Advocate ("OCA"), the Office of Small Business Advocate ("OSBA"), and the Bureau of Investigation and Enforcement ("I&E"), agreed to a mutual waiver of cross examination in anticipation of reaching settlement; therefore, the hearing was adjourned until the afternoon to share the settlement with the remaining active parties: Summit, Center, and Cleveland-Cliffs. When the parties reconvened in the afternoon on July 28<sup>th</sup>, all pre-served written testimony and exhibits were entered into the record. Relying upon the representation that the Municipal Protestants would not oppose the anticipated settlement by their counsel (*see* Recommended Decision, p. 4), the Butler Parties withdrew their pending Motions to Strike and waived their reserved cross-examination of the Municipal Protestants' Supervisors. Thus, the evidentiary hearing was adjourned on July 28, 2023 and Judge Guhl cancelled the second day of the hearing previously scheduled for July 31, 2023.

On August 14, 2023, Pennsylvania-American submitted a Joint Petition for Approval of Unanimous Settlement of All Issues ("Unanimous Settlement") to the Commission on behalf of Pennsylvania-American, BASA, the Township, the City, OCA, OSBA, and the I&E, (collectively referred to herein as the "Joint Petitioners"). The Unanimous Settlement reflects a resolution of

---

<sup>1</sup> These Motions to Strike were later withdrawn as explain in more detail *infra*.

<sup>2</sup> Cleveland-Cliffs did not serve testimony in this proceeding. Instead, counsel for Cleveland-Cliffs essentially monitored the activities leading up the Evidentiary Hearings.

all issues in the instant proceeding, which was explicitly adopted by the vast majority of active parties. The remaining active parties – the Municipal Protestants and Cleveland-Cliffs – who did not join the settlement as a signatory stated for the record that they did not oppose it, and the signatories – including the Butler Parties – relied on these representations. *See* Unanimous Settlement, ¶ 14; *see also* Recommended Decision, p. 4. No objections were filed to the Unanimous Settlement when it was presented to Judge Guhl via the Joint Petition.

Nonetheless, Judge Guhl recommended the denial of the Application and the Unanimous Settlement based on an erroneous conclusion that Pennsylvania-American failed to meet its burden to illustrate that its ownership will affirmative promote the service, accommodation, convenience, or safety of the public under section 1103 of the Public Utility Code (the “Code”) in her Recommended Decision dated September 14, 2023 (the “Recommended Decision”). For reasons set forth in more detail below, the Butler Parties except to the Judge Guhl’s Recommended Decision in its entirety and, therefore, respectfully request that the Commission approve the Proposed Transaction and Unanimous Settlement without modification.

## **II. SUMMARY OF ARGUMENT**

The Butler Parties respectfully submit the following exceptions to Judge Guhl’s Recommended Decision for numerous reasons set forth in more detail below. First, Judge Guhl’s recommendation of denial of the Unanimous Settlement undermines the Commission’s stated policy encouraging settlement. It is important to note that the terms of the settlement in this proceeding provide additional benefits that directly help mitigate Judge Guhl’s primary concern regarding the Proposed Transaction – *i.e.*, any potential (theoretical) rate impact to customers. Thus, the Butler Parties respectfully submit that the Commission should preserve and maintain its

policy promoting settlements by rejecting this recommendation and approving the settlement without modification.

Judge Guhl also misinterpreted and misapplied the legal standard set forth by sections 1102 and 1103 of the Code, as interpreted by the Pennsylvania Supreme Court in *Popowsky* and *City of York*, and further expounded upon by the Commonwealth Court in *McCloskey*. The law is clear: Pennsylvania-American must demonstrate that its acquisition of the Authority's System under the terms of the Unanimous Settlement will affirmatively promote the service, accommodation, convenience, or safety of the public. However, here, Judge Guhl concluded that the Authority's reputation for providing adequate wastewater service and history of obtaining debt financing to improve the System renders this transaction detrimental to the public due to the potential and prospective rate increases to Pennsylvania-American's existing customers in the short term (as well as the Authority's customers). Under the standard applied by Judge Guhl, any transaction proposed under section 1329 of the Code would not be in the public interest due to the statutorily-permitted spreading of rates to the acquiring utility's existing customers under Act 11.

Moreover, Judge Guhl's conclusion that this Unanimous Settlement does not provide any public benefit that outweighs potential and prospective rate increases to existing Pennsylvania-American customers is erroneous, regardless of the standard applied. This conclusion is wholly unsupported by the record and is, in fact, directly contradicted by the record in this proceeding. As detailed below, there are numerous facts from the record that were either overlooked, mischaracterized, or disregarded by Judge Guhl in reaching her conclusion that the Unanimous Settlement is not in the public interest.

Finally, Judge Guhl essentially creates a new standard for approval that requires a municipality or municipal authority wishing to sell its wastewater assets to first prove imminent

financial distress, inadequacy of service, or some element of operational or financial distress prior to exploring a sale. However, there is no requirement under Pennsylvania law that a system must be troubled, or a municipality must be in distress, for the Commission to approve a transaction. Nonetheless, under this Recommended Decision, a municipal authority – like BASA – that provides competent service but chooses to be proactive by anticipating its future shortcomings is penalized and must, apparently, satisfy a higher burden of proof to sell its wastewater assets.

Accordingly, for the reasons set forth herein, the Butler Parties respectfully submit the following Exceptions to the Recommended Decision and urges the Commission to approve the Unanimous Settlement, without modification.

### **III. EXCEPTIONS**

#### **A. Exception No. 1 – The Recommended Decision Undermines the Commission’s Stated Policy Encouraging Settlement**

---

The Butler Parties respectfully submit that Judge Guhl erred in recommending the denial of the Unanimous Settlement and, in turn, the Application by deviating from the Commission’s policy encouraging settlements. Her recommendation to reject the settlement undermines this policy and would have the chilling effect of discouraging parties from negotiating to streamline proceedings and resolve the disputes presented before the Commission.

Pursuant to 52 Pa. Code § 5.231(a), it is the stated policy of the Commission to encourage the parties’ resolution of contested proceedings through settlement. Similarly, the Commission believes “the results achieved from a negotiated settlement or stipulation, or both, in which the interested parties have had an opportunity to participate are often preferable to those achieved at the conclusion of a fully litigated proceeding.” 52 Pa. Code § 69.401. Where all active parties in a proceeding have reached a settlement, the principal issue for Commission consideration is whether the agreement is in the public interest. *See, e.g., Pa. Pub. Util. Comm’n v. C. S. Water*

*and Sewer Assoc.*, 74 Pa. P.U.C. 767 (1991); *Pa. Pub. Util. Comm'n v. Philadelphia Electric Co.*, 60 Pa. P.U.C. 1 (1985).

There is, of course, good reason for this. Settlements in any dispute present certainty, promote efficiency and judicial/administrative economy, and provide predictability for the parties involved. *See, e.g., Nationwide Ins. Co. v. Schneider*, 960 A.2d 442, 449 (Pa. 2008) (“Indeed, it remains a strong, prevailing public policy in Pennsylvania to encourage voluntary settlements.”); *Rothman v. Fillette*, 469 A.2d 543, 546 (Pa. 1983) (“Voluntary settlement of civil controversies is in high judicial favor. Judges and lawyers alike strive assiduously to promote amicable adjustments of matters in dispute, as for the most wholesome of reasons they certainly should. When the effort is successful, the parties avoid the expense and delay incidental to litigation of the issues; the court is spared the burdens of a trial and the preparation and proceedings that must forerun it.”). Such is the case with the Unanimous Settlement reached in the instant proceeding, which not only resolves all issues in this proceeding but actually provides even more public benefits than those present in the Application as submitted. The Joint Petitioners all agreed that the Unanimous Settlement should be approved without modification and, as a result, agreed that the settlement is in the public interest. Moreover, while Center, Summit, and Cleveland Cliffs did not specifically join the Unanimous Settlement, they each represented via written correspondence to Judge Guhl and the parties that they do not oppose the Unanimous Settlement and would no longer contest it. *See Unanimous Settlement*, ¶ 14. In fact, both Municipal Protestants verified in written correspondence to Judge Guhl and all participating parties that each of their Board of Supervisors voted unanimously that they “will not oppose, nor will [they] contest the settlement for the sale of Butler Area Sewer Authority as reached between Pa American Water, Office of Small Business Advocate, Office of Consumer Advocate, and the Bureau of Enforcement and Investigations,

BASA, the City of Butler and Butler Township” and that they “will take no further action in the Protest filed with the Public Utility Commission at Docket No. A-2022-3037047.” *See* Recommended Decision, p. 4. Neither of the Municipal Protestants filed objections to the Unanimous Settlement when it was presented via the Joint Petition. Just as the parties to this proceeding relied upon these affirmative representations of non-opposition, the Commission should do the same in approving the Unanimous Settlement.

The Joint Petitioners collaborated to enter into a settlement resolving all contested issues from Pennsylvania-American’s Application that provides unprecedented affirmative public benefits to the public. All Joint Petitioners agreed that the Unanimous Settlement was in the public interest. *See generally* Unanimous Settlement (summarizing the Joint Petitioners’ resolution of all issues, including the Joint Petitioners’ respective Statements of Support). The Butler Parties, and others, waived their rights to fully develop the record through cross-examination of witnesses and the resolution of motions based on the explicit representations of either consent or non-opposition by the parties in this proceeding. Across the board, there was agreement that the transaction in question should be approved on the agreed-upon terms, and these proceedings were efficiently streamlined as a direct result of this.

Notwithstanding the Joint Petitioners’ unanimity regarding the public benefits of this transaction, Judge Guhl recommended denial of the Unanimous Settlement and the Application in direct contravention of the Commission’s stated policy encouraging settlement. In doing so, she essentially ignored that the Unanimous Settlement contains a number of additional provisions that clearly establish that the Acquisition meets the applicable legal standards. The Commission should preserve and maintain its policy promoting settlements, which not only promotes efficiency but, as here, allows for even more public benefits by rejecting this recommendation, and should

approve the settlement without modification.

Accordingly, the Butler Parties respectfully submit that Judge Guhl erred in recommending the denial of the Unanimous Settlement that resolves all contested issues in the instant proceeding.

**B. Exception No. 2 – The Recommended Decision Misinterpreted and Misapplied the Legal Standards Set Forth by Sections 1102 and 1103 of the Public Utility Code as Interpreted by Pennsylvania Courts**

The Butler Parties respectfully except to the Recommended Decision as Judge Guhl misinterpreted and, therefore, misapplied the legal standards set forth by section 1102 and 1103 of the Code as interpreted by the Pennsylvania Supreme Court that is applied to review of section 1329 applications such as the instant Application.

As the Commission is aware, section 1102 of the Code requires Commission approval, by issuance of a *Certificate of Public Convenience*, for a public utility like Pennsylvania-American to expand its service territory and offer, render, furnish, or supply wastewater service to the public. *See* 66 Pa.C.S. § 1102(a)(1). Pursuant to the Code, the Commission will issue a Certificate of Public Convenience to a public utility, like Pennsylvania-American, when granting such a certificate “is necessary or proper, for the service, accommodation, convenience, or safety of the public.” *See id.* § 1103(a).

The Pennsylvania Supreme Court has interpreted section 1103(a) to require a showing that a proposed transaction will “affirmatively promote the ‘service, accommodation, convenience, or safety of the public’ in some substantial way.” *See, e.g., Popowsky v. Pa. Pub. Util. Comm’n*, 937 A.2d 1041, 1052 (Pa. 2007); *City of York v. Pa. Pub. Util. Comm’n*, 295 A.2d 825, 828 (Pa. 1972). Further, the Commonwealth Court has held that a potential impact on rates does not render a proposed transaction detrimental to the public; instead, the Commission must assess whether the impact of rates is outweighed by other positive factors that the acquisition – on the whole – will

confer substantial public benefits. *See McCloskey v. Pa. Pub. Util. Comm'n*, 195 A.3d 1055, 1066-67 (Pa. Cmwlth. 2018).<sup>3</sup> More importantly, the law states that “an acquiring utility is not required to offer specific evidence on how the transaction would offer substantial public benefit over the incumbent utility;” instead, “as long as the reasons the applicant advances are a public benefit, even if the reasons as well as the means by which they are to be achieved are general in nature, these reasons, if accepted by the Commission, constitute substantial evidence to find that there is a public benefit sufficient to justify finding that the merger is in the public interest under Section 1103 of the Code.” *See id.* at 1065.

Judge Guhl’s recommendation to deny the Unanimous Settlement and the Application is unsupported by the record evidence and, in fact, directly contradicted by the record evidence (as described in more detail below in the Butler Parties’ Exception No. 3). Even leaving that aside, Judge Guhl misinterpreted and, therefore, misapplied the legal standard set forth by sections 1102 and 1103 of the code as it has been interpreted and applied by the Pennsylvania courts. In her Recommended Decision, Judge Guhl directly compared the advanced benefits of Pennsylvania-American’s acquisition of the Authority set forth in the Application and the Unanimous Settlement to the benefits already provided by the incumbent utility in direct contravention of applicable Pennsylvania precedent, wrongly concluding that this transaction is not in the public interest. Similarly, Judge Guhl afforded the Authority’s reputation for providing adequate service and the

---

<sup>3</sup> The Commission must also consider whether the party receiving the assets and service obligations is technically, legally, and financially fit. *See Joint Application of Peoples Natural Gas Co. LLC, Peoples TWP LLC, and Equitable Gas Co., LLC*, Docket No. A-2013-2353647, 309 P.U.R.4th 213 (2013). Among other benefits provide by the Proposed Transaction and Unanimous settlement, there is no dispute that Pennsylvania-American is technically, legally, and financially fit to provide wastewater service in the Commonwealth; nonetheless, the Unanimous Settlement and the Application generally make clear that Pennsylvania-American has the requisite technical, legal, and financial fitness to own and operate the System, and provide quality service to its existing customers and the acquired BASA customers.

lack of customer complaints regarding current service undue evidentiary weight in her Recommended Decision.

For example, Judge Guhl stated the following:

- “Existing BASA customers did not seem to have many issues with the quality of service that is provided currently by BASA.” *See* Recommended Decision, p. 62.
- “There is evidence that BASA is capable of continuing to provide service and have the means to provide upgrades in the future. While BASA is currently under a DEP compliance plan, it appears that it is making progress in remediating issues and providing safe service.” *See* Recommended Decision, p. 62-63.
- “The service being provided by BASA does not appear to be inadequate and other relevant evidence does not substantiate that the impact the transaction will have on rates outweighs the marginal benefits that would be provided by [Pennsylvania-American].” *See* Recommended Decision, p. 64.
- “Both BASA and PAWC have a similar ability to obtain the necessary financing to complete the capital improvement program, so [Pennsylvania-American] does not provide a uniquely different advantage to BASA’s ratepayers than already exists in BASA as a municipal authority. Specifically, there is no evidence that BASA can’t raise capital and point to past issuances as the evidence that it can raise capital. BASA has previously issued debt so we know they have the ability to raise debt. BASA has a theoretical lower cost of debt and a lower overall cost of capital if equity costs are included. Further, if [Pennsylvania-American] cost of capital is higher it would only be in the public interest if capital cannot be raised by BASA.” *See* Recommended Decision, p. 66.
- “However, in this particular instance, when evaluating the BASA system and circumstances, the proposed acquisition detrimentally impacts wastewater customers in its service territory due to increased rates without providing any substantial or necessary benefit to the BASA customers. Here, the proposed acquisition also increases costs for [Pennsylvania-American’s] current customers until and unless the BASA customers’ rates increase to cover the revenue deficiency estimated in this matter.” *See* Recommended Decision, p. 66.

Not only are these conclusions from the Recommended Decision completely contradicted by the record evidence in this proceeding, but these conclusions from the Recommended Decision also illustrate that Judge Guhl misapplied the law.

Under the standard applied by Judge Guhl, any transaction proposed under section 1329 of the Code would not be in the public interest because she views the statutorily-permitted spreading of rates to the acquiring utility's existing customers as a harm. Similarly, the Authority's (supposed) ability to raise capital to invest in and improve the system and its "adequate" provision of wastewater service to date is not dispositive in the substantial affirmative benefit analysis set forth by sections 1102 and 1003 and Pennsylvania case law (especially where, as addressed below, the record evidence does not support these factual conclusions).

Nonetheless, Judge Guhl concluded that the Authority's ability to continue to provide adequate service (which is actually contradicted by the record evidence) renders this transaction detrimental to the public due to the potential and prospective rate increases to Pennsylvania-American's existing customers in the short term (that are expressly permitted by the Code). This is not the standard set forth by the law. Rather, Pennsylvania-American must demonstrate that the Proposed Transaction will "affirmatively promote the 'service, accommodation, convenience, or safety of the public' in some substantial way." *See, e.g., City of York*, 295 A.2d at 828 (quoting 66 Pa.C.S. § 1103). Put another way, Pennsylvania-American need not prove that the Authority is presently incapable of providing adequate wastewater service or that the Authority is somehow deficient in its operation of the System such that a change of ownership is necessary. Even though such circumstances could result in a benefit (thus, supporting a sale), they are not absolutely required to demonstrate an affirmative public benefit under the law.

Simply put, the question for the Commission is whether Pennsylvania-American's acquisition of the Authority's System under the terms of the Unanimous Settlement will affirmatively promote the service, accommodation, convenience, or safety of the public in some substantial way. All parties to this proceeding agreed that the Application should be approved

under the terms of the Unanimous Settlement. As explained in more detail in Exception No. 3, and as the record evidence demonstrates, Pennsylvania-American easily met its burden under sections 1102 and 1103 of the Code in this proceeding.

Accordingly, the Butler Parties except to the Recommended Decision as Judge Guhl misinterpreted and, thus, misapplied the legal standard established by the Pennsylvania Code as interpreted by the Pennsylvania courts in recommending denial of the Unanimous Settlement and the Application.

**C. Exception No. 3 – The Recommended Decision’s Conclusion that the Substantial Public Benefits of the Proposed Transaction Do Not Outweigh the “Harm” of Potential Rate Impacts to Existing and Acquired Customers is Unsupported by the Record Evidence, and in fact, Directly Contradicted by the Record Evidence**

The Butler Parties except to the Recommended Decision and Judge Guhl’s conclusion that Pennsylvania-American “failed to establish that [BASA’s] sewer system under [Pennsylvania-American’s] ownership will affirmatively promote the service, accommodation, convenience, or safety of the public [and] the evidence did not establish that any benefit to be realized from the proposed transaction would outweigh the harms to current Pennsylvania-American’s water and wastewater customers or existing BASA wastewater customers.” *See* Recommended Decision, p. 66. This conclusion is not only unsupported by the record but directly contradicted by the evidence submitted by the parties, and particularly the Butler Parties.

While Judge Guhl did not apply the correct legal standard in recommending the denial of the Unanimous Settlement, the factual findings she made in support of her recommendation are erroneous regardless of the standard applied, overlooking the clear, and numerous, public benefits that exist.

**1. Mischaracterization of Public Opposition to the Proposed Transaction**

In her Recommended Decision, Judge Guhl stated that “[t]here was significant public

opposition to the acquisition at the public input hearings in this proceeding, as approximately 24 [Pennsylvania-American] and BASA customers testified regarding the harms that would occur should [Pennsylvania-American] acquire BASA's system." See Recommended Decision, p. 62. While Judge Guhl correctly noted that twenty-four individuals testified at the public input hearing in this proceeding, this number can hardly be considered "significant" when placed into the appropriate context as follows:

- Of the twenty-four individuals appearing at the public input hearings only 11 individuals that testified are BASA customers. See Transcript, pp. 94:13-17; 101:2-5; 105:25-106:5; 123:24-124:2; 127:11-14; 152:6-154:11; 158:5-10; 180:14-182:15; 188:3-191:1; 205:9-12; 211:8-22. The Authority serves approximately 14,792 customers; thus, approximately .074% of the current BASA customer base offered testimony in this proceeding. See BASA Statement No. 1, pp. 3-4. More importantly, four of the 11 individuals testifying at the public input hearings from the BASA customer base (*i.e.*, more than a third of those BASA customers testifying) offered statements *in support* of the Proposed Transaction. See *id.*, pp. 108:8-16; 152:6-154:11; 180:14-182:15; 188:3-191:1. The other seven individuals from the Butler service area did testify in opposition; however, two of those individuals were the Summit Township Supervisor, Wilfred Adams, and the Center Township Supervisor, Donald Pringle testifying in their individual capacity (as opposed on behalf the municipalities they respectively represent, which initially filed protests in this proceeding). See *id.* pp. 94:13-17; 211:8-22. Similarly, Supervisor Pringle's wife, Heather Schaffer Pringle, also testified in opposition of the Proposed Transaction. Of course, once the Unanimous Settlement was reached, Summit and Center not only made explicit written commitments that they did not oppose it, they also agreed to waive any possible claims (existing or future) relating to any alleged Center or Summit interests in BASA or proceeds from the sale – which was their basis for the protests in the first place.
- Four individuals, including Representative Marci Mustello (who represents all of the voters in the Township and the City) testifying on behalf of the 11<sup>th</sup> Legislative District in the Pennsylvania House of Representatives, and Jordan Grady, testifying in his official capacity as Executive Director of the Butler County Chamber of Commerce, testified in support of the Proposed Transaction and its numerous public benefits. See, *e.g.*, Transcript, pp. 152:6-154:11 (Representative Mustello's testimony in support of the sale); 180:14-182:15 (Mr. Grady's testimony in support of the sale on behalf of the Butler County Chamber of Commerce). Seemingly no weight was given to this testimony by Judge Guhl.
- Of the twenty-four individuals who testified, four individuals in opposition are residents of Towamencin Township (a municipality currently pending sale of its wastewater system to Pennsylvania-American) and affiliated in some way with the local political "grassroots" organization, the Neighbors Opposing Privatization Efforts ("NOPE"). See Transcript, pp. 59:8-9; 61:20-62:17; 85:23-25; 87:11-14; 90:24-91:3; 92:2-4; 173:18-174:20. Similarly,

one individual that testified in opposition is neither a customer of the Authority or Pennsylvania-American; instead, he testified as the co-founder of another local political “grassroots” organization, Keep Water Affordable. *See id.*, 74:21-75:11.

- The remaining eight individuals testifying in opposition are residents of Exeter Township, which Pennsylvania-American acquired that municipality’s wastewater assets in 2019. *See* Transcript, pp. 65:8-9; 71:16-19; 97:16-24; 120:3-6; 163:21-164:10; 195:7-10; 199:15-18; 218:21-219:9. As of January 1, 2023, Pennsylvania-American furnishes wastewater service to approximately 97,305 customers and water service to approximately 679,777 customers – a total of approximately 777,082 customers throughout the Commonwealth. *See* PAWC Statement No. 1, p. 16:20-23. Thus, not even .01% of Pennsylvania-American’s customers testified in opposition of the Proposed Transaction.

To characterize this as “significant public opposition” is simply not an accurate reflection of the record.

## **2. Mischaracterization of BASA’s Future Capabilities**

Judge Guhl also misstated BASA’s capabilities in making her erroneous conclusion that there would be no distinction in the provision of service to BASA’s customers regardless of whether the Proposed Transaction is approved by way of the Unanimous Settlement. Setting aside for the moment the fact (as addressed below) that the Proposed Transaction and Unanimous Settlement offer an array of benefits that would satisfy the legal standard for approval even if the service to BASA customers would not change, Judge Guhl simply ignored the ample record evidence submitted by BASA that service, in fact, will be considerably strained under BASA in the years to come if the Proposed Transaction is denied, and that this strain will be avoided if it is approved.

With respect to future upgrades that will be required for BASA’s system, Judge Guhl summarily concluded that “[t]here is evidence that BASA is capable of continuing to provide service and have the means to provide upgrades in the future [and w]hile BASA is currently under a DEP compliance plan, it appears that it is making progress in remediating issues and providing safe service.” *See* Recommended Decision, pp. 62-63. However, the following testimony

submitted by Duane McKee, BASA's Executive Director, directly contradict Judge Guhl's conclusions regarding the Authority's ability to provide adequate and fund the improvements necessary to bring the System into compliance:

- “BASA cannot fund the necessary capital improvements without a significant increase in rates to its customers. Even with a significant rate increase, BASA lacks the necessary skillset, expertise, and project experience to complete the large scale, complex projects that are needed to bring the System into compliance.” *See* BASA Statement No. 1, p. 7:7-10.
- “[B]ASA has worked diligently for years to continue to offer safe, reliable, and cost-efficient service to the public[; however,] the necessary capital investments to bring its aging System into compliance while simultaneously rendering safe, reliable, and cost-efficient service to the public required the experience and capital of a larger operator, like Pennsylvania-American, especially considering the \$40.6 million BASA [sic] in current debt.” *See* BASA Statement No. 1, p. 7:17-21; *see also* BASA Statement No. 2, p. 6:7-10.
- “[P]ennsylvania-American prepared an investment project and recurring project budget estimate totaling approximately \$75 million in *necessary* capital investments to update the aging System and address BASA's significant I&I issues over the next five years alone. Some of these projects include, but are not limited to, the following improvements: funding safety improvements at pumping stations; entirely replacing certain pump stations; flood studies and flood hazard reinforcement of the BASA treatment plant; and replacing and/or improving manholes across the System. Pennsylvania-American not only has access to deeper financial resources than the Authority to fund the identified projects but has a much more experienced workforce as well. As I mentioned above, the Authority's workforce on the whole is closer to retirement age than not. After closing of the Proposed Transaction, our remaining younger employees will benefit from the leadership of Pennsylvania-American's more experienced team.” *See* BASA Statement No. 1, pp. 8:19-9:8.
- “[T]he Authority has conducted 2,601 inspections to address the significant I&I issues with the System through the Realty Transfer Inspection Program. To date, forty percent (40%) of these inspections have revealed that the sewer lateral must be replaced. Under the Authority's ownership, the customers must bear the cost for any replacement or repair to a damaged lateral, which can be up to \$8,500. However, if the Proposed Transaction is approved, Pennsylvania-American is committed to including the BASA System and the damaged sewer and/or aging laterals in its first petition to the Commission in connection with its Damaged Wastewater Service Lateral pilot program. . . .” *See* BASA Statement No. 1, p. 9:11-19; *see also* BASA Statement No. 2, p. 7:11-19.
- “Pennsylvania-American, as the largest investor-owned water and wastewater system in the Commonwealth, has more resources than BASA to resolve the extensive environmental issues identified in the Authority's CAP in a more cost-efficient manner. This ability is one of the primary reasons that [the Butler Parties] ultimately determined that a sale to

Pennsylvania-American would be in the best interest of the System and its customers. For example, Pennsylvania-American employs a Manager of Wastewater Compliance, whose *sole* purpose is to address environmental compliance for *all* of the company's wastewater treatment plants in conjunction with its compliance team. BASA's employees will be incorporated into Pennsylvania-American's much larger compliance team, which has shared resources and more advanced management tools. Our employees have worked hard to keep the System in compliance throughout the years; however, the System will greatly benefit from Pennsylvania-American's Environmental Management Plans, which are reviewed and confirmed each quarter to ensure that compliance issues are continuously improving." *See* BASA Statement No. 1, pp. 10:18-11:10 ; *see also* BASA Statement No. 2, p. 9:6-7.

Mr. McKee – the individual overseeing and managing all aspects of the Authority's wastewater day-to-day operations for the last five years – makes clear that: (1) the Authority is **not** in the financial position to implement the necessary capital investments to bring the System into compliance, even with the significant rate increases that this would require, and (2) the Authority's workforce lacks the requisite experience and skillset to implement such a complex overhaul of its System, and would benefit from the expertise of a larger utility. *See generally* BASA Statement No. 1, pp. 6-9. There was no meaningful rebuttal to Mr. McKee's testimony. Thus, for Judge Guhl to suggest that service going forward would be largely similar under Pennsylvania-American's ownership is simply inaccurate and unsupported by the record.

In fact, the record only further supports Mr. McKee's testimony. For example, the Authority's average capital delivery performance over the last three years has been limited to approximately \$430,000 per year, and the necessary level of investment (an estimated \$75 million over the next five years) is thirty-five times that average, *i.e.*, \$15 million per year. *See* PAWC Statement No. 2-R, pp. 3-4. With respect to actually implementing the estimated \$75 million capital improvement plan, Pennsylvania-American currently employs 1,105 professionals with expertise in all areas of water and wastewater utility operations, whereas the Authority employs thirty-three (33) full-time employees. *See* BASA Statement No. 1, p. 7; PAWC Statement No. 2,

pp. 18-20. Judge Guhl did not properly afford the evidence regarding the Authority's future capabilities any weight at all in her section 1103 analysis in concluding (erroneously) that "[t]here is evidence indicating that BASA is capable of continuing to provide service and have the means to provide upgrades in the future." *See* Recommended Decision, p. 62-63. From the Butler Parties' perspective, it appears that Judge Guhl took the absence of customer complaints of BASA's quality of service as wholesale evidence that the Authority is capable of providing adequate wastewater service to its customers going forward. This conclusion is not only unsubstantiated but is directly contradicted by the record evidence as illustrated above.

Perhaps most egregiously, with respect to financing, Judge Guhl drew conclusions that are simply not present anywhere in the record. Specifically, Judge Guhl's contentions that BASA has a "similar ability to obtain the necessary financing to complete the capital investment program" as PAWC, that "there is no evidence that BASA can't raise capital," that "BASA has previously issued debt so we know they have the ability to raise debt," and that "BASA has a theoretical lower cost of debt and a lower overall cost of capital if equity costs are included" come without any evidentiary citation and are wholly baseless. No evidence was presented as to anything that is purely "theoretical," and the notion that BASA has issued debt in the past, so it surely will be able to again, is entirely flawed and fails to consider the amount of existing debt and the myriad of other factors that come into play with any debt issuance. More concretely, in making these statements, Judge Guhl failed to appreciate that the Butler Parties seek to *eliminate* debt by way of the Proposed Transaction, not to undertake \$75 million more of it. No evidence was presented that such a significant amount of additional debt was either possible or prudent, **and if the Application and Unanimous Settlement are denied and financing cannot be obtained, the resulting financial burden to area residents and/or BASA's customers constitutes an obvious harm.**

The Commission must consider the actual record evidence presented as part of this proceeding, not to speculate as to theoretical conclusions that lack evidentiary support. *See Popowsky*, 937 A.2d at 1057, 1059, 1061 (holding that “the appropriate legal framework requires a reviewing court to determine whether substantial evidence supports the Commission's finding” and reinstating PUC order after Commonwealth Court reversal where “the Commission was the designated finder of fact, and its factually-based determinations are entitled to respect where, as here, they are supported by substantial evidence” and “the PUC considered an extensive evidentiary record [and] made numerous, sufficiently detailed, and supported findings of fact”). In addition to the dearth of evidence supporting the conclusions made by Judge Guhl, the record here contains substantial evidence that BASA simply could not execute a \$75 million capital improvement project anywhere near as well or as quickly as PAWC. As indicated in the Application, this alone presents a significant public benefit that weighs in favor of approving the Proposed Transaction even without the considerable other benefits that it and the Unanimous Settlement contain.

### **3. Failure to Consider All Evidence of Public Benefits**

Finally, Judge Guhl erroneously concluded that the “evidence does not substantiate that the impact the transaction will have on rates outweighs the marginal benefits that would be provided by [Pennsylvania-American].” *See Recommended Decision*, p. 64. To arrive at this conclusion requires a wholesale dismissal of the actual benefits provided, by both the Proposed Transaction and the Unanimous Settlement, which is wholly unwarranted. The benefits of both are concrete, well-established by the record, and outweigh any potential rate impact.

The Butler Parties respectfully submit that the Proposed Transaction alone – absent the additional benefits established by the Unanimous Settlement – will affirmatively promote the

service, accommodation, convenience, or safety of the public in a substantial way. These benefits include, but are not limited to, the following:

- “Lower-income BASA customers will also have access to Pennsylvania-American’s customer assistance programs to help pay their bills, which is a significant benefit as the Authority does not have a similar or equivalent program for these customers. Thus, absent approval of the Proposed Transaction, the Authority anticipates an abrupt, significant rate increase to our customers to help fund the projects without any viable low-income assistance program available.” *See* BASA Statement No. 2, p. 7:2-9.
- Pennsylvania-American agreed to retain all active personnel – both union and non-union – employed by the Authority with substantially similar pay, retirement and health benefits. *See* BASA Statement No. 2, pp. 8-9; *see also* PAWC Statement No. 1, p. 14.
- Pennsylvania-American agreed to award contracts for development projects to local, Butler County-based contractors, to the extent it is feasible and commercially reasonable. *See* BASA Statement No. 2, pp. 8-9; *see also* PAWC Statement No. 1, p. 14.
- Pennsylvania-American maintain an operations center at BASA’s current headquarters (for at least ten years) consisting of various managers, customer service representatives, and operators. *See* BASA Statement No. 2, pp. 8-9; *see also* PAWC Statement No. 1, p. 14.
- The Butler community at large will greatly benefit from this Proposed Transaction. With an improved and compliant System (that Pennsylvania-American is better situated to provide), businesses will be more encouraged to open in the greater Butler area and achieve both the Township and the City’s goal of a community that is a destination for business, industry, culture, and the arts. *See* City of Butler Statement No. 1, pp. 8-14 (summarizing numerous anticipated benefits to the Butler Community from the sale of the System); Township of Butler Statement No. 1, pp. 7-13 (same).
- While neither of the incorporating municipalities (the Township of Butler or the City of Butler) of BASA have reached any final decisions regarding the use of sale proceeds after the Authority’s debt is paid off and the Authority is dissolved, there are numerous potential projects and redevelopment opportunities that the respective municipalities’ leadership identified in their testimony that would otherwise require tax increases or placing the municipalities in a risky financial position. *See generally* City of Butler Statement No. 1, pp. 11-12 (discussing potential redevelopment opportunities for the proceeds); Township of Butler Statement No. 1, pp. 10-11 (same). The influx of cash will not only provide the respective leadership in the City and the Township with great flexibility in spending, but it also provides significant liquidity and a greater security blanket to allow the municipalities to weather any sort of emergency they may face – something that cannot be taken for granted with the cost of living continuously increasing due to inflation and other economic changes. In the event that these funds can be allocated elsewhere, they would help allow for redevelopment opportunities that may otherwise not be attainable absent significant tax increases to the public.

The Unanimous Settlement only added to the benefits already established in Pennsylvania-American's initial Application.

More importantly, the additional benefits advanced by the Unanimous Settlement were negotiated and agreed with an aim towards directly mitigating the impact of the anticipated rate increases, the primary purported "harm" that Judge Guhl references in her Recommended Decision. The record here makes clear that rate increases were inevitable regardless of ownership of the System given the necessary capital improvement. The Joint Petitioners, however, agreed upon the following terms to help mitigate any potential (theoretical) rate impact:

- Pennsylvania-American agreed to "propose to move the System to 1.4x the current System rate or Pennsylvania-American's proposed Rate Zone 1 system-average wastewater rates, **whichever is lower**, upon the later of (a) the first anniversary of Closing or (b) January 1, 2025." See Unanimous Settlement, ¶ 19(e) (emphasis added). While rate increases were inevitable regardless of ownership of the System given the necessary capital improvement, Pennsylvania-American's commitment regarding the first base rate case mitigates the possibility that the acquired BASA customers will not be subject to significant rate shock immediately upon closing.
- Pennsylvania-American committed to contribute \$700,000 annually to the hardship grant program for the five (5) years following Closing (\$3,500,000 total) that cannot be recovered in rates. See Unanimous Settlement, ¶ 36. More significantly, Pennsylvania-American also agreed to increase eligibility for the one-time grants to all Pennsylvania-American customers (both existing customers and newly acquired BASA customers) from 200% to 250% of Federal Poverty Income Guidelines. See Unanimous Settlement, ¶ 35. These particular provisions of the Unanimous Settlement provide additional assistance to the acquired BASA customers to help counteract any prospective rate increase.
- Pennsylvania-American committed to implementing a formal program for payment arrangements for commercial customers, including eligibility and payment terms. See Unanimous Settlement, ¶ 39. The novel establishment of such a program for Pennsylvania-American's existing commercial customers and acquired BASA commercial customers will provide long-lasting substantial affirmative public benefits.

Thus, the Joint Petitioners negotiated a Unanimous Settlement that provides even more substantial affirmative benefits than the numerous ones that the Application itself provided. As stated above, these additional benefits also directly seek to mitigate the only purported "harm" of the Proposed

Transaction considered by Judge Guhl. Accordingly, it is unclear how there is any basis in fact for the conclusion that the “evidence does not substantiate that the impact the transaction will have on rates outweighs the marginal benefits that would be provided by [Pennsylvania-American]” upon examination of the record evidence. *See* Recommended Decision, p. 64.

The Butler Parties respectfully submit that Judge Guhl misapplied the law in her analysis of substantial affirmative public benefits advanced by the Proposed Transaction. However, even if Judge Guhl applied the correct legal standard, her conclusion is wholly unsupported by the record and is, in fact, directly contradicted by the record in this proceeding. Accordingly, the Butler Parties except the Recommended Decision.

**D. Exception No. 4 – The Recommended Decision Creates a New Standard and Public Policy that a Municipality and/or Municipal Authority Cannot Sell its Wastewater Assets Unless or Until Dire Circumstances Warrant the Sale**

As illustrated above and throughout this proceeding, Pennsylvania-American satisfied its burden to prove that the Proposed Transaction on the whole will affirmatively promote the service, accommodation, convenience or safety of the public – consistent with section 1103 of the Code. However, the Recommended Decision seemingly requires Pennsylvania-American to satisfy a newly imagined, practically insurmountable burden of proof under section 1103 of the Code.

Despite the ample substantial affirmative public benefits advanced by the Proposed Transaction, Judge Guhl concluded that “[t]he service being provided by BASA does not appear to be inadequate and other relevant evidence does not substantiate that the impact the transaction will have on rates outweighs the marginal benefits that would be provided by [Pennsylvania-American].” *See* Recommended Decision p. 64. Similarly, Judge Guhl emphasized that the Authority “has been successful in its efforts to obtain low-cost financing, as evidenced by BASA’s financial statements, and there is no apparent reason to believe that financing future system

improvements at [Pennsylvania-American's] cost would be more advantageous than financing available to BASA" to substantiate her recommended denial. *See* Recommended Decision p. 65. Thus, it is clear that Judge Guhl subjected Pennsylvania-American's Application to higher scrutiny given the Authority's history of competent service and ability to obtain debt financing, even though BASA acted in recognition of its inability to maintain its ability to do either going forward.

The Butler Parties were proactive in acknowledging the significant capital investment necessary to bring the System into compliance and, after careful consideration, determined that Pennsylvania-American was better suited to deal with the necessary comprehensive overhaul of the System. These efforts in foresight and proactivity should be commended and only serve to promote public safety. The Recommended Decision instead seeks to supplant this deliberate judgment and foresight by elected officials by creating both a new legal standard and public policy that requires a municipality and/or municipal authority to be providing worse service than the potential acquiring utility and/or to be in some form of financial distress for a transaction to be approved. Not only does this disincentivize municipalities with respect to the operation of similar systems, but it also creates a standard that rewards poor performance and penalizes the provision of competent service.

The Butler Parties – and specifically, those local public officials elected and appointed to make decisions that they determine to be in their customers' and residents' best interest – are best situated to know the ins and outs of the day-to-day operation of the System and its impact on the community and the pitfalls that linger on the horizon. However, the Recommended Decision creates an incentive for a municipality authority that provides adequate service to its customers – like the Authority – to somehow provide unsafe, unreliable, or inadequate service to its customers to ensure that the Commission will approve a proposed sale – a perverse, and wholly unnecessary,

disincentive, and surely not what was intended by the legislature. In such a world, the question municipal officials would ask is not how they can ensure long-term sustainable, safe and compliant service to constituents/customers, but rather whether they are in dire enough straits to do so and must they wait for conditions to get even worse, even further jeopardizing public safety. Not only would municipalities be penalized for competence in the provision of wastewater (as BASA would be if the Unanimous Settlement is denied), but they would have no guidance as to when conditions were sufficiently bad enough that a sale would warrant Commission approval.

Those charged with municipal governance should not be placed in such an untenable position. Municipalities should not be forced to eschew proactivity and their duties to constituents in favor of a guessing game as to how dire and unsafe things can get before the Commission will allow them to contemplate a sale. They should not have to play Russian roulette with complex matters of public safety, such as the provision of wastewater service. Rather, they must be empowered by this Commission to make the difficult decisions for which they were elected, taking all factors into consideration, and to be proactive rather than reactive.

Accordingly, the Butler Parties respectfully except to the Recommended Decision because it purportedly establishes a new legal standard by which applications to acquire a municipal authority and/or municipality's wastewater assets whose operators are in a stable financial position and have reputation for safe, reliable service to their customers will be subject to a higher scrutiny.

#### **IV. INCORPORATION OF PENNSYLVANIA-AMERICAN'S EXCEPTIONS**

In addition to the above Exceptions, the Butler Parties adopt and incorporate by reference the Exceptions filed by Pennsylvania-American to the Recommended Decision.

## V. CONCLUSION

For all of the reasons set forth herein, the Butler Parties respectfully submit that Judge Guhl erred in concluding that the Application and the Unanimous Settlement should be denied. The Commission is presented with a record that fully demonstrates the Proposed Transaction's numerous substantial affirmative public benefits, reinforced by those in the Unanimous Settlement. Accordingly, the Butler Parties respectfully request that the Commission grant the Exceptions submitted by the Butler Parties and Pennsylvania-American regarding the Recommended Decision and approve the Unanimous Settlement without modification.

Respectfully submitted,

*/s/ Thomas Wyatt*

---

Thomas Wyatt, Esquire (PA I.D. 89342)  
Matthew S. Olesh, Esquire (PA I.D. 206553)  
Sydney N. Melillo, Esquire (PA I.D. 328031)

**OBERMAYER REBMANN  
MAXWELL & HIPPEL LLP**

Centre Square West

1500 Market Street, Suite 3400

Philadelphia, PA 19102

Tel.: (215) 665-3000

Fax: (215) 665-3165

Thomas.Wyatt@obermayer.com

Matthew.Olesh@obermayer.com

Sydney.Melillo@obermayer.com

*Counsel for the Butler Area Sewer Authority, the  
Township of Butler, and the City of Butler*

Dated: September 21, 2023