

COMMONWEALTH OF PENNSYLVANIA



PATRICK M. CICERO  
Consumer Advocate

OFFICE OF CONSUMER ADVOCATE  
555 Walnut Street, 5th Floor, Forum Place  
Harrisburg, Pennsylvania 17101-1923  
(717) 783-5048  
(800) 684-6560

 @pa\_oca  
 /pennoca  
FAX (717) 783-7152  
consumer@paoca.org  
www.oca.pa.gov

September 25, 2023

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

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 all of the assets, properties and rights related to the wastewater collection and treatment system owned and operated by Towamencin Township and Towamencin Municipal Authority, and (2) the rights of Pennsylvania-American Water Company to begin to offer or furnish wastewater service to the public in the Township of Towamencin and portions of the Townships of Franconia, Lower Salford and Worcester and the Borough of Lansdale, all in Montgomery County, Pennsylvania  
Docket No. A-2023-3039900

Dear Secretary Chiavetta:

Attached for electronic filing please find the Motion of the Office of Consumer Advocate for a Stay of the Section 1329 Application of Pennsylvania-American Water Company for the Acquisition of Towamencin Township's and Towamencin Municipal Authority's Wastewater System Assets in the above-referenced proceeding. The OCA has attached the verification of Patrick M. Cicero, Consumer Advocate, pursuant to the requirements of 52 Pa. Code Section 1.36.

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

Respectfully submitted,

/s/ Darryl A. Lawrence  
Darryl A. Lawrence  
Senior Assistant Consumer Advocate  
PA Attorney I.D. # 93682  
DLawrence@paoca.org

Enclosures:

cc: The Honorable Charles E. Rainey (**email only:** [crainey@pa.gov](mailto:crainey@pa.gov))  
Paul Diskin, BTUS (**email only:** [pdiskin@pa.gov](mailto:pdiskin@pa.gov))  
David Screven, Law Bureau (**email only:** [dscreven@pa.gov](mailto:dscreven@pa.gov))  
Certificate of Service

\*4855-5036-4034

CERTIFICATE OF SERVICE

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 all of the assets, properties and :
rights related to the wastewater collection : Docket No. A-2023-3039900
and treatment system owned and operated :
by Towamencin Township and Towamencin :
Municipal Authority, and (2) the rights of :
Pennsylvania-American Water Company to :
begin to offer or furnish wastewater service :
to the public in the Township of Towamencin and :
portions of the Townships of Franconia, :
Lower Salford and Worcester and the Borough of :
Lansdale, all in Montgomery County, Pennsylvania :

I hereby certify that I have this day served a true copy of the following document, the Office of Consumer Advocate’s Motion for a Stay, upon parties of record in this proceeding in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant), in the manner and upon the persons listed below:

Dated this 25th day of September 2023.

**SERVICE BY E-MAIL ONLY**

Carrie B. Wright, Esquire
Bureau of Investigation & Enforcement
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17120
carwright@pa.gov
Counsel for I&E

Sharon E. Webb, Esquire
Office of Small Business Advocate
555 Walnut Street
1st Floor, Forum Place
Harrisburg, PA 17101-1923
swebb@pa.gov
Counsel for OSBA

Teresa K. Harrold, Esquire
Pennsylvania-American Water Company
852 Wesley Drive
Mechanicsburg, PA 17055
teresa.harrold@amwater.com
Counsel for PAWC

David P. Zambito, Esquire
Jonathan P. Nase, Esquire
Cozen O’Connor
17 North Second Street, Suite 1410
Harrisburg, PA 17101
dzambito@cozen.com
jnase@cozen.com
Counsel for PAWC

**SERVICE BY E-MAIL ONLY (continued)**

Lauren A. Gallagher, Esquire  
Samantha L. Newell, Esquire  
Rudolph Clarke, LLC  
7 Neshaminy Interplex, Ste. 200  
Trevose, PA 19053  
[lgallagher@rudolphclarke.com](mailto:lgallagher@rudolphclarke.com)  
[snewell@rudolphclarke.com](mailto:snewell@rudolphclarke.com)  
*Counsel for Upper Gwynedd Township*

Kofi Osei  
105 Cambridge Way  
Harleysville, PA 19438  
[oseikk3@gmail.com](mailto:oseikk3@gmail.com)

Jennifer Foster  
105 Concord Place  
Harleysville, PA 19438  
[jenn.foster105@gmail.com](mailto:jenn.foster105@gmail.com)

/s/ Darryl A. Lawrence  
Darryl A. Lawrence  
Senior Assistant Consumer Advocate  
PA Attorney I.D. # 93682  
[DLawrence@paoca.org](mailto:DLawrence@paoca.org)

Harrison W. Breitman  
Assistant Consumer Advocate  
PA Attorney I.D. # 320580  
[HBreitman@paoca.org](mailto:HBreitman@paoca.org)

Christopher M. Andreoli  
Assistant Consumer Advocate  
PA Attorney I.D. # 85676  
[CAndreoli@paoca.org](mailto:CAndreoli@paoca.org)

Counsel for:  
Office of Consumer Advocate  
555 Walnut Street  
5<sup>th</sup> Floor, Forum Place  
Harrisburg, PA 17101-1923  
Phone: (717) 783-5048  
Dated: September 25, 2023  
\*4872-8366-4757

BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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	:	Docket No. A-2023-3039900
substantially all of the assets, properties and	:	
rights related to the wastewater collection	:	
and treatment system owned and operated	:	
by Towamencin Township and Towamencin	:	
Municipal Authority, and (2) the rights of	:	
Pennsylvania-American Water Company to	:	
begin to offer or furnish wastewater service	:	
to the public in the Township of Towamencin and	:	
portions of the Townships of Franconia,	:	
Lower Salford and Worcester and the Borough of	:	
Lansdale, all in Montgomery County, Pennsylvania	:	

---

NOTICE TO PLEAD

---

You are hereby advised to file a written response within 20 days to the attached Office of Consumer Advocate’s (OCA) Motion for a Stay in the above-captioned proceeding. If you do not file a written response to OCA’s Motion, the Chief Administrative Law Judge may rule in favor of OCA as to the attached Motion.

All pleadings, such as answers to motions, must be filed with the Secretary of the Pennsylvania Public Utility Commission:

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

A copy should also be served on the undersigned counsel, the Chief Administrative Law Judge and all other parties.

Respectfully submitted,

/s/ Darryl Lawrence

Darryl Lawrence  
Senior Assistant Consumer Advocate  
PA Attorney I.D. # 93682  
[DLawrence@paoca.org](mailto:DLawrence@paoca.org)

Office of Consumer Advocate  
555 Walnut Street  
5<sup>th</sup> Floor, Forum Place  
Harrisburg, PA 17101-1923  
Phone: (717) 783-5048  
Dated: September 25, 2023

Counsel for:  
Patrick M. Cicero  
Consumer Advocate

BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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 : Docket No. A-2023-3039900  
substantially all of the assets, properties and :  
rights related to the wastewater collection :  
and treatment system owned and operated :  
by Towamencin Township and Towamencin :  
Municipal Authority, and (2) the rights of :  
Pennsylvania-American Water Company to :  
begin to offer or furnish wastewater service :  
to the public in the Township of Towamencin and :  
portions of the Townships of Franconia, :  
Lower Salford and Worcester and the Borough of :  
Lansdale, all in Montgomery County, Pennsylvania :

---

MOTION OF THE OFFICE OF CONSUMER ADVOCATE  
FOR A STAY OF THE SECTION 1329 APPLICATION OF  
PENNSYLVANIA AMERICAN WATER COMPANY FOR THE  
ACQUISITION OF TOWAMENCIN TOWNSHIP’S AND  
TOWAMENCIN MUNICIPAL AUTHORITY’S  
WASTEWATER SYSTEM ASSETS

---

AND NOW comes the Office of Consumer Advocate (OCA) by and through counsel, pursuant to 52 Pa. Code Section 5.103, who files this Motion for Stay respectfully requesting that the presiding officer stay all substantive proceedings in this docket relating to the Application of Pennsylvania American Water Company (PAWC or Company) to acquire the system assets of Towamencin Township and Towamencin Municipal Authority (Towamencin or Township) (the Application).

On or about August 21, 2023, Plaintiffs Jennifer Foster and Kofi Osei (Plaintiffs) filed the attached Complaint in Mandamus and Declaratory Judgment with the Montgomery County Court

of Common Pleas (Complaint)<sup>1</sup> naming the Towamencin Township Board of Supervisors as Defendants.

The Complaint addresses several issues that overlap with and directly impact the current PUC proceedings regarding PAWC's Application to acquire Towamencin, specifically asking the court to: (1) invalidate the Asset Purchase Agreement (APA) between Towamencin and PAWC; (2) invalidate the Sewer Sale Ordinance (Ordinance No. 23-03), and; (3) declare a violation of the Sunshine Act.

In support of this the Motion, the OCA states as follows:

## **I. BACKGROUND & PROCEDURAL HISTORY**

1. On or about July 15, 2022, NextEra Water Pennsylvania, LLC (NEWPA) filed an Application at Docket No. A-2022-3033924 for all necessary approvals to authorize NEWPA to furnish and supply wastewater service to or for the public within the Commonwealth. As discussed in the July 15, 2022 filing, the Application was submitted as the first part of a proposed two phase process wherein NEWPA would: (1) first seek a determination that NEWPA was legally, operationally, and financially fit to operate as a wastewater utility in Pennsylvania; and (2) upon completion of all information and studies needed for a filing for a Certificate of Public Convenience (CPCN) under 66 Pa. C.S. Section 1329, NEWPA would file a second application requesting that the Commission authorize the acquisition of most of the wastewater assets of Towamencin.

2. On March 22, 2023, the Towamencin Township Board of Supervisors voted to assign the sale of the wastewater assets of Towamencin from NEWPA to PAWC. On March 23, 2023, the Towamencin Municipal Authority held a Special Board meeting approving the

---

<sup>1</sup> Attached as Appendix A.

assignment of the sale to PAWC, among other things.

3. On May 15, 2023, an Application was filed by PAWC at Docket No. A-2023-3039900 regarding the acquisition subject to the assigned APA<sup>2</sup> between Towamencin, NEWPA (the original buyer as reflected on the original June 14, 2022 Asset Purchase Agreement with the Authority and the Township before the assignment from Next Era as purchaser to PAWC as purchaser), and PAWC which was executed on March 23, 2023 (assigned APA).

4. The PAWC Application requests approval (1) to acquire the wastewater assets and treatment system owned and operated by Towamencin; (2) approval to begin to offer and furnish wastewater service to the public in the Township and portions of the Townships of Franconia, Lower Salford and Worcester, the Borough of Landsdale and all of Montgomery County, PA (Service Area); (3) approval of PAWC's use of the lesser of the fair market value or negotiated purchase price of the assets related to the system owned and operated by the Authority and the Township; (4) approval to collect a distribution system improvement charge, to accrue allowance for funds used during construction for post-acquisition improvements not recovered through the distribution system improvement charge, and to defer depreciation related to post-acquisition improvements not recovered through the distribution system improvement charge; (5) approval to include a claim for transaction and closing costs in the next base rate case; and (6) approval and issuance of Certificates of filings pursuant to the Pennsylvania Public Utility Code, 66 Pa. C.S. Section 507 regarding the original June 14, 2022 Asset Purchase Agreement between Towamencin and NEWPA (Original APA), the assigned APA, and other related agreements.

5. On May 16, 2023, Towamencin residents voted to approve a Home Rule Charter prohibiting the sale, transfer, assignment, or delivery of ownership of the Township's water,

---

<sup>2</sup> Attached as Appendix B.

wastewater, and stormwater assets to a non-governmental entity. The Home Rule Charter took effect on July 1, 2023. The new Home Rule Charter casts significant uncertainty about whether the sale of Towamencin's water and/or wastewater systems can move forward after that date.

6. On or about August 21, 2023, Plaintiffs Jennifer Foster and Kofi Osei filed the attached Complaint in Mandamus and Declaratory Judgment with the Montgomery County Court of Common Pleas naming the Towamencin Township Board of Supervisors as Defendants. The Complaint addresses several issues that overlap with and directly impact the current PUC proceedings regarding PAWC's Application to acquire Towamencin, specifically asking the court to: (1) declare a violation of the Sunshine Act; (2) grant an order of mandamus to invalidate the Asset Purchase Agreement (APA) between Towamencin and PAWC; and (3) invalidate the Sewer Sale Ordinance No. 23-03. These issues overlap with and directly impact the PUC proceedings at the above-captioned docket. The OCA asserts that this underlying legal dispute regarding the Home Rule Charter should be resolved prior to this proceeding moving forward to avoid the possibility of wasting resources for all stakeholders and the Commission. There is no reason to proceed to litigate whether a transfer of assets is in the public interest under 66 Pa. C.S. Section 1103 if the seller does not have the legal authority to transfer the assets.

## **II. LEGAL STANDARD**

7. The OCA respectfully submits that due to the Complaint filed in the Montgomery County Court of Common Pleas, the presiding officer should, pursuant to their discretionary authority under 52 Pa. Code Section 5.483, place a stay on the instant proceeding involving PAWC's Application until there is a final determination on the related matters currently before the Montgomery County Court of Common Pleas.

8. When reviewing petitions or motions for stay, the Commission has applied the Pennsylvania Supreme Court's factors and analysis in *Pa. PUC v. Process Gas Consumers Group*, 467 A.2d 805 (Pa. 1983). The *Process Gas* factors also supports a stay of the proceeding.

### **III. DISCUSSION**

A. A Stay of the Proceedings is Necessary to Prevent A Waste of Judicial and Administrative Resources.

9. On or about August 21, 2023, Plaintiffs Jennifer Foster and Kofi Osei filed the attached Complaint in Mandamus and Declaratory Judgment with the Montgomery County Court of Common Pleas requesting that the Court determine Towamencin's ability to lawfully proceed with the proposed transaction and alleging new facts and legal issues highly pertinent to PAWC's Application. Specifically, the Plaintiffs argue that the Asset Purchase Agreement violates the Home Rule Charter.<sup>3</sup>

10. The matters raised by the Plaintiff's Complaint are not tangential, but critical to and inextricably tied to the facts underlying these proceedings on PAWC's Application. Essentially, the Montgomery Court of Common Pleas will be determining whether the Township can legally sell the system.

11. Going forward with a Commission proceeding is an unreasonable waste of judicial and administrative resources given the current Montgomery County Court of Common Pleas proceeding regarding the legality of the sale.

---

<sup>3</sup> Complaint at 15-21.

12. Accordingly, the OCA requests that the presiding officer exercise their authority under 52 Pa. Code Section 5.483 to stay the current proceeding pending issuance of a Final Order on the Plaintiffs' Complaint.

B. Analysis of the *Process Gas* Factors Also Supports a Stay of the Proceeding.

13. The requested stay falls within the presiding officer's and the Commission's powers to regulate an Application proceeding. To the extent the presiding officer determines otherwise, however, the OCA submits that consideration of the *Process Gas* factors also supports a stay of the proceeding.

14. Pursuant to *Process Gas*, the Commission will grant a petition or motion for stay when:

- a. The petitioner makes a strong showing that he is likely to prevail on the merits;
- b. The petitioner has shown that without the requested relief, he will suffer irreparable injury;
- c. The issuance of a stay will not substantially harm other interested parties in the proceedings; and
- d. The issuance of a stay will not adversely affect the public interest.<sup>4</sup>

15. In this case, the OCA requests a stay due to the pending Complaint in the Court of Common Pleas. The OCA submits, however, that assessment of the Plaintiffs' likelihood of success is complicated based on the questions presented to the Court of Common Pleas and both the legal and fact-based nature of the claims related to the APA, the Township's Ordinance, and the Home Rule Charter.

16. There is a potential for irreparable injury if a stay is not granted. If the parties are required to continue with hearings in the Application proceeding while the Plaintiffs' Complaint

---

<sup>4</sup> *Petition of Cypress Renewables*, 2018 Pa. PUC LEXIS 286, \*5-6, citing *Process Gas Consumers Group*, 467 A.2d at 808-809 (Pa. 1983).

remains pending before the Montgomery County Court of Common Pleas, the parties will suffer irreparable injury because the evidentiary record for this exceedingly complex proceeding would exclude consideration and examination of the claims made therein. The parties and the Commission cannot conduct the intended full evaluation if the legal basis and facts central to the selling party's ability to meet the terms of the APA consistent with the Application remain subject to ongoing litigation brought by the Plaintiffs against the Township.

17. Issuance of a stay will not substantially harm the other parties or adversely impact the public interest. In regard to any concerns that a stay may impact the potential transaction, the APA specifically establishes that Commission approval in the form of a Final Order is necessary<sup>5</sup> and that the Outside Date for Closing on the transaction can be extended by up to ninety (90) days if necessary to obtain a required governmental approval.<sup>6</sup> Accordingly, the transacting parties would not be unduly prejudiced because the APA contemplates Closing to occur after any necessary litigated proceedings have concluded.

18. Regarding the public interest, judicial economy and administrative efficiency support the issuance of a stay. Awaiting resolution of the Plaintiffs' Complaint enables the parties to present the Commission with a comprehensive record on PAWC's Application without uncertainty regarding the pending claims challenging the legality of the proposed transaction. Accordingly, the issuance of a stay serves the public interest.

19. Pursuant to the *Process Gas* analysis, the OCA requests that the presiding officer exercise their authority under 52 Pa. Code Section 5.483 to stay the current application proceeding pending issuance of a Final Order from the Montgomery County Court of Common Pleas on the Plaintiffs' Complaint.

---

<sup>5</sup> PAWC filed Asset Purchase Agreement (APA), Appendix A-24-a.3 at 47.

<sup>6</sup> APA Appendix A-24-a.3 at 52.

**WHEREFORE**, the Office of Consumer Advocate respectfully requests that the Commission grant the foregoing Motion for Stay and issue an Order staying the proceedings at Docket No. A-2023-3039900 until the Montgomery County Court of Common Pleas enters a Final Order on Plaintiffs' pending Complaint.

Respectfully submitted,

/s/ Darryl A. Lawrence  
Darryl A. Lawrence  
Senior Assistant Consumer Advocate  
PA Attorney I.D. # 93682  
DLawrence@paoca.org

Harrison W. Breitman  
Assistant Consumer Advocate  
PA Attorney I.D. #320580  
HBreitman@paoca.org

Christopher M. Andreoli  
Assistant Consumer Advocate  
PA Attorney I.D. #85676  
CAndreoli@paoca.org

Office of Consumer Advocate  
555 Walnut Street  
5<sup>th</sup> Floor, Forum Place  
Harrisburg, PA 17101-1923  
Phone: (717) 783-5048  
Fax: (717) 783-7152  
Dated: September 25, 2023

Counsel for:  
Patrick M. Cicero  
Consumer Advocate

## IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA

JENNIFER FOSTER

vs.

THE BOARD OF SUPERVISORS TOWAMENCIN  
TOWNSHIP

NO. 2023-18907

**NOTICE TO DEFEND - CIVIL**

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this complaint and notice are served, by entering a written appearance personally or by attorney and filing in writing with the court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the complaint or for any other claim or relief requested by the plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW. THIS OFFICE CAN PROVIDE YOU WITH INFORMATION ABOUT HIRING A LAWYER.

IF YOU CANNOT AFFORD TO HIRE A LAWYER, THIS OFFICE MAY BE ABLE TO PROVIDE YOU WITH INFORMATION ABOUT AGENCIES THAT MAY OFFER LEGAL SERVICES TO ELIGIBLE PERSONS AT A REDUCED FEE OR NO FEE.

LAWYER REFERENCE SERVICE  
MONTGOMERY BAR ASSOCIATION  
100 West Airy Street (REAR)  
NORRISTOWN, PA 19404-0268

(610) 279-9660, EXTENSION 201

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA

JENNIFER FOSTER

vs.

THE BOARD OF SUPERVISORS TOWAMENCIN  
TOWNSHIP

NO. 2023-18907

**CIVIL COVER SHEET**

State Rule 205.5 requires this form be attached to any document commencing an action in the Montgomery County Court of Common Pleas. The information provided herein is used solely as an aid in tracking cases in the court system. This form does not supplement or replace the filing and service of pleadings or other papers as required by law or rules of court.

Name of Plaintiff/Appellant's Attorney: LAUREN GALLAGHER, Esq., ID: 206113

Self-Represented (Pro Se) Litigant

**Class Action Suit**  Yes  No

**MDJ Appeal**  Yes  No

**Money Damages Requested**

**Commencement of Action:**

**Amount in Controversy:**

Complaint

\_\_\_\_\_

**Case Type and Code**

Miscellaneous:

Mandamus

**Other:** \_\_\_\_\_

Case# 2023-18907-0 Docketed at Montgomery County Prothonotary on 08/22/2023 3:50 PM. Fee = \$268.75. The filer certifies that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.



## NOTICE

**Pennsylvania Rule of Civil Procedure 205.5. (Cover Sheet) provides, in part:**

**Rule 205.5. Cover Sheet**

(a)(1) This rule shall apply to all actions governed by the rules of civil procedure except the following:

- (i) actions pursuant to the Protection from Abuse Act, Rules 1901 et seq.
- (ii) actions for support, Rules 1910.1 et seq.
- (iii) actions for custody, partial custody and visitation of minor children, Rules 1915.1 et seq.
- (iv) actions for divorce or annulment of marriage, Rules 1920.1 et seq.
- (v) actions in domestic relations generally, including paternity actions, Rules 1930.1 et seq.
- (vi) voluntary mediation in custody actions, Rules 1940.1 et seq.

(2) At the commencement of any action, the party initiating the action shall complete the cover sheet set forth in subdivision (e) and file it with the prothonotary.

(b) The prothonotary shall not accept a filing commencing an action without a completed cover sheet.

(c) The prothonotary shall assist a party appearing pro se in the completion of the form.

(d) A judicial district which has implemented an electronic filing system pursuant to Rule 205.4 and has promulgated those procedures pursuant to Rule 239.9 shall be exempt from the provisions of this rule.

(e) The Court Administrator of Pennsylvania, in conjunction with the Civil Procedural Rules Committee, shall design and publish the cover sheet. The latest version of the form shall be published on the website of the Administrative Office of Pennsylvania Courts at [www.pacourts.us](http://www.pacourts.us).

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY,  
PENNSYLVANIA

Jennifer Foster and

Kofi Osei

VS.

NO.

The Board of Supervisors

Towamencin Township

**NOTICE TO DEFEND-CIVIL**

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this complaint and notice are served, by entering a written appearance personally or by attorney and filing in writing with the court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the complaint or for any other claim or relief requested by the plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW. THIS OFFICE CAN PROVIDE YOU WITH INFORMATION ABOUT HIRING A LAWYER.

IF YOU CANNOT AFFORD TO HIRE A LAWYER, THIS OFFICE MAY BE ABLE TO PROVIDE YOU WITH INFORMATION ABOUT AGENCIES THAT MAY OFFER LEGAL SERVICES TO ELIGIBLE PERSONS AT A REDUCED FEE OR NO FEE.

LAWYER REFERENCE SERVICE  
MONTGOMERY BAR ASSOCIATION  
100 West Airy Street (REAR)  
NORRISTOWN, PA 19401  
(610) 279-9660, EXTENSION 201



### PARTIES

1. Plaintiff, Kofi Osei, is an adult individual residing at 105 Cambridge Way, Harleysville, Towamencin Township, PA 19438. Plaintiff, Jennifer Foster, is an adult individual residing at 105 Concord Place, Harleysville, Towamencin Township, PA 19438 (collectively, “Plaintiffs”).
2. The Township of Towamencin, is a municipality, previously classified as a township of the second class and now operating under a Home Rule Charter in the Commonwealth of Pennsylvania, with administrative offices of 1090 Troxel Road, Lansdale, PA 19466 (the “Township”).
3. The Board of Supervisors is the governing body of the Township and is comprised of five (5) residents of the Township, elected at-large, as set forth in the Second Class Township Code, 53 P.S. § 65101, *et seq.*

### BACKGROUND

4. On or about September 3, 2020, Public Financial Management (“PFM”) approached the Township about possible monetization of the Sewer System. On September 3, 2020, the Township also approved a Phase 1 contract with PFM to explore monetization of the public sanitary sewer system.
5. On or about January 13, 2021, the Township approved Phase 2 and Phase 3 contracts with PFM to further explore the monetization of the sewer assets.
6. On February 24, 2021, the Township retained Dilworth Paxson, LLP as special counsel for legal services pertaining to the monetization of the sewers.

7. On February 12, 2021, the Township issued a Request for Qualifications, soliciting responses from prospective bidders for the purchase or lease of the public sanitary sewer system owned and operated by the Towamencin Municipal Authority (“Sewer System”).<sup>1</sup>
8. On March 12, 2021, the Township received Responses to its Request for Qualifications for the sale or lease of the Sewer System. On March 17, 2021, the Township decided to prequalify all interested bidders: Aqua Pennsylvania, Inc. (“Aqua”), Pennsylvania American Water, Inc. (“PA American” or “PAAW”), NextEra Energy, Inc. (“NextEra”), Franconia Sewer Authority (“Franconia”), and Vico.
9. On or about May 21, 2021, the Township held pre-bid meetings and tours of the assets with all pre-qualified bidders.
10. On December 12, 2022, the Board of Supervisors authorized a Request for Bids for the purchase or lease of the Sewer System, with bids due on or before February 11, 2022.
11. The Township received five (5) bids, as follows:
  - NextEra: \$115,300,000.00 (with a two-year rate freeze offered);
  - PAAW: \$92,400,000.00 (no rate freeze offered);
  - Aqua: \$54,100,000.00 (no rate freeze offered);
  - Franconia: \$23,500,000.00 (regardless of rate freeze); and
  - Vico:
    - With rate freeze for 2 years: \$45,000,000.00
    - Without rate freeze for 2 years: \$55,000,000.00
12. Throughout this process, members of the public have been consistently appearing at public meetings of the Board of Supervisors to voice their objection to the proposed sale and demanding increased transparency from the Board. Ultimately, the Board held two

<sup>1</sup> The Towamencin Municipal Authority is a municipal authority organized and existing pursuant to the Municipalities Authorities Act, 53 Pa.C.S. § 5601, *et seq.* The Authority was established by the Township in 1964, and is not a party to this litigation. If the proposed sale of the public sanitary sewer system were to be completed, the Authority would be dissolved and cease its existence.

- (2) town hall meetings, sent out mailers, and pledged to listen to their constituents throughout the process.
13. On or about April 6, 2022 and April 22, 2022, the Board of Supervisors held two (2) town hall meetings at Dock Academy for public presentation and comments on the proposed sale of the Sewer System. Each town hall had approximately 300 residents and other interested persons in attendance. Only two (2) members of the public voiced support of the sale, while many members of the public spoke in opposition to the sale.
  14. On or about May 25, 2022, the Board of Supervisors held a public meeting to decide whether to approve a sale to NextEra. At the meeting, approximately 70 residents attended, almost unanimously speaking in opposition to the proposed sale.
  15. Nevertheless, the Board of Supervisors voted four-to-one (4-1) to approve a sale of the Township's municipal sewer system to NextEra for One Hundred Fifteen Million Three Hundred Thousand Dollars (\$115,300,000.00).
  16. On or about June 14, 2022, the Township entered into an Asset Purchase Agreement ("APA") with the highest bidder, NextEra.

#### THE SEWER COMMITTEE

17. As the public meetings progressed, members of the public began to discover that the Township had formed a Sewer Committee which had taken on responsibilities that would normally be undertaken by the Board of Supervisors as a whole. The Township was not, however, forthright about the membership or functions of the Sewer Committee, unless asked specific questions through the Right-to-Know process, despite the Township's promises and assurances regarding transparency.

18. Through these efforts, Plaintiffs have been able to piece together limited information regarding the membership and function of the Sewer Committee. Plaintiffs continue to attempt to access information regarding same.
19. For the process related to the proposed Sewer Sale, upon information and belief, the members of the Sewer Committee were H. Charles Wilson III (Chairman of the Board of Supervisors), Daniel M. Littley Jr., Robert Ford (former Township Manager), Brooke Neve, William Dingman, and Solicitor John T. Dooley.
20. Plaintiffs believe, and therefore aver, that membership of the Sewer Committee has changed over the years, but as there are no minutes of meetings or proper records of the Sewer Committee, Plaintiffs are unable to aver which members served on the Sewer Committee at which times, other than as stated herein. At some point, Supervisor Richard Marino became a part of the Sewer Committee, and was part of the Sewer Committee that recommended the proposed sale to NextEra.
21. With respect to the proposed sale, the Sewer Committee was tasked with “examin[ing] whether it is in the Township’s best interest, or not, to monetize the sanitary sewer system.” The Sewer Committee “recommended that an ‘Analysis & Valuation’ study of the sanitary sewer system be conducted to collect the needed information to make an informed decision on monetization.” *See* Towamencin Sewer Sale Informational Webpage, <https://www.towamencin.org/information/sewer-system-sale/> (last visited August 9, 2023).
22. Upon information and belief, the Plaintiffs believe, and therefore aver, that the Sewer Committee was intimately involved with the process related to the Sewer Sale, including reviewing the aforementioned Analysis and Valuation study, interviewing prospective

bidders, reviewing and analyzing bid submissions for the specific purpose of making a recommendation to the Board of Supervisors, and ultimately making a recommendation to the Board of Supervisors, which was accepted and approved by four (4) of the five (5) supervisors.

23. As the Sewer Committee was so incredibly influential regarding the decision to monetize the sewer assets, the interview and bid process, and the eventual persuasive recommendation to the full Board of Supervisors, the Sewer Committee, acting as an established committee of the Township, must comply with the Pennsylvania Sunshine Act, related to public meetings.
24. The Pennsylvania Sunshine Act, 65 Pa.C.S.A. § 701, *et seq.*, (the “Sunshine Act”), governs the conduct of meetings of governmental agencies. Specifically, the Sunshine Act mandates that “[o]fficial action and deliberations by a quorum of the members of an agency shall take place at a meeting open to the public...” 65 Pa.C.S.A. § 704.
25. Official action is defined to include:
  - (1) Recommendations made by an agency pursuant to statute, ordinance or executive order.
  - (2) The establishment of policy by an agency.
  - (3) The decisions on agency business made by an agency.
  - (4) The vote taken by an agency on any motion, proposal, resolution, rule, regulation, ordinance, report or order.

65 Pa.C.S.A. § 703.

26. An agency is defined to include “[t]he body, and all committees thereof authorized by the body to take official action or render advise on matters of agency business ... of any political subdivision of the Commonwealth or any ... township...” 65 Pa.C.S.A. § 703.

27. A political subdivision is defined as “[a]ny county, city, borough, incorporated town, township, school district, intermediate unit, vocational school district or county institution district.” Id.
28. Towamencin Township is unquestionably a political subdivision and township that is subject to the provisions of the Sunshine Act, such that official actions and deliberations of Township agencies must comply with the open meeting requirements.
29. The Sewer Committee is a committee of the Township.
30. The Sewer Committee did not comply with the mandates of the Sunshine Act.
31. There were numerous Right-to-Know requests that were submitted in order to find out basic information about the Sewer Committee, its membership, and its function. *See* Exhibit “A,” multiple Right-to-Know requests and responses from the Township.
32. Requests were required to be submitted to find out:
- Sewer Committee membership
  - Sewer Committee minutes or notes
  - Any information regarding the formation of the Sewer Committee
  - Advertisements regarding Sewer Committee meetings
33. As a result of these numerous requests, it was determined that there are not complete records of who served on the Sewer Committee, there are no meeting minutes or records of discussion (including no record of any handwritten notes), there were no advertisements of the meetings, the meeting agendas were not posted. Of great concern, the full extent of the function of the Sewer Committee remains unknown as of this filing due to the flagrant disregard of the basic tenants of the Sunshine Act. *See* Exhibit “A,” pgs. 2, 4.
34. Further, as the meetings were not advertised and no agendas were posted, there could be no public involvement or input.

35. Plaintiffs believe, and therefore aver, that the purpose of conducting the meetings of the Sewer Committee in such a fashion was to purposely exclude public input and to shield the Township's deliberations regarding a major asset from public scrutiny, despite the requirements of the Sunshine Act and the significant public interest in the proposed sale.

### THE HOME RULE CHARTER

36. There were many citizens that viewed the Township's lack of transparency regarding this proposed sale troublesome, at best. There was a clear lack of transparency on behalf of the Township, including private meetings, insufficient information, and violations of the Sunshine Act.
37. Due to these plentiful concerns regarding the lack of transparency of the Board of Supervisors and a strong objection to the proposed sale of the Sewer System, residents of the Township organized to utilize the options of the Home Rule Charter and Optional Plans Law to petition for a government study commission and election to establish a Home Rule Charter for the Township. 53 Pa.C.S.A. § 2901, *et seq.*
38. On November 8, 2022, the following question was posed to the voters of Township on the general election ballot, "Shall a government study commission of seven members be elected to study the existing form of government of Towamencin Township, to consider the advisability of the adoption of a home rule charter; and if advisable, to draft and to recommend a home rule charter?"
39. Also on the ballot was a separate voting measure, which was reliant on the formation of the government study commission being approved: "If the question of forming a government study commission is approved by the voters, seven people are required to be elected to serve on the commission. Regardless of how you voted on the question of

appointing a government study commission, you can vote to elect candidates to the commission. You may vote for no more than seven candidates to serve on the study commission.”

40. There were a total of fourteen (14) candidates for the government study commission. Leading up to the November 8, 2022 election, there were two (2) separate and distinct candidate slates.
41. Seven (7) of the candidates openly proclaimed their opposition to the Sewer Sale and proposed the use of the Home Rule Charter and Optional Plans law to block the proposed Sewer Sale. These candidates identified as the Neighbors Opposing Privatization Efforts, or “NOPE” slate, and were Plaintiffs, Gisela Koch, Mark Warren, Christina Gallagher, Don Lepp and Martin Cohen.
42. The remaining seven (7) candidates identified as the Township Residents United Serving Towamencin, or “TRUST” slate, and were Douglas Kile, Connie Brown, Jeffrey Baer, Nancy Becker, Richard Fisher, Amy Tarlo and Michael Main. The TRUST slate was in favor of the proposed sale, and was open in its intent to maintain the Township’s form of government to allow the proposed Sewer Sale to proceed.
43. The express primary goal of the NOPE candidates was to stop the sale of the Sewer System, with secondary goals of increased transparency from the Township and the addition of a referendum function for the voters of Towamencin Township.
44. A government study commission was approved by the voters in the November 2022 election (the “Government Study Commission” or “GSC”).
45. As the formation of the GSC was approved, the seven (7) persons with the most votes that were elected to serve on the Government Study Commission were the seven

members of the NOPE slate, including Plaintiffs in this action, who became the Chair and Vice Chair of the Government Study Commission.<sup>2</sup>

46. On December 6, 2022, the Government Study Commission members took their oaths of office and held an organizational meeting.
47. The GSC published numerous drafts of a Home Rule Charter, held several public meetings where various elected and appointed officials were interviewed, toured the Towamencin Municipal Authority sewage treatment plant, held a public hearing, and held a town hall thereafter in pursuit of fulfilling its statutory responsibilities.
48. The GSC undertook a review of how a Home Rule Charter could change the outcome of the Sewer Sale, in addition to adding citizen participation through referenda and transparency to Township operations.
49. The GSC was clear from the beginning: its primary goal was to explore the ways in which a Home Rule Charter could stop the sewer sale. This goal, along with adding citizen referenda and transparency in Township operations, was repeated at the beginning of each GSC meeting and published on the GSC website.
50. On March 1, 2023, the GSC approved the required report of its findings, its proposed Home Rule Charter (the “Charter”), and the Ballot question.
51. The Sunshine Act mandates that for each of its public meetings “the [Township] shall post the agenda, which includes a listing of each matter of agency business that will be or may be the subject of deliberation or official action at the meeting, on the website no later than 24 hours in advance of the time of the convening of the meeting.” 65 Pa.C.S.A. § 709(c.1)(1)(i).

---

<sup>2</sup> Don Lepp was unable to take office, and was thereafter replaced with Joseph Rumsey.

52. The Sunshine Act prohibits the Township from taking any action on items not included in agenda: “an agency may not take official action on a matter of agency business at a meeting if the matter was not included in the notification required under section 709(c.1).” 65 Pa.C.S.A. § 712.1(a).
53. The Sunshine Act allows exceptions to this mandate for emergencies and for matters that are brought to the agency’s attention during the 24-hour period between the posting of the agenda, so long as they are of a *de minimis* nature. 65 Pa.C.S.A. §§ 712.1(b) & (c). However, the agency must announce the reason for the change in the agenda at the public meeting. 65 Pa.C.S.A. § 712.1(e).
54. On March 8, 2023, at the start of its public meeting, the Board of Supervisors alerted the public to both the proposed withdrawal of NextEra and that NextEra had proposed to assign its contractual rights to PA American.
55. The Board Chairman, Charles Wilson, announced that the reason for the change in the agenda was “due to certain information recently received by the Board.” See Exhibit “B,” Minutes of the March 8, 2023 and March 22, 2023 Board of Supervisors meetings.
56. There was no statement that the information had arisen within the 24 hours prior to the meeting. Plaintiffs believe, and therefore aver, that the Township was aware of the “certain information” well prior to the 24 hours in advance of the meeting.
57. Despite having no motion on the agenda for such an action, no updated financial analysis, and in clear and flagrant violation of the Sunshine Act, the Township Supervisors voted to amend the meeting’s agenda to 1) amend the existing Asset Purchase Agreement, 2) draft an Assignment Agreement, and 3) draft an amendment to the Sewer Sale Ordinance.

All of these items were approved by a vote of four-to-one (4-1), with Supervisor Joyce Snyder as the lone dissenting vote. See Exhibit “B.”

58. On March 22, 2023, the Board of Supervisors then approved the amendment to the Asset Purchase Agreement, the Assignment Agreement, and the amendment to the Sewer Sale Ordinance. At this same meeting, the Township adopted a 3-minute time limit on public comment and actively enforced this policy prior to the official adoption.
59. On March 9, 2023, the day after the Board of Supervisors announced and voted to begin the process of transferring the sale from NextEra to PAAW, the GSC released its final report, in which the adoption of a Home Rule Charter was recommended. The report was revised slightly to account for the proposed change from NextEra to PAAW. A true and correct copy of the March 9, 2023 Report is attached hereto, incorporated herein and labeled Exhibit “C.”
60. The proposed Charter did not alter elected offices, change any financial procedure, change limitations to taxation rates, or make any change to the general operating procedures of the Township. Rather, as was clearly discussed at each meeting of the GSC, the proposed Charter, *inter alia*, prohibited, “the sale or long-term lease of potable water, wastewater, and stormwater systems to nongovernmental entities.” See Exhibit “C,” pg. 2.
61. As part of the March 9, 2023 GSC report, four major concerns were addressed: “(1) The sewer sale is neither necessary nor popular, (2) There is little wrong with the current structure of government, (3) There isn’t enough direct democracy in Towamencin, and (4) There isn’t enough transparency in Towamencin.” See Exhibit “C,” pg. 5.

62. The GSC continued to move forward as commissioned. On March 10, 2023, the final report, proposed Charter and ballot question were transmitted to the Montgomery County Board of Elections for inclusion on the May 16, 2023 ballot.
63. As a result of the in-depth study and findings thereof, the required referendum was placed on the Tuesday, May 16, 2023 primary election ballot. As required by the Home Rule Charter Law, the ballot question read: “Should the Home Rule Charter contained in the report dated March 9, 2023, of the Government Study Commission, prepared in accordance with the Home Rule Charter and Optional Plans Law, be adopted by the Second Class Township of Towamencin?”
64. The Home Rule Charter referendum was passed by the eligible voters of Towamencin Township on Tuesday, May 16, 2023 with a vote of 2,728 to 2,418, and certified on June 5, 2023.
65. The Home Rule Charter went into effect on July 1, 2023.
66. On May 15, 2023 the Township filed a Petition *Nunc Pro Tunc* with the Pennsylvania Public Utility Commission (the “PUC”), seeking a Certificate of Public Convince, *Nunc Pro Tunc*, seeking approval from the PUC to offer, furnish, render, and supply wastewater service, yet at the same time seeking a Certificate to Abandon Service upon the closing of a proposed sale by the Township of substantially all of the assets comprising its wastewater system to PAAW.
67. On May 16, 2023, PAAW filed an Application to Acquire the Towamencin Wastewater System with the PUC, seeking approval of the transfer of assets to PAAW and the rights of PAAW to begin to offer or furnish wastewater service.

**THE FOSTER RIGHT-TO-KNOW REQUEST**

68. Also on March 9, 2023, Plaintiff Foster submitted a Right-to-Know request to the Township asking for records relating to communications regarding PAAW. On March 16, 2023, the Township invoked a 30-day extension. A true and correct copy of the Right-to-Know Request is attached hereto, incorporated herein and labeled Exhibit “D.”
69. On April 13, 2023, the Township requested an additional 15 days to respond to the March 9, 2023 Right-to-Know request.
70. On May 8, 2023, the Township provided a partial response to the March 9, 2023 Right-to-Know request, and denying the request in part, citing the attorney-client privilege and internal pre-decisional records exceptions in the Pennsylvania Right-to-Know Law. A true and correct copy of the Township’s response and responsive records is attached hereto, incorporated herein, and labeled Exhibit “E.”
71. At the Township meeting on May 10, 2023, Township President Charles Wilson seemingly attempted to cure the text messages as provided in response Plaintiff Foster’s request, by openly amending his previously identified timeline, stating that: (1) he informed the public on March 8, 2023 that the Township was notified by NextEra of their intent to exit on or around November 28, 2022, (2) that PAAW had reached out to the Township in early December 2022 to inform the Township of NextEra’s intent to assign and see if the Township was open to this change, and (3) that NextEra told the Township the Thursday or Friday before March 8<sup>th</sup> that they came to an agreement with PAAW to assume the APA.

72. On May 25, 2023, Plaintiff Foster filed an appeal of the partial denial. The Township and the Plaintiff Foster thereafter engaged in mediation, including the Township providing a supplemental affidavit.
73. The appeal is now before an Office of Open Records hearing officer, who is conducting an *in camera* review of the records the Township has failed to disclose.
74. The records received in the Township's partial response revealed that, contrary to the Township's assertion on March 8, 2023 that it had only recently learned of the transfer of the APA from NextEra to PAAW, text messages exchanged between two (2) Board members in early December 2022 revealed that such discussions had begun months before the Board's last minute agenda modification, which was in clear violation of the Sunshine Act.
75. At all times material hereto, the Board has continued to move forward with the proposed sale, despite lengthy public comment in opposition of the agreement, lack of public support, and an overwhelming lack of transparency.

### COUNT I: MANDAMUS

76. All paragraphs above are hereby incorporated by reference.
77. Plaintiffs seek an order of mandamus in this action compelling the Board of Supervisors of Towamencin Township and Towamencin Township to terminate the Asset Purchase Agreement with Pennsylvania American Water, as the Board of Supervisors and the Township are refusing to abide by, and are blatantly violating, requirements under the Home Rule Charter.
78. A "[m]andamus is the proper remedy only where the plaintiff demonstrates (1) a clear legal right in the petitioner, (2) a corresponding duty in the respondent, and (3) absence

of any other appropriate or adequate remedy.” Equitable Gas Co. v. City of Pittsburgh, 488 A.2d 270, 272 (Pa. 1985). Plaintiffs clearly satisfy each prong of this test, as the Plaintiffs have a clear right to relief, the Township and the Board of Supervisors have an unequivocal duty, and there is a clear lack of other appropriate remedies.

79. Despite the Home Rule Charter going into effect, the Board of Supervisors and Township are intent on proceeding with a proposed sale that is in direct violation of the clear language of the Charter as well as the obvious intent of the voters of Towamencin Township.
80. The Home Rule Charter states that, “The Township, municipal authorities incorporated by the Township, or any other governmental entity that owns and/or operates a Potable Water System, a Wastewater System, or a Storm Water System in the Township, shall not permanently sell, transfer, assign, or deliver ownership or operation of the Potable Water System, the Wastewater System, or the Storm Water System to a non-governmental entity.” See Exhibit “F,” at Article 6, § 601.
81. Plaintiffs seek a mandamus action as a, “[m]andamus is an extraordinary remedy designed to compel official performance of a ministerial act or mandatory duty where there exists a clear legal right in the plaintiff, a corresponding duty in the defendant and want of any other adequate remedy at law.” Allegheny County v. Com., 490 A.2d 402, 408 (Pa. 1985). Moreover, “[t]o succeed in an action of mandamus, the plaintiff must show an immediate, specific, well defined and complete legal right to the thing demanded.” Equitable Gas Co. v. City of Pittsburgh, 488 A.2d 270, 273 (Pa. 1985).
82. The Charter creates a clear right to relief for Plaintiffs, as residents of the Township are entitled to see the provisions of the Charter followed. Further, due to a recently issued

Commonwealth Court opinion, it has become abundantly clear that the proposed sale of the Sewer System must fail. *See generally Cicero v. Penna. Public Utility Comm'n*, Docket No. 910 C.D. 2022 (Pa. Commw. Ct., July 31, 2023).

83. There can be no question regarding the duties of the Board of Supervisors in this action, as the Charter is explicit, unambiguous and does not give the Board of Supervisors or the Township any discretion in complying with its terms. The Charter creates an unequivocal duty for the Township and the Board of Supervisors to terminate the APA, as the Township cannot proceed with the proposed sale.
84. Despite this, the Board of Supervisors openly and confidently continues to promote, encourage, and advance the illegal proposed sale.
85. Indeed, four (4) of the Supervisors issued a joint statement advising of their intent to disregard the Charter, which stated: “As have we previously stated, and as we have shared with the opponents of the sewer system sale, the Township legal team does not believe the passage of the Home Rule Charter negates the sewer sale under current Pennsylvania law and the Pennsylvania Constitution. There is strong legal precedent against overturning pre-existing contracts based on the passage of new laws. As such, we do not intend to seek to terminate the contract.” *See* Towamencin Board of Supervisors’ Statement: Home Rule Charter, May 25, 2023, [https://www.towamencin.org/media/2607/bos-statement-home-rule-charter\\_sewer-sale.pdf](https://www.towamencin.org/media/2607/bos-statement-home-rule-charter_sewer-sale.pdf). (Last visited August 14, 2023).
86. The duty of the Board of Supervisors and the Township is to comply with the Charter. The Home Rule Charter created a final governmental order or decision that prohibits the Township from consummating the transaction.

87. The present situation is expressly contemplated by the clear and unambiguous terms of the APA.
88. The APA, Section 14.01(b)(ii), states that, “This agreement may...be terminated and abandoned at any time before completion of the Closing...by the Seller or the Buyer if...any Governmental Authority shall have issued an order, decree or ruling or **taken any other action**, in each case permanently **restraining, enjoining, or otherwise prohibiting the material transactions contemplated by this agreement.**” See Exhibit “G,” at 52 (emphasis added).
89. A “Governmental Authority” is defined in the APA to mean “**any** court, department, commission, board, bureau, municipality, municipal authority (established pursuant to the Pennsylvania Municipal Authorities Act of the Commonwealth of Pennsylvania), **agency** or instrumentality of the United States, **any state, county, city or political subdivision thereof**, or any foreign governmental body, including without limitation, the PaPUC, the EPA, PaDEP, **the Municipal Board** and the Authority Board.” See Exhibit “G,” at 6 (emphasis added).
90. The Township is, by this definition, a Governmental Authority.
91. As noted above, the voters of the Township voted in favor of adopting a Home Rule Charter.
92. The newly adopted Charter specifically prohibits the transactions contemplated by the APA. Specifically, because of the clear and unambiguous terms of the Home Rule Charter, the Township may not execute any of the final asset transfer agreements that are necessary to complete the proposed sale.

93. The APA is, by its terms, an agreement to agree at a later date if certain conditions precedent are met. Because of the Charter, the conditions precedent, the execution of the final transfer documents, can no longer be met and the APA is, therefore, no longer performable.
94. “If performance on one side or another of a contract becomes excusably impossible while the transaction is wholly executory on both sides, not only is the contract discharged, but neither party is subject to obligation of any kind.” Davis-Haas v. Exeter Twp. Zoning Hearing Bd., 166 A.3d 527, 538 (Pa. Commw. Ct. 2017).
95. Black’s Law Dictionary defines an executory contract as, “A contract that remains wholly unperformed or **for which there remains something still to be done on both sides, often as a component of a larger transaction** and sometimes memorialized by an informal letter agreement, by a memorandum, or by oral agreement.” Black's Law Dictionary (11th ed. 2019).
96. Here, the Township must transfer the assets to PAAW and PAAW must obtain approval from the Pennsylvania Public Utility Commission. There can be no doubt that the current APA with PAAW is entirely and wholly executory. Therefore, this contract may be discharged and the Township is under no obligation to consummate the transaction.
97. This Home Rule Charter is now in effect and binding upon the Township, constituting a new form of government that the Board of Supervisors and the Township must abide by, including their inability to consummate this transaction.
98. At various times, four (4) of the five (5) members of the Board of Supervisors have stated their belief that the Charter cannot interfere with the APA, which they have opined is a legally binding contract.

99. As outlined above, however, the Charter does exactly what is specifically contemplated by the APA: it prevents the Township from being able to sign the final transfer documents. The APA is, by its terms, an agreement to agree at a later date, assuming that all agencies having jurisdiction have otherwise approved the proposed sale and that the Township is able to sign the final transfer agreements.
100. The only decision the Board of Supervisors can make is to comply with the legal requirements of the Charter. A majority of the Board of Supervisors has publicly declared their intent to ignore the Charter and attempt to proceed with the proposed sale.
101. In doing so, the Township will continue to incur substantial costs in the form of legal expenses related to petitions before the PUC, and will continue to frustrate the clear intent of the electorate.
102. No other remedy is sufficient to protect the Plaintiffs' interests. If the Township is permitted to proceed with the process of attempting to sell the Sewer System, the Township will continue to incur costs in the form of legal fees and consultant fees that are incurred through the prosecution of the Township's PUC petition and other associated matters.
103. As such, "[m]andamus is proper to compel the performance of legal duties, even where the existence and scope of such duties must be found and defined in the course of the mandamus action itself." Delaware River Port Auth. v. Thornburgh, 493 A.2d 1351, 1355 (Pa. 1985) (citing Volunteer Firemen's Relief Assoc. v. Minehart, 203 A.2d 476 (Pa. 1964)).
104. Plaintiffs are, therefore, entitled to the relief sought.

**WHEREFORE**, Plaintiffs respectfully requests this Honorable Court enter an order of Mandamus, directing the Township to comply with the Home Rule Charter and terminate the Agreement, as the Home Rule Charter is a final governmental order, prohibiting the material transaction from occurring.

### **COUNT II: DECLARATORY JUDGMENT**

105. All preceding paragraphs are hereby incorporated by reference.
106. A Declaratory Judgment, “declares the rights, status, and other legal relations whether or not further relief is or could be claimed. It has been observed that declaratory judgments are nothing more than judicial searchlights, switched on at the behest of a litigant to illuminate an existing legal right, status or other relation. **Stated otherwise, the purpose of awarding declaratory relief is to finally settle and make certain the rights or legal status of parties.**” J.B. v. Pennsylvania State Police, 288 A.3d 946, 951 (Pa. Commw. Ct. 2023) (emphasis added).
107. “[T]he Declaratory Judgments Act is remedial in nature and **intended to provide relief from uncertainty and establish various legal relationships.**” Curtis v. Cleland, 552 A.2d 316, (Pa. Commw. Ct. 1988) (emphasis added).
108. Moreover, “the Declaratory Judgments Act provides that it should be used to ‘settle and to afford relief from uncertainty and insecurity with respect to the rights, status and other legal relations and should be liberally construed ...” National Solid Wastes Mgmt. Assoc. v. Casey, 580 A.2d 893, 898 (Pa. Commw. Ct. 1990) (internal citations omitted.).
109. As noted at length above, a substantial portion of the Home Rule Charter is the prohibition on the sale of wastewater assets to non-governmental entities. The Plaintiffs

in this action are the former Chair and Vice Chair of the GSC, originally tasked with drafting the now-adopted Charter.

110. Despite the adoption of the Charter, the Township continues to actively pursue completion of this transaction. Four (4) of the five (5) elected Supervisors stated in their May 25, 2023 press release that, “the Township legal team does not believe the passage of the Home Rule Charter negates the sewer sale under current Pennsylvania law and the Pennsylvania Constitution. There is strong legal precedent against overturning pre-existing contracts based on the passage of new laws. As such, we do not intend to seek to terminate the contract.” A true and correct copy of the Township’s May 25, 2023 press release is attached hereto, incorporated herein and labeled as Exhibit “H.”
111. However, Defendants fail to acknowledge, or blatantly disregard, their duty and powers as established under the Home Rule Charter.
112. **“A municipality which has adopted a home rule charter may exercise any powers and perform any function not denied by the Constitution of Pennsylvania, by statute or by its home rule charter.** All grants of municipal power to municipalities governed by a home rule charter under this subchapter, whether in the form of specific enumeration or general terms, shall be liberally construed in favor of the municipality.” Wecht v. Roddey, 815 A.2d 1146, 1150–51 (Pa. Commw. Ct. 2002) (emphasis added).
113. The Township has retained Dilworth Paxson, LLP to represent it in front of the PUC regarding the Application *Nunc Pro Tunc* to furnish wastewater services – a clear action taken so that the Township may sell its sewer assets, as it has provided wastewater services for decades without such necessary certificates. In addition, the Township seeks a certificate to Abandon Wastewater Services after the sale to PAAW is finalized. This

application directly cites to the PAAW application to acquire the Towamencin Wastewater Service System on numerous occasions. *See* Exhibit “I.”

114. An action brought under the Declaratory Judgments Act must allege an interest by the party seeking relief which is direct, substantial and present, and must demonstrate the existence of an actual controversy related to the invasion or threatened invasion of one's legal rights. Bowen v. Mount Joy Twp., 644 A.2d 818, 821 (Pa. Commw. Ct. 1994).
115. The Plaintiffs have an interest which is direct, substantial and present. Plaintiffs are residents and voters of the Township and are entitled to see the Township and the Board of Supervisors comply with the Home Rule Charter.
116. There is an ongoing controversy: the requirements under the Charter are clear and unambiguous, but Defendants continue to intentionally ignore the mandate of the Charter and mischaracterize its implications. Defendants willfully turn a blind eye to the mandate given to them by the electorate, falsely claiming that their hands are tied and attempting to proceed with the sale of a public asset. As they proceed, the Defendants are wasting thousands of taxpayer dollars to continue with a process that cannot ultimately be concluded, for the reasons outlined herein.
117. As outlined above, the instant situation is expressly contemplated by the APA, and the Township is prohibited from executing the final transfer documents.
118. The frivolous expenditure of public tax dollars in pursuit of a futile and illegal sale is most certainly a direct, substantial, and present controversy, which is entirely related to the invasion of the rights of the voters of Towamencin, who are vehemently opposed to this sale and are having their tax dollars squandered in pursuit thereof.

119. The residents of Towamencin cannot and will not ever recover these poorly spent funds, and a majority the Board of Supervisors refuses to listen to the will and concern of the voters of the Township. The longer the Township continues to erroneously assert that the transaction is legal and operate under such misrepresentations, the longer residents and taxpayers continue to suffer.
120. In further demonstration of the futility and frivolousness of this attempt to sell the Sewer System, in a case with nearly identical facts to the instant matter, a recent Commonwealth Court decision overturned the PUC approval of a sewer sale finding there to be no financial benefit. *See Cicero v. Penna. Public Utility Comm'n*, Docket No. 910 C.D. 2022, Opinion Issued July 31, 2023.
121. In *Cicero*, the court held that “financial, technical, and managerial ‘benefits’ the Commission concluded could result from [a] transaction relate to and/or are not benefits that ‘affirmatively promote the service, accommodation, convenience, or safety of the public in some substantial way.’” *Id.* at 18-19.
122. The *Cicero* court further reasoned that there was no public benefit regarding the sale of a public sewer system to a private entity because, “the System is already providing and is capable of providing the same or similar benefits without the acknowledged rate increase that will occur as a result of the acquisition.” *Id.* The court also stated that, “[h]olding that a transaction will result in substantial affirmative public benefits because it will provide the same services as already being provided is not a benefit, let alone a substantial affirmative public one as required by statute and our caselaw. Nor is it a benefit to provide for upgrades that Township is equally capable of providing...This is particularly true when the existing system is already operating safely and reliably.” *Id.*

123. The Sewer System here is in perfect functioning order. Even on the Township flyer titled, “Why The Sewer Sale Is Good For Towamencin Families,” the Township is only able to point to monetary benefits that will “eliminate township debt” or “enhance existing township pension plan trust” or “eliminate need for future borrowings.” *See* Exhibit “J.”
124. Moreover, the President of the Board, Charles Wilson, noted that, “The system has been well maintained with annual inspection and repair activities. The plant is in good condition.” *See* Exhibit “K.”
125. It is obvious based on the representations of the Township, there is no actual public benefit to the sale of the Sewer System, except for an enormous financial windfall to the Township. This financial motivation is further diminished when, faced with the prospect of increased sewer rental fees and taxes or the sale of the Sewer System, the voters of Towamencin Township voted for increased fees and taxes. Residents spoke at public meetings encouraging the Board to raise taxes rather than sell the Sewer System.
126. The Township is also fruitlessly, frivolously, and wastefully spending taxpayer funds to push a sale forward that provides no public benefits, which is a losing argument as evidence by the holding in Cicero.
127. However, this proposed sale fails on its own without reliance on the Cicero decision. The Township is not permitted to sell the Sewer System under the Home Rule Charter. The Township is specifically blocked from consummating the transaction.
128. This declaratory action is necessary to stop the Township from continuing to try to consummate the transaction they are so obviously and legally barred from, to stop the Township from continuing to litigate a sale that should never get approved under current

caselaw, and from wasting hard earned taxpayer funds in pursuit of an incredibly short sighted and lackluster financial proposition, the sale to PAAW.

129. Therefore, this Honorable Court should issue an Order prohibiting the Township from executing the final transfer documents and finalizing the sale to PAAW.

**WHEREFORE**, the Plaintiffs respectfully request that this Honorable Court enter an order that the Township of Towamencin cannot finalize this Transaction and may not execute the necessary documents to complete the transfer of the sewer system assets.

### COUNT III: VIOLATION OF THE SUNSHINE ACT

130. The preceding paragraphs are hereby incorporated by reference.
131. The Township has glaringly been committing Sunshine Act violations for some time, though the extent of those violations is still unknown.
132. This sale was precipitated by PFM approaching the Township regarding the potential monetization of the Sewer System.
133. The Sewer Committee, as noted *infra*, was fully entrusted with 1) deciding whether to monetize the sewer assets, 2) to review bids and interview bidders, and 3) make a recommendation regarding bid acceptance and monetization to the Board of Township Supervisors for final approval.
134. The Sewer Committee most certainly meets the definition of “Agency” under the Sunshine Act: “the body, and all committees thereof authorized by the body to take official action or render advice on matters of agency business...” See 65 Pa.C.S.A. § 70
135. The Sewer Committee also performed “Agency Business”, which is defined by the Act as: “**the framing, preparation**, making or enactment of laws, policy or regulations, **the**

**creation of liability by contract** or otherwise or the adjudication of rights, duties and responsibilities, but not including administrative action.” Id.

136. As the Sewer Committee so clearly meet the definitions of “Agency” and “Agency Business,” it is entirely unclear to Plaintiffs why not a single meeting was advertised, nor a single agenda provided, nor a roster of members kept, nor at the very least, why there are no records of what occurred in those meetings.
137. While the Sewer Committee did not take the final vote entering the Township into the APA, the Sewer Committee handled the entire deliberative process that typically would be the responsibility of the Board of Supervisors. The purpose of such actions can only have been to avoid public deliberations surrounding a deeply unpopular proposed sale of a Township asset.
138. The Township, once again operating in secrecy to cover up actions that were detrimental to the residents of the Township, hid behind a Committee to block the public’s view and input regarding these important decisions, discussions, and processes.
139. Sewer Committee meetings and the results of such illegal meetings, including the recommendation to the Township that NextEra bids be accepted and the sewer assets monetized, are in violation and the recommendations that resulted from such meetings be overturned.
140. The Township cannot be rewarded for attempting, and succeeding, to conceal its actions through a Committee that willfully disregarded the requirements of the Sunshine Act.
141. Moreover, the Township openly violated the Sunshine Act by amending the agenda on March 9, 2023 to include considerations of amendments of agreements and the assignment of NextEra contractual rights to PAAW.

142. Based on the Township's website Sewer Sale Update, dated April 11, 2023, the Township asserted that right before its March 8<sup>th</sup> meeting, the Board was advised of NextEra's intent to withdrawal and PAAW's intent to assume the NextEra contract.
143. The Township, however, was well aware of the intended change in advance of the March 8<sup>th</sup> meeting, with plenty of time to properly post the agenda and the motions, for adequate public notice and comment. Furthermore, the Township has offered no reason, emergency or otherwise, as to why the vote could not be postponed to the next regularly-scheduled or special meeting of the Board of Supervisors. Plaintiffs believe and therefore aver that the rushed and illegal vote was to intimidate and influence the work of the GSC and the adoption of the Charter in advance of its submission for the ballot and the May 16, 2023 election and to prevent the public from having adequate notice of a major Township decision.
144. The Sunshine Act both requires that agencies, "post the agenda, which includes a listing of each matter of agency business that will be or may be the subject of deliberation or official action at the meeting, on the website no later than 24 hours in advance of the time of the convening of the meeting...[and] shall post the agenda, which includes a listing of each matter of agency business that will be or may be the subject of deliberation or official action at the meeting, at the location of the meeting and at the principal office of the agency." *See* 65 Pa. C.S.A. § 709(c.1)(i-ii).
145. Again, operating under the cover of darkness, and knowing full well that this information had been available well prior to 24 hours before the meeting, the Board of Supervisors hid these facts from the residents and failed to comply with the Sunshine Act, despite their self-serving assertions on their website that they fully complied.

146. The Township, anticipating push back from their cloak and dagger approach, asserted on their own website that they amended the agenda, “in accordance with the PA Sunshine Law Section 712.1(c).” Towamencin Township, Sewer Sale Update, <https://www.towamencin.org/resources/news/article/?id=5621> (last visited August 18, 2023).
147. Section 712.1(c) allows for items to be added to an agency agenda, without having been properly noticed if, “An agency may take official action on a matter of agency business that is not listed on a meeting agenda if: (1) the matter arises or is brought to the attention of the agency within the 24-hour period prior to the meeting; and (2) the matter is *de minimis* in nature and does not involve the expenditure of funds or entering into a contract or agreement by the agency.” 65 Pa C.S.A. § 712.1(c).
148. It remains unclear why the Township felt the need to so publicly proclaim compliance with the Act, when it does not actively post regarding its compliance with any other vote, agenda, or agency decision.
149. Further, it is unfathomable that the Township both believed that by authorizing the Township Solicitor to move forward with all the required paperwork was not indicative of entering into a new contract or agreement and that the authorization of the solicitor and special counsel to proceed with this work in a short amount of time did not involve the expenditure of funds.
150. The Plaintiffs find it further noteworthy that this glaring violation of an Act meant to increase transparency was only discovered upon the filing of several Right-to-Know requests which revealed that these conversations had happened months before the March 8, 2023 meeting and prior to the GSC members even being sworn into their roles. *See Generally*, Exhibit “A.”

151. The Plaintiffs further note that the Foster Right-to-Know request that brought the violation to light is still the subject of an appeal with the Office of Open Records. Despite mediation, the Township refused to provide certain responsive records under the guise of Attorney-Client privilege and pre-decisional deliberations. The Office of Open Records hearing officer is currently conducting an in camera review of the records in question.
152. Even more egregious is the fact that several Supervisors have spoken at meetings of the GSC and their own public meetings, to admonish both the public and the GSC of the potential for NextEra to pursue legal action related to a potential termination of the APA, despite knowing full well that NextEra had already declared its intent to remove itself from the industry entirely and terminate or transfer the APA.
153. Further, the Township's claims that the Home Rule Charter can have no effect upon the APA are diluted by their dishonest, illegal and unethical behavior and comments surrounding the change from NextEra to PAAW. Several members of the Board of Supervisors spoke at GSC meetings regarding their belief that the Home Rule Charter could expose the Township to liability under the APA with NextEra, despite knowing that NextEra had already communicated its intent to terminate or assign the APA.
154. The Township cannot be rewarded for the underhandedness with which it has operated to sell an asset that the voters of Towamencin have clearly and unambiguously, through two separate elections, declared that they do not wish to sell.
155. As this was a willful violation of the Sunshine Act, the business transacted at that meeting should be void, "[a] legal challenge under this chapter shall be filed within 30 days from the date of a meeting which is open, or within **30 days from the discovery of any action that occurred at a meeting which was not open at which this chapter was**

**violated, provided that, in the case of a meeting which was not open, no legal challenge may be commenced more than one year from the date of said meeting...**Should the court determine that the meeting did not meet the requirements of this chapter, it may in its discretion find that any or all official action taken at the meeting shall be invalid.” 65 Pa.C.S.A. § 713 (emphasis added).

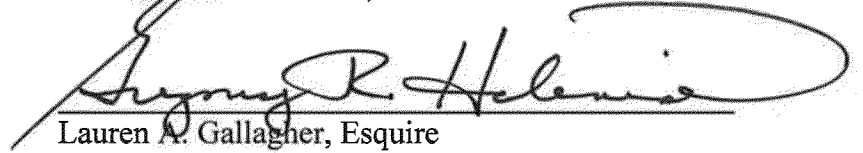
156. This assertion of a Sunshine Act violation involves complex facts. The Plaintiffs do not dispute the proper advertising of the March 8, 2023 meeting date and that the meeting was open to the public. However, the Sunshine Act was clearly violated and the actual discovery of many of the violations did not occur until much later and, indeed, continues to be revealed.
157. Therefore, as the Plaintiffs are still actively fighting in Office of Open Records for documents that would reveal the true extent of the violations, the willfulness thereof, and the blatant disregard of the law, the time for filing a claim for the clear violations has not yet begun to run.
158. The Plaintiffs are now bringing this Action, with no ability to reasonably discern how intensive or how rampant such violations are, as the Township continues to hide the full extent and deceit under the guise of false exemptions.
159. The Sunshine Act challenges are, therefore, timely.
160. This Honorable Court is empowered to issue an Order that will provide the public with a reasonable means of participating in the process.
161. Plaintiffs believe, and therefore aver, that the only appropriate remedy is to strike the votes taken at the March 8, 2023 and March 22, 2023 meetings related to the proposed

Sewer System sale, invalidate the APA with PAAW and invalidate Ordinance Number 23-03 due to the violations of the Sunshine Act.

**WHEREFORE**, Plaintiffs respectfully request that this Honorable Court enter an order, declaring that the action taken by the Board on March 8, 2023 and March 22, 2023 are in violation of the Sunshine Act and declare their actions null and void, invalidating the APA with PAAW and voiding Ordinance No. 23-03.

Respectfully Submitted,

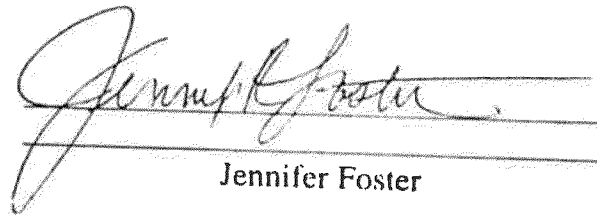
**RUDOLPH CLARKE, LLC**



Lauren A. Gallagher, Esquire  
Gregory R. Heleniak, Esquire  
Samantha L. Newell, Esquire  
*Attorneys for Plaintiffs*

VERIFICATION

I, Jennifer Foster, certify and affirm that the statements contained in the Complaint In Mandamus and Declaratory Judgment, are true and correct to the best of my knowledge, information and belief, and are made subject to the penalties of 18 Pa.C.S. §4904 relating to unsworn falsifications to authorities.

  
Jennifer Foster

Date: 8/21/2023

Case# 2023-18907-0 Docketed at Montgomery County Prothonotary on 08/22/2023 3:50 PM. Fee = \$268.75. The filer certifies that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

VERIFICATION

I, Kofi Osei, certify and affirm that the statements contained in the Complaint In Mandamus and Declaratory Judgment, are true and correct to the best of my knowledge, information and belief, and are made subject to the penalties of 18 Pa.C.S. §4904 relating to unsworn falsifications to authorities.



Kofi Osei

Date: 8/21/2023

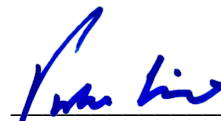
BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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 all of the assets, properties and :  
rights related to the wastewater collection :                   Docket No. A-2023-3039900  
and treatment system owned and operated :  
by Towamencin Township and Towamencin :  
Municipal Authority, and (2) the rights of :  
Pennsylvania-American Water Company to :  
begin to offer or furnish wastewater service :  
to the public in the Township of Towamencin and :  
portions of the Townships of Franconia, :  
Lower Salford and Worcester and the Borough of :  
Lansdale, all in Montgomery County, Pennsylvania :

VERIFICATION

I, Patrick M. Cicero, hereby state that the facts set forth in the Office of Consumer Advocate’s Motion for a Stay, are true and correct (or 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).

DATED: September 25, 2023

Signature:  \_\_\_\_\_  
Patrick M. Cicero  
Consumer Advocate

Address:           Office of Consumer Advocate  
555 Walnut Street  
5<sup>th</sup> Floor, Forum Place  
Harrisburg, PA 17101-1923