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September 26, 2023

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

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

Dear Judge Guhl:

Attached for electronic filing please find the Reply to Exceptions Filed by Pennsylvania-American Water Company, Butler Area Sewer Authority, the Township of Butler and the City of Butler, Submitted Jointly by Protestants, Center Township and Summit Township.

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

Respectfully submitted,

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MDG:mt
Attachment

cc: Center Township Supervisors *(by email)*
Summit Township Supervisors *(by email)*

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Administrative Law Judge Marta Guhl

In re: Application of Pennsylvania-American Water :
Company under Sections 1102(a) and 1329 of the :
Pennsylvania Public Utility Code, 66 Pa C.S. §§ 1102(a) :
and 1329, for approval of (1) the transfer, by sale, to :
Pennsylvania-American Water Company, of substantially : Docket No. A-2022-3037047
all of the assets, properties and rights related to the :
wastewater collection and treatment system owned by the :
Butler Area Sewer Authority, (2) the rights of :
Pennsylvania-American Water Company to begin to offer :
or furnish wastewater service to the public in the City of :
Butler, portions of the Borough of East Butler, and portions :
of the Townships of Butler, Center, Connoquenessing, :
Oakland, and Summit, in Butler County, Pennsylvania :

**REPLY TO EXCEPTIONS FILED BY PENNSYLVANIA-AMERICAN WATER
COMPANY, BUTLER AREA SEWER AUTHORITY, THE TOWNSHIP OF BUTLER
AND THE CITY OF BUTLER, SUBMITTED JOINTLY BY PROTESTANTS, CENTER
TOWNSHIP AND SUMMIT TOWNSHIP**

Dated: September 26, 2023

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I. INTRODUCTION

The parties to this Reply to Exceptions are Center Township and Summit Township (“Center/Summit”), both located in Butler County, Pennsylvania, and in which reside residents who are customers of Butler Area Sewer Authority (“BASA”). Both Townships are Protestants to the Application of Pennsylvania-American Water Company (“PAWC”) to purchase the assets of BASA. Neither Center Township nor Summit Township are a party to the Settlement Agreement entered into by the other parties. Due to the short deadline for filing Replies to Exceptions, this Reply is to both PAWC’s and BASA’s Exceptions to ALJ Guhl’s Recommendation to the PUC by both PAWC and BASA.¹ Center/Summit respectfully request the PUC, without hesitation, to adopt the Recommendations of Judge Guhl to deny the Application of PAWC to purchase the assets of BASA and set aside the Settlement Agreement because there is no “...benefit to be realized from the proposed transaction [that] would outweigh the harms to current PAWC water and wastewater customers or existing BASA wastewater customers.” [*ALJ Guhl’s Op. at p. 66*].

II. STANDARD OF REVIEW

Pursuant to 66 Pa. C.S.A. § 335(a) of the Public Utility Code, the PUC has the authority to supersede the Opinion of an ALJ. However, such power is limited by the longstanding requirement that a decision reached by the PUC contrary to the Recommendation of the ALJ must be supported by substantial evidence. *Pa. Retailers Assoc. v. Pa. PUC*, 440 A.2d 1267 (Pa. Cmwlth. 1982).²

¹ BASA, the City of Butler and Butler Township filed joint Exceptions. They are collectively referred to as “BASA”.

² The standard of review that applies to the ALJ in applying the affirmative public benefit test is a preponderance of the evidence standard. *Cicero v. PUC*, 2023 Pa. Commw. LEXIS 120.

III. REJECTION OF SETTLEMENT AGREEMENT

The initial Exceptions asserted by both PAWC (Exception No. 1) and BASA (Exception No. 1) is an illustration of two important, but here conflicting, precepts of law. The first, as pointed out by BASA and PAWC, is the recognition that settlements are to be encouraged. As a public policy, settlements are generally recognized as necessary to keep the Court system (or in this case the administrative system) from breaking down. This precept has been codified as a public policy by the PUC at 52 Pa. Code § 5.231(a). In this case, most of the parties, PAWC, BASA, the City of Butler, Butler Township, the Office of Consumer Advocate, the Office of Small Business Advocate, and the Bureau of Investigation and Enforcement, entered into an 11th hour agreement to settle the matter. Center/Summit were informed of the settlement at the time of the scheduled day 1 of the proceedings and after subsequent consultation with their full Boards of Supervisors pursuant to a vote at a public meeting as required by the Pennsylvania Sunshine Act, declined to become a party to the Settlement Agreement but did agree to not oppose the Settlement Agreement.³

The second precept is that notwithstanding the Settlement Agreement, it still remains for PAWC and the BASA parties to meet the burden to prove that the sale of BASA to PAWC benefits the public, that the sale be shown to affirmatively promote the service, accommodation, convenience or safety to the public in some substantial way; that the transaction is indeed in the public interest. [*ALJ Guhl's Op. at p. 56 citing City of York v. Pa. PUC, 295 A.2d 828 (Pa. 1972)*].

³ From a procedural standpoint, *see Popowsky v. Pa. PUC, 653 A.2d 1385 (Pa. Cmwlth. 1995)*, in which the Office of Trial Staff did not oppose a settlement agreement but refused to sign the settlement agreement. The Office Trial Staff, however, continued to challenge the case on the basis of jurisdiction. Here, Center/Summit did not oppose the Settlement Agreement but refused to sign the Agreement and challenges the case based on the application by ALJ Guhl of *Cicero v. PUC, Id.*, decided by the Commonwealth Court on July 31, 2023, to the Settlement Agreement and Application.

In other words, PAWC and BASA cannot bargain away the public interest. A general policy consideration must yield to the specific requirements for the issuance of a certificate of public convenience.

The well-reasoned opinion of ALJ Guhl found that the Settlement Agreement did not yield to the affirmative public benefit test for multiple reasons, including:

- “It is evident that PAWC did not consider that a significant portion of its current revenue requirement from the wastewater utility was already being allocated to its water customers when negotiating a purchase price with BASA.” [*ALJ Guhl’s Op. at p. 63*].
- “The Commission’s goal of regionalization is not to encourage mergers and acquisitions regardless of the potential future ratemaking impacts. 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 PAWC.” [*Id. at p. 64*].
- “It is clear that the cost of this acquisition outweighs the other benefits discussed in testimony, especially considering the existing rate impact of past acquisitions to PAWC customers.” [*Id.*].
- “...BASA’s year one revenue will be \$12,698,000, and under the proposed 1.4x rate increase, would increase to approximately \$17,777,200. ...leaving a revenue requirement deficiency of \$13,424,800...” [*Id. at p. 65*].
- “...a municipal authority does not have include a rate of return on equity for either the \$228 million acquisition or the \$75 million for capital improvements and can obtain lower interest loans than available to an investor-owned utility such as PAWC.” [*Id.*].

- “Both BASA and PAWC have a similar ability to obtain the necessary financing to complete the capital improvement program, so PAWC does not provide a uniquely different advantage to BASA’s ratepayers than already exists in BASA as a municipal authority.” *[Id. at p. 66]*.
- “...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.” *[Id.]*.

The Exceptions filed in response to ALJ Guhl’s Recommendation by PAWC and BASA are based solely on the evidence they submitted into evidence and without due regard to the evidence submitted by the other parties, such as OCA, and indeed without regard to a proper review and analysis of all the evidence. ALJ Guhl, on the other hand, undertook such an analysis and review, and in doing so, has provided the PUC with a far greater reasoned analysis than the arguments submitted to the PUC by BASA and PAWC. In other words, merely contractually agreeing that an affirmative substantial benefit exists does not prove it to be so. Indeed, it would be an error of law for ALJ Guhl, or any other party, to draw such a conclusion.

IV. SUBSTANTIAL EVIDENCE

The second category of Exceptions filed by PAWC (Exceptions 2 and 3) and BASA (Exceptions 2 and 3) urge this Court to reject the Recommendation of ALJ Guhl as unsupported and contradicted by the facts (BASA Exception at p. 9) and (PAWC Exception at p. 12 (Not supported by substantial evidence))⁴ based on the misapplication and misinterpretation (BASA Exception at p. 9 and PAWC Exception at p. 11 (clear error)) of the affirmative public benefit test. PAWC and BASA, in effect, are arguing to the PUC that the only outcome possible is a complete

⁴ *See*, footnote 2, *supra*, for the correct standard to be exercised by the ALJ

reversal of ALJ Guhl because of her failure to properly apply a net benefits analysis. However, not only is the opinion well-reasoned in accord with the *Cicero* decision, there also does not exist substantial evidence to warrant reversal.

In *Cicero, supra*, the Commonwealth Court rejected the sale of the East Whiteland Township sewage system based on a detailed analysis of the factual scenarios proposed by the sale. The Commonwealth Court addressed five claims of benefit which it pointed out were indeed not benefits at all. In her compelling analysis, ALJ Guhl pointed out PAWC and BASA's reliance on all five of these purported "benefits".

First, the Commonwealth Court pointed out that a remote customer care phone number with longer hours does not constitute a benefit over a local number. 2023 Pa. Commw. LEXIS 120 *25. ALJ Guhl pointed out that PAWC and BASA still claim the assertion to be a benefit. *[ALJ Guhl Op. at p. 61]*.

Second, the Commonwealth Court pointed out that just because a large concern can undertake refinancing for capital improvements and remediation, it is not a benefit when the entity to be purchased has the same ability. *Id.* ALJ Guhl pointed out that the evidence shows that BASA can refinance for capital improvements and remediation and at a presumably lower rate. *[ALJ Op. at p. 65]*.

Third, the Commonwealth Court pointed out that monetizing a sale for other governmental purposes is not a benefit; instead, it is a burden placed on other PAWC customers who do not benefit from the other governmental benefit. *Id.* at *26. ALJ Guhl pointed out in her Recommendation that other governmental purposes is the true driver of the sale of BASA to PAWC. *[ALJ Op. at p. 48 and p. 48 n. 108]*.

Fourth, the Commonwealth Court pointed out that upgrades are not a benefit when a system is running safely and reliably. *Id.* ALJ Guhl found, and the evidence supports, her finding that “BASA is capable of continuing to provide service and have the means to provide upgrades in the future.” [ALJ Guhl Op. at pp. 62-63].

Fifth, the Commonwealth Court reiterated that pursuant to the Supreme Court holding in *Popowsky v. Pa. PUC*, 937 A.2d at 1040 (Pa. 2007), the affirmative public benefit test is a net benefits test whereby if there are no real actual benefits to the public that are substantially different from what is being offered by the concern being acquired and, where there are known harms from the acquisition, then there is an insufficient net benefit to support the sales transaction. In this matter, ALJ Guhl applied a net benefits test and also analyzed the harm to the PAWC and BASA customers, reaching the conclusion that under a net benefits analysis, a sale of BASA to PAWC is not warranted. [ALJ Guhl Op. at pp. 63-65]. All of this is in accord with the Supreme Court directive that a net benefit assessment is necessary. *Cicero, supra, citing Commonwealth v. King*, 839 A.2d 237 (Pa. 2003).

PAWC and BASA do their utmost to ignore the analysis of the Commonwealth Court in *Cicero*. They go in every direction to attempt to obfuscate the clear direction of the Commonwealth Court in the *Cicero* case. PAWC goes so far as to suggest to the PUC that the decision in *Cicero* is not currently binding precedent. (PAWC Exception at p. 3, n. 3)⁵. However, ignoring the analysis of the Commonwealth Court in a new case almost directly on point does not create substantial evidence nor does such action present a good reason for the PUC to reverse ALJ Guhl.

⁵ In another example of attempting to lead the PUC astray, the BASA Exceptions (on p. 13, first bullet point, underlined sentence), claim that Center/Summit waived all claims against the opposing parties. That statement is both outside the record and absolutely false; a breach of the decorum of this august body.

V. **PUBLIC POLICY**

BASA argues (in its Exception No. 4) to the PUC, that the Recommended Decision by ALJ Guhl creates an unobtainable standard wherein a Municipal Government may only sell the assets of an Authority that is in distress, which is contrary to the policy that bigger is necessarily better. Center/Summit answer that the opinion of ALJ Guhl, based on the Commonwealth Court decision in *Cicero*, specifically dispelled this claim as an aspirational statement, which the Commonwealth Court specifically limited in favor of a measured net benefits test.

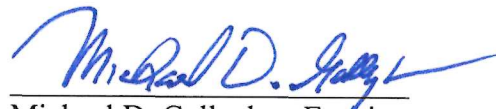
Center/Summit point out to the PUC that if a Municipal Authority is going to be sold to a large private conglomerate with the loss of local oversight and control, along with a considerable price increase to consumers, then public policy, as evidenced by the *Cicero* decision, dictates that there must be a compelling public interest to do so. Monetization of the asset is not a substantial reason upon which to approve the sale of BASA. And here, Center/Summit assert that the PUC should find, as did ALJ Guhl, that there exists no substantial reason that the proposed sale will affirmatively promote the service, accommodation, convenience or safety of the public.

VI. CONCLUSION

For the reasons set forth above, Center Township and Summit Township urge the PUC to adopt the Recommendation of ALJ Guhl to both strike the Settlement Agreement of the other parties and to deny the Application of PAWC to purchase the assets of BASA.

Respectfully submitted,

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A handwritten signature in blue ink, appearing to read "Michael D. Gallagher", with a horizontal line underneath it.

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

I hereby certify that I have this 26th day of September, 2023 served a true copy of the foregoing Reply to Exceptions Filed by Pennsylvania-American Water Company, Butler Area Sewer Authority, the Township of Butler and the City of Butler Submitted Jointly by Protestants, Center Township and Summit Township in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

VIA ELECTRONIC MAIL ON SEPTEMBER 26, 2023

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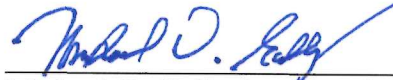
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