

COMMONWEALTH OF PENNSYLVANIA



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September 26, 2023

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

Re: Application of Pennsylvania-American Water Co. under Sections 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 Secretary Chiavetta:

Attached for electronic filing please find the Office of Consumer Advocate's Reply Exceptions in the above-referenced proceeding.

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

Respectfully submitted,

/s/ Erin L. Gannon  
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Certificate of Service

\*4878-2309-1842

CERTIFICATE OF SERVICE

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

I hereby certify that I have this day served a true copy of the following document, the Office of Consumer Advocate's Reply Exceptions, 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. This document was filed electronically on the Commission's electronic filing system.

Dated this 26<sup>th</sup> day of September 2023.

SERVICE BY E-MAIL ONLY

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BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

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REPLY EXCEPTIONS OF THE  
OFFICE OF CONSUMER ADVOCATE

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Dated: September 26, 2023

## I. INTRODUCTION

The Office of Consumer Advocate (OCA) submits this limited Reply to the Exceptions of the Pennsylvania American Water Company (PAWC) and the Butler Area Sewer Authority, the Township of Butler, and the City of Butler (collectively, Butler Parties) because it disagrees with certain assertions of law in PAWC's and the Butler Parties' Exceptions.<sup>1</sup>

The OCA joined the proposed settlement, its position on the settlement is contained in its Statement in Support, and the facts and conclusions of law on which there was agreement by the settling parties are set forth in Attachments 6 and 7 to the settlement. In their Exceptions, PAWC and the Butler Parties' set forth a characterization of the law governing approval of Section 1329 transactions that is not endorsed by the settlement agreement. They attempt to litigate, through exceptions, issues and conclusions of law that are fundamentally disputed.

The OCA is also concerned with the hyperbole regarding the impact of the recommendation to reject the settlement. Settlements are rejected or modified in the ordinary course. While the parties to a settlement may disagree with that outcome, it is improper to suggest the Commission must approve all settlements for fear that the possibility of rejection will chill future settlement efforts. A settlement can only be found to be in the public interest if the *Commission* (and not merely the parties) make that finding based on the settlement and underlying record in a particular case.

As such, the OCA files these limited Replies to the Exceptions addressing the Commission's authority and obligation concerning review of settlements generally and specific to Section 1329 transactions.

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<sup>1</sup> While the OCA also takes issue with several mischaracterizations of fact made by PAWC and the Butler Parties in their exceptions, the focus of the OCA's limited reply is to state its disagreement with certain assertions of law. This should not be construed as indicating the OCA's agreement to assertions of fact that are not included in the settling parties' proposed Findings of Fact. Settlement, Att. 7.

## II. OCA Reply to Exceptions

### A. PAWC and the Butler Parties' Rely on Contested Legal Theories That Are Not Supported by the OCA, as a Settling Party. (PAWC Exc. at 8-9, 14, 17-18, 21; Butler Exc. at 5, 7, 11, 20-23)

In PAWC's Exceptions, the Company posits numerous legal challenges to Administrative Law Judge Guhl's decision that are not supported by the OCA.<sup>2</sup> There are four key areas of disagreement:

- Throughout Exception 3, PAWC claims the settlement provides numerous "affirmative" benefits that were contested on the record. PAWC Exc. at 121; *see* Butler Exc. 16-18.
- PAWC argues that ALJ's reasoning would counter the legislative intent behind passage of Section 1329. PAWC Exc. at 8; *see* Butler Exc. at 22, 23.
- The Company argues that the ALJ's reasoning would permit only troubled systems to be eligible for Section 1329 treatment. PAWC Exc. at 8, 18; *see* Butler Exc. at 5, 23.
- PAWC submits that the ALJ's legal analysis would establish a new and unreasonably high bar for Section 1329 transactions. PAWC Exc. at 9; *see* Butler Exc. at 11, 23.

The OCA excepts to all of the above legal arguments, insofar as the OCA's agreement to the settlement is not based on any of these legal theories. The Settlement document, along with the Statements in Support, provide the parties' basis for approval of the settlement as in the public interest.<sup>3,4</sup> The Settlement does not, in any respect, adopt the legal principles espoused by PAWC

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<sup>2</sup> To the extent that the Butler Parties do not include these characterizations of law in their Exceptions, they incorporate them by reference through their adoption of PAWC's Exceptions. Butler Exc. at 23.

<sup>3</sup> As noted by PAWC, the ALJ did not cite the recent decision in *Cicero* in addressing the public interest standard. PAWC Exc. at 3, n.3 (citing *Cicero v. Pa. PUC*, 2023 Pa. Commw. LEXIS 120). The OCA, however, takes issue with any suggestion by PAWC that ALJ Guhl was acting on anything other than the facts of this case in reaching her decision. While PAWC may not like the ALJ's analysis, in footnote 3, it engages in wild speculation that is unbecoming and inappropriate. In addition, while PAWC is correct that the parties negotiated the settlement with knowledge of the issues on appeal, it omits the fact that no party had knowledge of when the Commonwealth Court would rule on *Cicero*. The parties advised the ALJ they had reached a settlement on July 28, 2023. The Court's opinion and order in *Cicero* was entered on July 31, 2023. Thus, when the parties – including the OCA – agreed to the settlement, the OCA was aware of its arguments on appeal, but it was also aware of the uncertainty of appellate outcomes and, thus, made its decision in the context of that uncertainty and the fact that the Commission, thus far, has approved every litigated application filed under Section 1329.

in its Exceptions. If the Commission grants the Exceptions of PAWC and the Butler Parties, it should not adopt the statements of fact and assertions of law contained in those Exceptions that are contested by the OCA.

B. The Commission Has Authority to Reject or Modify a Settlement. (PAWC Exc. 1 at 3-9, Requested Relief at 34-35; BASA Exc. at 5-8, 23)

As set forth in its Exceptions, PAWC does not agree that the proposed settlement should be rejected. It goes beyond the bounds, however, when it threatens that the Commission *must* adopt the proposed settlement because failure to do so would create the risk that some settlements will not be approved, and all future cases will be fully litigated to avoid that risk. PAWC Exc. at 3-4. This is a gross overstatement. The Commission can and has rejected or modified settlements. For example, less than a year ago, the Commission rejected a PAWC settlement which fully resolved all issues and was joined in/not opposed by all active parties. *Petition of Pennsylvania-American Water Company for Approval of an Arrearage Management Plan*, P-2021-3028195, 26-29 (Order Dec. 28, 2022) (*PAWC AMP*).<sup>5</sup> The ALJs' decision recommending that the settlement was in the public interest was vacated and the case was remanded. Yet settlements continue to be proposed.

Further, the possibility that the Commission might reject the proposed settlement is addressed in the terms of the settlement filed in this proceeding:

41. The Settlement is conditioned upon the Commission's approval of the terms and conditions contained in the Settlement without modification. If the Commission modifies the Settlement, any Petitioner may elect to withdraw from the Settlement and may proceed with litigation and, in such event, the Settlement shall be void and of no effect. Such election to withdraw must be made in writing, filed with the Secretary of the Commission and served upon all Joint Petitioners within five (5) business days after the entry of an Order modifying the Settlement.

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<sup>4</sup> On September 26, 2023, the Commonwealth Court issued an Order denying all applications for reargument of its opinion and order in *Cicero*. 910 C.D. 2022 (Order Per Curiam Sept. 26, 2023).

<sup>5</sup> [www.puc.pa.gov/pcdocs/1768904.pdf](http://www.puc.pa.gov/pcdocs/1768904.pdf)

The Joint Petitioners acknowledge and agree that the Settlement, if approved, shall have the same force and effect as if the Joint Petitioners had fully litigated this proceeding.

42. This Settlement is proposed by the Joint Petitioners to settle all issues in the instant proceedings. If the Commission does not approve the Settlement and the proceedings continue, the Joint Petitioners reserve their respective procedural rights, including the right to present additional testimony and to conduct full cross-examination, briefing and argument. The Settlement is made without any admission against, or prejudice to, any position which any Petitioner may adopt in the event of any subsequent litigation of these proceedings, or in any other proceeding.

Settlement ¶¶ 41-42. Thus, it is inconsistent for PAWC to argue in its request for relief that the Commission should not reject or modify the proposed settlement because a party could appeal or withdraw, or the case could be remanded. PAWC Exc. at 34-35. PAWC avers that “[i]n the proceedings on remand, it is unlikely that the Joint Petitioners would be willing to enter into another unanimous settlement, considering that the instant unanimous settlement was disapproved by the ALJ.” *Id.* at 34. Yet that just occurred in the *PAWC AMP* proceeding. The OCA cannot predict what its position would be if the Commission were to reject or modify the settlement because it would be based on the facts as then known, and it is inappropriate for PAWC to speculate and hypothesize about what they or any party might do if this were to occur. The OCA presumes that all parties would act in good faith based on the record and the law.

It is also concerning that the settlement under review purports to reserve the parties’ procedural rights, “including the right to present additional testimony and to conduct full cross-examination, briefing and argument” but PAWC suggests that the Commission would violate the six-month timeframe in Section 1329(d)(2) if it remands the case or otherwise allows the parties to exercise those rights.<sup>6</sup> PAWC Exc. at 34-35. Moreover, PAWC’s position seems inconsistent

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<sup>6</sup> There is precedent for a Section 1329 proceeding to be remanded. *Application of Aqua Pennsylvania Wastewater, Inc.*, 2021 Pa. PUC LEXIS 89 (*DELCORA*). There, the ALJs recommended denying the application. When there were new developments that the utility wanted to afford the Commission time to consider before issuing its Order,

with its own statements that the parties' reservation of their procedural rights to continue litigation is a protection that is in the public interest. It stated:

This provision is standard in settlements in Commission proceedings. It protects all of the Joint Petitioners by allowing them to withdraw from the Settlement if the Commission modifies the Settlement in a way they find unacceptable. This provision makes parties to a Commission proceeding more willing to settle than they otherwise might be. It is therefore in the public interest and should be approved.

Settlement, Att. 1 (PAWC Statement in Support) at 31.

The Commission recognizes the benefits of settlements, for many of the same reasons identified by PAWC about avoided costs and conservation of administrative resources. 52 Pa. Code § 69.401; PAWC Exc. at 3-4, 34. But PAWC goes too far when it suggests that the Commission must approve this settlement because disapproval would cause additional litigation in this case and all future cases. *See* PAWC Exc. at 3-4 (“on a going forward basis, it will cause litigants and the Commission to expend considerable additional resources litigating cases to conclusion because of the heightened uncertainty surrounding the Commission’s policy favoring settlements”); *see also* PAWC Exc. at 34. That is akin to saying that settlement versus litigation is always in the public interest. That is not true, as it depends on what the parties agree to in settlement.

To the contrary, despite the concept that settlements can save resources, “the Commission does not simply rubber stamp settlements without determining whether the terms are in the public interest.” *Application of Aqua Pennsylvania, Inc.*, A-2022-3034143, 11-12 (Order July 13, 2022) (citing *Pa. PUC v. Philadelphia Gas Works*, M-00031768 (Order Jan. 7, 2004); *Pa. PUC v. CS Water and Sewer Assoc.*, 74 Pa. PUC 767 (1991); *Pa. PUC v. Philadelphia Elec. Co.*, 60

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the utility filed a letter to the Commission requesting to waive the statutory deadline. *Id.* at 15. The Commission entered an order vacating the Recommended Decision, reopening the record, remanding the proceeding to the Office of Administrative Law Judge for further proceedings. *Id.*

Pa. PUC 1 (1985)). Rather, the decisions of the Commission must be supported by substantial evidence under 2 Pa. C.S. § 704, and the settlement parties have the burden to show the particular terms and conditions of each settlement are in the public interest. 66 Pa. C.S. § 332(a). *See, e.g., PAWC AMP* at 9; *Implementation of Chapter 32 of the Public Utility Code Regarding Pittsburgh Water and Sewer Authority -- Stage 1*, 2020 Pa. PUC LEXIS 270, \*116 (“substantial evidence consistent with statutory requirements must support the proposed settlement”) (citing *Popowsky v. Pa. PUC*, 805 A.2d 637 (Pa. Cmwlth. Ct. 2002); *ARIPPA v. Pa. PUC*, 792 A.2d 636 (Pa. Cmwlth. Ct. 2001)). The parties to this proposed settlement agreed that is the case here based on the record and state of the law known to them at the time they agreed to the settlement, however, the fact of their agreement can only *inform* the Commission’s determination, not dictate it. In every Section 1102 application, the determination must be rooted in facts that are specific to the transaction. This requires the Commission to conduct a fact-based evaluation and fact-based balancing such that any approval must demonstrate that the public is better off – on net – because of the transaction than it would be in the absence of the transaction. *Popowsky v. Pa. PUC*, 937 A.2d 1040 (Pa. 2007); *City of York v. Pa. PUC*, 295 A.2d 825 (Pa. 1972); *McCloskey v. Pa. PUC*, 195 A.3d 1055 (Pa. Cmwlth. Ct. 2018); *Cicero*.

### III. CONCLUSION

The OCA joined the settlement in this case and submitted a Statement in Support of that settlement. The Administrative Law Judge has recommended that the settlement be denied and PAWC and the Butler Parties have filed exceptions to that recommendation. For the reasons set forth above, as well as within the record of this case, the OCA respectfully requests that, if the Public Utility Commission grants the Exceptions of PAWC and the Butler Parties, it should not adopt the assertions of fact and law contained in those Exceptions that are contested by the OCA.

Respectfully Submitted,



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