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October 16, 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 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 Secretary Chiavetta:

Attached for electronic filing please find the Joint Response of Center Township and Summit Township to Joint Motion of Pennsylvania-American Water Company, the Butler Area Sewer Authority, The City of Butler, and the Township of Butler to Strike Reply Exceptions.

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

Respectfully submitted,

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

cc: Center Township Supervisors (*by email*)
Summit Township Supervisors (*by email*)
All Parties Listed on Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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 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

DOCKET NO. A-2022-3037047

JOINT RESPONSE OF CENTER TOWNSHIP AND SUMMIT TOWNSHIP TO JOINT MOTION OF PENNSYLVANIA-AMERICAN WATER COMPANY, THE BUTLER AREA SEWER AUTHORITY, THE CITY OF BUTLER, AND THE TOWNSHIP OF BUTLER TO STRIKE REPLY EXCEPTIONS

Filed Jointly on Behalf of Protestants:

**CENTER TOWNSHIP,
BUTLER COUNTY, PENNSYLVANIA
AND SUMMIT TOWNSHIP, BUTLER
COUNTY, PENNSYLVANIA**

Counsel of Record for these Parties:

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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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 :

**JOINT RESPONSE OF CENTER TOWNSHIP AND SUMMIT TOWNSHIP TO JOINT
MOTION OF PENNSYLVANIA-AMERICAN WATER COMPANY, THE BUTLER
AREA SEWER AUTHORITY, THE CITY OF BUTLER, AND THE TOWNSHIP OF
BUTLER TO STRIKE THE REPLY EXCEPTIONS**

I. INTRODUCTION

1. Pennsylvania-American Water Company (hereinafter “PAWC”), and Butler Area Sewer Authority, the City of Butler and Butler Township (hereinafter collectively referred to as “BASA”), jointly filed a Motion to Strike the Joint Reply of Protestants, Center Township and Summit Township (hereinafter collectively referred to as “Center/Summit”). Center/Summit’s Reply was filed in response to the Exceptions filed by PAWC and BASA to ALJ Marta Guhl’s Recommended Decision that the PUC both set aside a Settlement Agreement entered into between PAWC, BASA, the Office of Consumer Advocate, the Office of Small Business Advocate, and

the Bureau of Investigation and Enforcement, and deny the Application of PAWC to purchase the assets of BASA.¹

2. As set forth below, it is the position of Center/Summit that the Motion to Strike is both procedurally invalid and substantively deficient and should therefore be dismissed.

II. BACKGROUND

3. In their Motion to Strike, PAWC and BASA refer to a host of matters which are irrelevant and, in many cases, not of record. This will be dealt with in more detail below.

4. For purposes of this Response, it is sufficient to refer the docket and the Recommended Decision of ALJ Guhl, which discloses:

a. July 28, 2023 – On this date, the first day of scheduled evidentiary hearings, BASA, PAWC, the Office of Consumer Advocate, the Office of Small Business Advocate, and the Bureau of Investigation and Enforcement advise the ALJ that they have reached a Settlement Agreement.

b. August 3, 2023 – Although discussion was had that Center/Summit may join in the Settlement Agreement at the time of the evidentiary hearing, Summit Township and then Center Township, report to the ALJ that, after deliberation of their respective Boards of Supervisors, they will not oppose the Settlement Agreement.²

c. September 14, 2023 – ALJ Guhl issues her Recommended Decision, as aforesaid, that the Settlement Agreement be set aside and that the Application of PAWC to purchase BASA³ be denied.

¹ (The singular entity).

² Center/Summit, as Municipalities of the Second Class are subject to the Pennsylvania Sunshine Act and may only make such a decision at an advertised public meeting. *See*, 65 Pa. C.S.A. 704 of the Act entitled “Open Meetings,” which states, in pertinent part: “Official action and deliberations by a quorum of members of an agency shall take place at a meeting open to the public...”.

³ (The singular entity).

d. September 22, 2023 – PAWC and BASA file Exceptions to the Recommended Decision of ALJ Guhl.

e. September 26, 2023 – Center/Summit files a Joint Reply to the Exceptions arguing that the decision of the PUC must follow the intervening decision of the Commonwealth Court in *Cicero v. Pa. PUC*, 2023 Pa. Commw. LEXIS 120, issued on July 31, 2023 (rehearing denied on September 26, 2023), (hereinafter referred to as “*Cicero*”). In that matter, in a relatively similar fact pattern, the Commonwealth Court affirmed a similar Recommendation made by ALJ Guhl involving the sale of the East Whiteland Township sewage system.

5. Despite the multitude of attempts by PAWC and BASA to conflate the meaning of entering into a settlement agreement versus not opposing a settlement agreement, because Center/Summit is not a party to the Settlement Agreement in this matter, Center/Summit has both the right and the corresponding duty to raise the issue of the intervening decision in *Cicero*.

6. Even a cursory review of the Reply of Center/Summit to the Exceptions of PAWC and BASA reveals that the focus of Reply is presenting legal argument that ALJ Guhl did indeed follow the analysis of the Commonwealth Court in *Cicero* when rejecting the Settlement Agreement and Application of PAWC to purchase BASA.⁴ Center/Summit does not reargue the testimony it presented; nor did it submit extraneous additional facts into evidence. Instead, Center/Summit properly made a responsive argument based upon the intervening precedent.

III. THE MOTION TO STRIKE IS PROCEDURALLY INVALID

7. 52 Pa. Code § 5.533 requires Exceptions to ALJ Recommendations to be filed within 20 days of a Recommended Decision (subject, as here, to a shorter time period as may be directed by the PUC). § 5.535 allows Replies to Exceptions to be filed 10 days after the filing of

⁴ (The singular entity).

the Exceptions (subject, as here, to a shorter time period as may be directed by the PUC). The Code does not provide for any further filings in response to ALJ recommendations. As a general rule, and in this specific matter, filings after Reply Exceptions are procedurally invalid.

8. For example, in the unreported decision of *Boatin v. PUC*, 2009 Pa. Commw. Unpub. 64 (2009), the Commonwealth Court affirmed an ALJ's disregard of a Motion to Strike Exceptions as being beyond the scope of §5.535. In a similar vein, a Response to a Reply to an Exception was held to be invalid in *Gofort v. Penn Elec. Co.*, 2020 Pa. PUC LEXIS 617, F-2019-301348.⁵

9. In *Grell v. Suez Water Pa., Inc.*, 2022 Pa. PUC LEXIS, n.1, C-2019-30122992, the PUC held that no filings should be allowed beyond Reply Exceptions, "to establish a sense of finality to a proceeding." In *Glen Riddle Station, L.P. v. Sunoco Pipeline, L.P.*, 2020 Pa. PUC LEXIS 211, C-2020-3023129, the PUC stated that a "surreply" is to be disregarded. The PUC further stated that reference to precedential case law and arguments asserted therefrom does constitute properly made arguments for Reply Exceptions. *Id.* Center/Summit did exactly that - - make reference to precedential case law and made its arguments therefrom in its Reply Exceptions.

10. In support of its Motion to Strike, PAWC and BASA attaches a series of documents, by use of Verification, which purport to show that Center/Summit is playing fast and loose, or, in the words of PAWC and BASA, "sandbagging". The introduction of extraneous documents to a preliminary objection, such as the Motion to Strike, is referred to as a speaking objection or a speaking demurrer.

⁵ In a very limited circumstance, the Commonwealth Court did allow a Motion to Strike a Reply Exception when the Reply Exception sought to introduce new evidence. *See, Hess v. Pa. PUC*, 107 A.3d 246 (Pa. Cmwlth. 2023). However, this case provides the very opposite because the parties that seek to introduce new evidence are PAWC and BASA in their Motion. Center/Summit's Reply is limited to a review of the Recommended Decision of ALJ Guhl and the intervening decision in *Cicero*.

11. A speaking demurrer is defined as “one which, in order to sustain itself, requires the aid of a fact not appearing on the face of the pleading objected to, or, in other words, which alleges or assumes the existence of a fact not already pleaded, and which constitute the ground of objection and is condemned both by the common law and the code system of pleading.” *Regal Indus. Corp. v. Crum & Forster, Inc.*, 890 A.2d 395 (Pa. Super. 2005), quoting BLACK’S LAW DICTIONARY 299 (6th ed. 1991). A speaking demurrer cannot be considered in sustaining a preliminary objection. *Regal Indus. Corp. at Id.*

12. Here, PAWC and BASA utilize the outside exhibits to assert that Center/Summit have engaged in a twofold course of fast and loose conduct. The first is an implication that a recommendation of entering into the Settlement Agreement was not carried through. On the contrary, the Board of Supervisors determined at an open meeting held pursuant to the Pennsylvania Sunshine Act (*see, fn. 2, infra.*), they would not enter into the Agreement but would, instead, not oppose the Agreement. The second claim of “sandbagging,” according to PAWC and BASA, was the Reply to the Exceptions was filed after Center/Summit agreed not to oppose the settlement, despite PAWC and BASA addressing the intervening precedent in *Cicero*. In other words, PAWC and BASA are saying that they can address the intervening case of *Cicero*, but Center/Summit cannot.

13. PAWC and BASA avoid stating the obvious, that the Pennsylvania Sunshine Act requires entering into a Settlement Agreement to be undertaken by the full Board at a public meeting, including the right of the majority of Supervisors to accept, reject, or, in this case, not oppose a settlement agreement. And yet, PAWC and BASA attempt to portray Center/Summit’s compliance with the Sunshine Act as malevolent. The speaking objections of PAWC and BASA are a classic example of why the “no surrebuttal to Exception Replies” rule exists. PAWC and

BASA seek to introduce into evidence documents outside the record; yet, no mechanism for the resolution of a disputed fact exists. There exists no method to ascertain whether the introduction of evidence is prejudicial, relevant or admissible, from which it asserts conclusions of fact.

14. In conclusion, PAWC and BASA themselves attempt to play fast and loose by introducing extraneous “evidence” of sandbagging by Center/Summit. To grant such a dubious Motion, which is, in reality, a disguised surrebuttal to a Reply Exception, is in contravention of the due process rights of Center/Summit to respond to the Exceptions of PAWC and BASA.

IV. THE MOTION TO STRIKE IS SUBSTANTIVELY DEFICIENT

15. PAWC and BASA assert in their Argument A that Center/Summit waived the ability to file a Reply Exception because Center/Summit did not raise the issues before the close of evidence. [Motion to Strike at π 31].

16. PAWC and BASA, as did all parties, stipulated to the record and all the other parties, except Center/Summit, entered into the Settlement Agreement. Yet, in numerous instances in their Exceptions, PAWC and BASA cited to matters outside the Settlement Agreement. For example, the Reply Exceptions of the OCA state four key areas⁶ of disagreement as to the state of the record. [OCA Reply Exceptions at p. 2].

17. The OCA also pointed out in their Reply Exceptions:

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.*

⁶ OCA stated:

“- 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.”

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.

Id. at p. 2, fn. 3.

18. If PAWC and BASA are permitted to go outside the record in their Exceptions to engage in “wild speculation that is unbecoming and inappropriate,” as well as matters which are not agreed upon, then it logically follows that Center/Summit must be able to file a Reply to Exceptions to illustrate how the ALJ's Recommended Decision comports with the Commonwealth Court decision in *Cicero*. In other words, because PAWC and BASA engage in fast and loose conduct in their Exceptions, Center/Summit must be given a chance to respond, otherwise their due process rights will be violated.

19. The next substantive argument asserted by PAWC and BASA is set forth in paragraph 41 of their Motion, which states:

The Commission has held that issues raised for the first time in a reply brief cannot be considered because that would violate the due process rights of the other parties, who cannot file a response. *See, e.g., Sattar v. Aqua Pennsylvania, Inc.*, C-2010-2169756 (Opinion and Order entered Jul. 28, 2011) p. 6. Similarly, the Townships should not be permitted to change their positions in Reply Exceptions because that would deny the other Parties an opportunity to respond to the Townships' new arguments.

20. The Motion to Strike, however, fails to identify a single argument raised Center/Summit that was not raised below. Instead, in sweeping strokes, PAWC and BASA argue

that Center/Summit's Reply Exceptions raise new issues that must be addressed by PAWC and BASA. This argument lacks merit because Center/Summit's Reply Exceptions follow the ALJ's opinion quite succinctly, and assert no new issues that were not raised by the ALJ herself or that were not raised by PAWC and BASA in their Exceptions pertaining to *Cicero*.

21. In addition, *Sattar*, on its face, is inapplicable to this matter. In *Sattar*, The ALJ set a briefing schedule for the issues raised by Complainant, requiring Main Briefs followed by Reply Briefs. The Complainant did not file a Main Brief, and thus the Commission held that the Complainant was precluded from filing a Reply Brief. In the instant case, no Main Brief was required to be filed by Center/Summit. The Secretarial letter instead states that exceptions are to be filed by September 21, 2023, and that replies to exceptions are to be filed by September 26, 2023. [Secretarial letter dated September 14, 2023].

22. Moreover, PAWC and BASA's assertion that they cannot respond to the Reply to Exceptions of Center/Summit is not a violation of due process. Instead, the inability to respond is established by 52 Pa. Code § 5.533 and § 5.535. According to the Administrative Rules of Procedure, PAWC and BASA are permitted to file Exceptions and Center/Summit to file Reply Exceptions. PAWC and BASA raise the issue of *Cicero* in their Exceptions. Center/Summit limited their Reply Exceptions to the issues presented by *Cicero*. PAWC and BASA are not now permitted to file surrebuttal or introduce new evidence. But here, they attempt to do so by means of a Motion to Strike with its speaking objection. Indeed, it is PAWC and BASA that are playing fast and loose with the Rules of Procedure.

V. CONCLUSION

23. Even though Center/Summit did not oppose the Settlement Agreement of the other parties, due to the intervening decision by the Commonwealth court in *Cicero*, which affirmed the

decision of ALJ Guhl in a substantially similar matter, it became proper for Center/Summit to file a Reply to the Exceptions of PAWC and BASA of ALJ's Guhl's Recommended Decision for the PUC to: (1) not adopt the Settlement Agreement of the parties; and (2) reject the Application of PAWC to purchase BASA.⁷

24. Center/Summit's Reply to Exceptions does not repeat the evidence submitted by Center/Summit, nor does it introduce new factual matters; it instead addresses how the ALJ's decision in *Cicero* comports with the ALJ's Recommended Decision in this matter, which is a typical and permissible use of a Reply Exception, made necessary by the intervening precedent in *Cicero*.

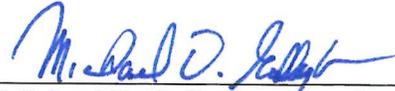
25. PAWC and BASA, on the other hand, play fast and loose with the Rules of Procedure by filing a Motion to Strike, which is nothing more than disguised impermissible surrebuttal, utilizing a speaking objection or speaking demurrer outside of the record. PAWC and BASA complain Center/Summit are acting outside the record (which they are not); yet, act outside the record themselves. These hands are certainly not clean.

⁷ (The singular entity).

26. For the reasons and the reasoning set forth above, the Motion to Strike filed by PAWC and BASA should, without hesitation, be denied.

Respectfully submitted,

GALLAGHER LAW GROUP

A handwritten signature in blue ink, appearing to read "Michael D. Gallagher", is written over a horizontal line.

Michael D. Gallagher, Esquire

PA I.D. No. 59237

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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

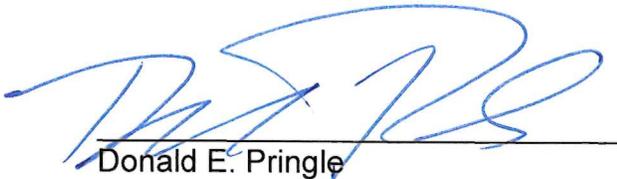
In re: Application of Pennsylvania-American Water :
Company under Sections 1102(a) and 1329 of the :
Pennsylvania Public Utility Code, 66 Pa C.S. §§ 1102(a) :
and 1329, for approval of (1) the transfer, by sale, to :
Pennsylvania-American Water Company, of substantially : Docket No. A-2022-3037047
all of the assets, properties and rights related to the :
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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 :

VERIFICATION

I, Donald E. Pringle, of the Center Township Board of Supervisors, hereby state that the facts above set forth are true and correct to the best of my knowledge, information and belief. I understand that the statements herein are made subject to the penalties of 18 Pa. C.S. § 4904 (relating to unsworn falsification to authorities).

Date: _____

10/16/23



Donald E. Pringle

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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) :
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Butler, portions of the Borough of East Butler, and portions :
of the Townships of Butler, Center, Connoquenessing, :
Oakland, and Summit, in Butler County, Pennsylvania :

VERIFICATION

I, Willie Adams, Chairman of the Summit Township Board of Supervisors hereby state that the facts above set forth are true and correct to the best of my knowledge, information and belief. I understand that the statements herein are made subject to the penalties of 18 Pa. C.S. § 4904 (relating to unsworn falsification to authorities).

Date: 10/13/2023



Willie Adams, Chairman

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that I have this 16th day of October, 2023 served a true copy of the foregoing Joint Response of Center Township and Summit Township to Joint Motion of Pennsylvania-American Water Company, the Butler Area Sewer Authority, the City of Butler, and the Township of Butler, to Strike Reply Exceptions in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

VIA ELECTRONIC MAIL ON OCTOBER 16, 2023

Administrative Law Judge Marta Guhl
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VIA U.S. MAIL, POSTAGE PREPAID ON OCTOBER 16, 2023

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