

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

October 25, 2023

Via Electronic Mail Only

The Honorable Katrina L. Dunderdale
Office of Administrative Law Judge
Pennsylvania Public Utility Commission
Piatt Place
301 5th Avenue, Suite 220
Pittsburgh, PA 15222

Re: Application of Pennsylvania-American Water Company under Sections 1102(a) and 1329 of the Pennsylvania Public Utility Code to acquire the wastewater collection and conveyance system owned by the Borough of Brentwood and to provide wastewater service to the public in the Borough of Brentwood in Allegheny County, Pennsylvania Docket No. A-2021-3024058

Dear Judge Dunderdale:

Enclosed please find the Answer of the Office of Consumer Advocate to the Pennsylvania-American Water Company's Motion to Compel in the above-referenced proceeding. As required under the Commission's regulations, the Office of Consumer Advocate's Answer is accompanied by a verification in accordance with 52 Pa. Code Section 1.36.

Copies have been served as indicated on the enclosed Certificate of Service, in accordance with the Prehearing Order dated October 18, 2023.

Respectfully submitted,

/s/ Andrew J. Zerby
Andrew J. Zerby
Assistant Consumer Advocate
PA Attorney I.D. # 332222
AZerby@paoca.org

Enclosures:

cc: Nicholas Miskanic, ALJ's Legal Assistant (**email only**: nmiskanic@pa.gov)
PUC Secretary Rosemary Chiavetta (**via e-filing only**)
Certificate of Service

*4886-533-6490

CERTIFICATE OF SERVICE

Application of Pennsylvania-American Water :
Company under Sections 1102(a) and 1329 of :
the Pennsylvania Public Utility Code to acquire : Docket No. A-2021-3024058
the wastewater collection and conveyance system :
owned by the Borough of Brentwood and to provide:
wastewater service to the public in the Borough of :
Brentwood in Allegheny County, Pennsylvania :

I hereby certify that I have this day served a true copy of the following document, the Office of Consumer Advocate's Answer to Pennsylvania-American Water Company's Motion to Compel, 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 October 2023.

SERVICE BY E-MAIL ONLY

Carrie B. Wright, Esquire
Michael A. Podskoch, Jr., Esquire
Bureau of Investigation & Enforcement
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17120
carwright@pa.gov
mpodskoch@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

Elizabeth Rose Triscari, Esquire
Erin K. Fure, Esquire
Pennsylvania-American Water Company
852 Wesley Drive
Mechanicsburg, PA 17055
elizabeth.triscari@amwater.com
erin.fure@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

Thomas Wyatt, Esquire
Matthew S. Olesh, Esquire
Sydney N. Melillo, Esquire
Obermayer Rebmann Maxwell & Hippel LLP
Centre Square West
1500 Market Street, Suite 3400
Philadelphia, PA 19102
Thomas.Wyatt@obermayer.com
Matthew.Olesh@obermayer.com
Sydney.Melillo@obermayer.com
Counsel for the Borough of Brentwood

SERVICE BY E-MAIL ONLY (continued)

Scott T. Wyland, Esquire
Elana D. Schnall, Esquire
Salzmann Hughes, P.C.
1801 Market Street, Suite 300
Camp Hill, PA 17011
swyland@salzmannhughes.com
eschnall@salzmannhughes.com
Counsel for ALCOSAN

Chester R. Babst, III, Esquire
Robert Max Junker, Esquire
Laura Stone, Esquire
Babst Calland Clements & Zomnir, P.C.
603 Stanwix Street
Two Gateway Center, 6th Floor
Pittsburgh, PA 15222
cbabst@babstcalland.com
rjunker@babstcalland.com
lstone@babstcalland.com
Counsel for ALCOSAN

/s/ Andrew J. Zerby
Andrew J. Zerby
Assistant Consumer Advocate
PA Attorney I.D. # 332222
AZerby@paoca.org

Christine Maloni Hoover
Deputy Consumer Advocate
PA Attorney I.D. # 50026
CHoover@paoca.org

Aron J. Beatty
Senior Assistant Consumer Advocate
PA Attorney I.D. # 86625
ABeatty@paoca.org

Counsel for:
Office of Consumer Advocate
555 Walnut Street
5th Floor, Forum Place
Harrisburg, PA 17101-1923
Phone: (717) 783-5048
Dated: October 25, 2023
*4862-7940-4170

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

In re: Application of Pennsylvania-American Water Company for Approval of the Transfer, by Sale, of Substantially all of the assets, properties and rights related to the wastewater collection and conveyance system Owned by Borough of Brentwood and the rights to begin to offer or furnish wastewater service to the public in The Borough of Brentwood, Allegheny County, Pennsylvania :
: Docket Nos. A-2021-3024058 *et al.*

ANSWER OF
THE OFFICE OF CONSUMER ADVOCATE
TO PENNSYLVANIA-AMERICAN WATER COMPANY’S
MOTION TO COMPEL

Pursuant to 52 Pa. Code § 5.342(g)(1) the Pennsylvania Office of Consumer Advocate (OCA) hereby files this Answer to the Pennsylvania-American Water Company’s (PAWC or the Company) Motion to Compel (Motion) filed on October 23, 2023. In support of this Answer, the OCA submits the following:

I. INTRODUCTION

On Tuesday, October 17, 2023, Pennsylvania-American Water Company served discovery (PAWC Set I) upon the OCA. The OCA orally communicated its objections to this discovery to PAWC on Thursday, October 19, 2023. The OCA and PAWC were unable to resolve the discovery dispute informally. The OCA filed its Objections to PAWC Set I Nos. 1(c), 3, 4, 7, and 8 on October 20, 2023. The OCA submits that PAWC Set I 1(c) requests information which is privileged, confidential, and not discoverable pursuant to 53 Pa. Code § 5.321(c). Furthermore, the OCA Submits that PAWC Set I No. 3, 4, 7, and 8 are overly burdensome, do not seek evidence

which is relevant to a claim or defense, are not of reasonable probative value, or are not reasonably calculated to lead to the discovery of admissible evidence.

With respect to relief, the OCA requests that the Commission deny the Motion to Compel, sustain the OCA's Objections and find that PAWC Set I Nos. 1(c), 3, 4, 7, and 8 seek responses that are either privileged attorney work product or unreasonably burdensome, irrelevant to any claim or defense, and an unreasonable annoyance.

II. LEGAL STANDARDS

Commission regulations allow for a participant to obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of another party or participant. 52 Pa. Code §5.321(c). While discovery under Commission regulations is broad, it is not without its limitations. 52 Pa. Code Section 5.361(a) limits discovery by stating:

(a) Discovery or deposition is not permitted which:

- (1) Is sought in bad faith.
- (2) Would cause unreasonable annoyance, embarrassment, oppression, burden or expense to the deponent, a person or party.
- (3) Relates to matter which is privileged.
- (4) Would require the making of an unreasonable investigation by the deponent, a party or witness.

52 Pa. Code § 5.361(a)

Privileges which protect information from discovery include attorney client privilege, attorney work product privilege, and deliberative process privilege. The Commission recognized the deliberative process privilege in its holding in *Andrezeski, et al. v. Pennsylvania Electric Company*, 71 Pa. PUC 56 (1989) (*Andrezeski*), in which the Commission denied requested access to a Commission Staff report and the materials used in the preparation of the Staff report because those documents were privileged. The

Commission explained its reasons for this privilege by stating “[a]fter careful review of this issue, we are of the opinion that the material requested by Bethlehem constitutes a confidential internal staff report to the Commission which is protected by the deliberative process privilege. . . . it would be improper to allow a probe of the mental processes of the Commission as embodied in the staff report.” *Andrezeski*, 71 Pa. PUC at 4-5. Furthermore, the Commission stated that “the quality of agency decisionmaking would be seriously undermined if agencies were forced to operate in a fishbowl environment.” *Id.* at 5 (citing *Commonwealth of Pennsylvania v. Pennsylvania Public Utility Commission*, 17 Pa. Commonwealth Ct. 351, 331 A.2d 598 (1975)); see also *Petition of John M. Didonata, Attorney, for Disclosure of Pennsylvania Public Utility Commission Records Relative to Gas Explosion at 1842 Shallcross Avenue, Borough of Folcroft, Delaware County*, 73 Pa. PUC 547 (1990) (noting that a Commission staff report is protected by the deliberative process privilege “i.e., documents prepared by staff to advise the Commission. Here, the Commission staff’s investigative report falls squarely within the deliberative process privilege . . .”)

The attorney work product privilege and attorney-client privilege has been recognized by the Commission in *Pa. PUC et al, v. Pennsylvania American Water Co.*, 2011 Pa. PUC Lexis 1523* 26-28 (Opinion on Motion to Compel July 21, 2011) (finding that PAWC objection to interrogatory seeking invoices for non-rate case legal expense was legitimate and the information sought was covered by privilege, which in its objection PAWC claimed was both attorney work product and attorney client privilege.)

III. PAWC'S MOTION TO COMPEL SHOULD BE DENIED

The OCA objected to select questions of PAWC Set I because it sought responses which are either protected by attorney work product privilege or unreasonably burdensome, irrelevant to any claim or defense, and an unreasonable annoyance. In the subsections below, the OCA will respond to the arguments made by PAWC in its Motion to Compel and show how despite these arguments the objections made by the OCA are based in law and made to prevent the OCA from being forced to waste valuable time searching for overly burdensome, irrelevant documents or turning over valuable and protected attorney work product.

A. PAWC Set I No. 1(c) Seeks a Response Which is Protected by Attorney Work Product Doctrine.

In Question 1(c), PAWC explicitly requests that the OCA “*explain why*” it would object to PAWC’s proposed methodology for collecting Allegheny County Sanitary Authority (ALCOSAN) treatment charges in this case. In its Motion to Compel, PAWC attempts to turn the interrogatory into a search for a document, but that is not what PAWC requested. Specifically, the PAWC motion states that “it is possible that an OCA witness testified as to why that contractual billing arrangement,” or “it is possible that an OCA pleading,” would support the Company’s preferred billing arrangement. Motion at ¶ 14. The Company argues that “such a document” would not be privileged. Motion at ¶ 14.

Question 1(c), however, does not seek the production of past OCA testimony or pleadings. Rather, what it seeks are internal deliberations made within the OCA by and between its attorneys and the Consumer Advocate regarding its position on PAWC’s proposed contractual billing arrangement. As explained more fully below, this deliberation is protected by privilege and not discoverable.

As explained in the OCA's objection to this question, the OCA is established pursuant to Section 309-1, et seq. of title 71, Administrative Code of 1929. 71 P.S. §§ 309-1 to 309-7. The Consumer Advocate is statutorily vested with the duty to represent the interests of Consumers before the Public Utility Commission and may initiate proceedings "if in his judgment such may be necessary ..." 71 P.S. §§309-4(a). Specifically, Section 309-4(b) authorizes the Consumer Advocate to exercise his discretion in proceedings before the Commission. PAWC Set I No. 1(c) clearly seeks privileged information as to why the OCA would choose its preferred litigation position in this case. As such, the information requested is privileged.

Furthermore, PAWC Set I No. 1(c) seeks to discover information which is protected by attorney-client privilege and/or attorney work product doctrine. The OCA, by statute, includes attorneys appointed as Assistant Consumer Advocates. 71 P.S. §§ 309-3. Assistant Consumer Advocates are counsel to the Consumer Advocate and provide legal advice and representation to the Consumer Advocate about the issues that should or should not be pursued in a case and then act at the direction of the Consumer Advocate regarding the scope of issues to be pursued. PAWC Set I No. 1(c) asks for disclosure of these privileged communications between the Consumer Advocate and his legal counsel, which constitute communications covered by attorney-client privilege. In addition to being covered by the attorney-client privilege, PAWC Set I No. 1(c) likely delves into privileged attorney work product. The internal reviews and assessments made by the Consumer Advocate, Assistant Consumer Advocates, and other OCA staff for the Office of Consumer advocate comprise privileged information which is not discoverable under Commission rules.

The existence of attorney-client privilege and the work product doctrine when attorneys act in their professional capacity for governmental agencies is well-established. See, *Sedat Inc. v.*

Dept. of Env'tl. Res., 641 A.2d 1243, 1244 (Pa. Commw. 1994), citing *Okum v. Unemployment Compensation Bd. of Review*, 77 Pa. Commw. 386, 465 A.2d 1324 (1983). Therefore, pursuant to 52 Pa. Code Section 5.3(a)(3), the information requested in PAWC Set I No. 1(c) is not discoverable as it is privileged information.

Furthermore, since the filing of this motion by PAWC, the OCA has served its direct testimony on all parties, OCA Statements 1 and 2. The factual basis for the OCA's position on the issue of PAWC's proposed methodology for collecting ALCOSAN bills is provided in the OCA's direct testimony. Any legal arguments in support of the testimony and regarding the ALCOSAN billing issue will be made in the OCA's brief.

- B. PAWC Set I Nos. 3 and 4 are Overly Burdensome, Irrelevant to Any Material Issue, Position, or Defense of a Party and as Such is not Discoverable Pursuant to 52 Pa. Code §§ 5.321(c), 5.361(a)(2).

PAWC Set I Nos. 3 and 4 seeks "the caption and docket number for every application, rate proceeding or Section 507 proceeding in the last five years in which the OCA has participated in which a water and/or wastewater utility has proposed a contractual billing arrangement to collect amounts due to a third party" and "for every case listed in response to Interrogatory 3, please indicate whether the OCA opposed the proposed contractual billing arrangement." PAWC Set I No. 3, 4 (Emphasis added). PAWC seeks to force the OCA to waste its limited time and resources during an expedited case to scour five years' worth of litigation. The OCA objected to the above question on the grounds that it is overly burdensome in violation of 52 Pa. Code Section 5.361(a)(c) and is irrelevant to any material issue, position, or defense of a party in this case.

PAWC seeks to establish the reasonableness of the amount of information it seeks by showing how PAWC "limited" its request. Motion at ¶ 18. PAWC claims that it "reasonably limited" its request by seeking the caption and docket number of every 507 filing, rate case, or application made by a water and/or a wastewater utility to which the OCA was a party, and the

utility proposed a contractual billing arrangement to collect amounts due to a third party. Motion at ¶ 18. PAWC argues that the request only requires docket numbers and case titles, and as such is not burdensome. Motion at ¶ 19. This inquiry would require the OCA to search all rate-related dockets in the past five years and review all testimony and schedules where a supposed “contractual billing arrangement” was discussed in order to comply with the request. The OCA does not oppose the request because it is burdensome to list docket numbers and case captions. Rather, it is the massive investigation that would need to take place to review all water and wastewater cases to see if 1) there in fact were any matters that would fall within the overly broad and undefined term “contractual billing arrangements”; and 2) whether the OCA addressed such arrangement in testimony and/or pleadings. This is not reasonable.

In addition, PAWC’s interrogatory is unreasonably burdensome because the phrase “contractual billing arrangement to collect amounts due to a third-party” is extremely broad and could refer to myriad arrangements from any Commission-regulated utility. PAWC argues that the term “contractual billing arrangement” was explained to OCA as situations analogous to the PAWC proposal to collect ALCOSAN charges from customers. Motion at ¶ 17. This supposed “definition” of a contractual billing arrangement would make the review of all rate case materials over the last five years even more burdensome, not less, as judgment would need to be applied to determine if this standard was met.

PAWC argues that the requested review is not burdensome, explicitly referring to OCA Interrogatories Set I Nos. 12, 15, and 16 which each requested a response that included five years. Motion at ¶ 18. However, a crucial difference exists between the timeline requested by PAWC Set I, Nos. 3 and 4 and that requested by the OCA in OCA Interrogatories Set I Nos. 12, 15, and 16 in that the OCA’s interrogatories cited by PAWC all requested a five-year projection into the future

whereas PAWC seeks to force the OCA to search five years of history. The OCA requested a five-year projection to assess the impact of *this* acquisition on ratepayers. PAWC's comparison holds no merit.

Lastly, PAWC Set I Nos. 3 and 4 seek information which is not relevant, or of sufficient probative value to be reasonable or relative to the facts that are specific to this case. PAWC seeks information on the positions the OCA took in other cases, positions that were determined under a different set of facts, and involved cases to which PAWC may or may not have been a party.

In light of the unreasonable burden to produce, and irrelevance of, the information requested, the OCA requests that PAWC's Motion to Compel OCA responses to PAWC Set I Nos. 3 and 4 be denied, and the OCA's objections be sustained.

C. The Information Sought by PAWC Set I No. 7 is Irrelevant, Not of Reasonable Probative Value, and Overly Burdensome.

PAWC Set I No. 7 seeks any communication made with any group belonging to PAWC's undefined term of "anti-privatization group" that involved PAWC's proposed acquisition of the Brentwood System. This request would require the OCA investigate current and former personnel of the office including attorneys, support staff, and call center personnel to attempt to determine if any of them have communicated with a member or leader of an undefined group regarding PAWC's proposed acquisition of the Brentwood system. The investigation required to comply with this request would be an unreasonable burden and an unreasonable annoyance on the OCA, a burden and annoyance which is magnified when viewed in the limited timeline of the proceeding at hand and that fact that that that information sought is immaterial to the underlying transaction and legal standard.

PAWC attempts to justify this burden by claiming that through providing two examples of what would constitute an "anti-privatization" group and claiming that beyond that the term is self-

evident. PAWC Motion to Compel at 7, 8. The OCA does not agree. The OCA submits that if it asked consumers who contact the OCA if they were part of an “anti-privatization group,” there would not be a clear understanding of the term. For example, it is not clear whether this term includes any combination of individuals who had at any point in time voiced displeasure or opposition to a sale of a municipal asset to a privately-owned company. It is not clear whether this term is reserved for more disciplined opposition such as those parties filing a protest or another legal action. PAWC’s attempt to dispel the vagueness of its request by claiming that the term is “self-evident” does nothing to define the groups from which communications may or may not exist. Therefore, given the breadth and vagueness of the term “anti-privatization group,” PAWC Set I No. 7 is overburdensome and an unreasonable annoyance, as such it is prohibited by 52 Pa. Code Section 5.361(a)(2).

More importantly, however, PAWC Set I No. 7 seeks information which is not reasonably calculated to lead to admissible evidence. Given the vagueness and breadth of the information sought, material sought by the interrogatory could not be either relevant or of reasonably probative value to a claim or defense raised by any parties to this proceeding, which is required by 52. Pa. Code Section 5.321(c). PAWC is requesting that the OCA embark on a fishing expedition which would not advance any claim or defense that PAWC might make in the instant proceeding. The OCA’s ultimate position in this case will apply existing law to the evidence of record. The policy preferences of those with whom the OCA might have spoken is of no relevance to the Commission as it makes its determination regarding PAWC’s application.

Lastly, at the Prehearing Conference, Counsel for PAWC stated on the record that “in recent public input hearings in these cases have been that there has been, with regard to certain witnesses, a level of coordination with certain parties.” Telephonic Prehearing Conference

Transcript at 16 lines 13-16. Counsel for PAWC elaborated that “I was not making any specific allegations, particularly against the OCA. But we have seen coordination in prior public input hearings.” *Id.* at 17 lines 22-24. PAWC stated that they were not claiming allegations against the OCA, given these statements by PAWC counsel at the Prehearing Conference clarifying that they are not alleging anything against the OCA, it is unclear how the OCA’s communications that are sought by PAWC Set I No. 7 could reasonably lead to the admission of admissible evidence or prepare PAWC for cross-examination of witnesses as claimed by PAWC. PAWC Motion to Compel ¶27.

Therefore, PAWC’s Motion to Compel an OCA response to PAWC Set I No. 7 should be denied.

D. PAWC Set I No. 8 Seeks Information Which is Irrelevant, Not of Reasonable Probative Value, and Overly Burdensome.

The OCA incorporates its arguments in response to PAWC Set I No. 7 found in section C, above, as if fully restated herein.

In addition to the broad, irrelevant, and overly burdensome information sought by PAWC Set I No. 7, PAWC Set I No. 8 goes one step further in that it removes the limitation of the communications relating to the proposed acquisition of the Brentwood System by PAWC and instead seeks any communication made with an “anti-privatization group” regarding “any other proposed Section 1329 acquisition during the last five years.” PAWC Set I No. 8. This interrogatory seeks to force the OCA to scour five years’ worth of communications with consumers, to determine if they were made with a member of an undefined and vague group and pertained to a section 1329 acquisition. This request proves to be more of an unreasonable burden, unreasonable annoyance than PAWC Set I No. 7, and is more irrelevant and lacking in probative value to the case at hand than PAWC Set I No. 7. The request seeks communications that by the

wording of the interrogatory, do not relate to the proposed acquisition of the Brentwood System by PAWC. For these reasons, and those stated above in Section C, PAWC's Motion to Compel should be denied and the OCA's Objection to PAWC Set I No. 8 should be sustained.

III. CONCLUSION

Therefore, consistent with the arguments above, and 52 Pa. Code Sections 5.321(c) and 5.361, the OCA's Objections to PAWC Set I Nos. 1(c), 3,4,7, and 8 should be sustained and PAWC's Motion to Compel should be denied.

Respectfully submitted,

/s/ Andrew J. Zerby

Andrew J. Zerby
Assistant Consumer Advocate
PA Attorney I.D. # 332222
AZerby@paoca.org

Aron J. Beatty
Senior Assistant Consumer Advocate
PA Attorney I.D. # 86625
ABeatty@paoca.org

Counsel for:
Patrick Cicero
Consumer Advocate

Office of Consumer Advocate
555 Walnut Street, Forum Place 5th Floor
Harrisburg PA 17101-1923
(717) 783-5048
(717) 783-7152 (fax)

DATED: October 25, 2023

4872-2545-8570

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Application of Pennsylvania-American Water :
Company under Sections 1102(a) and 1329 of :
the Pennsylvania Public Utility Code to acquire : Docket No. A-2021-3024058
the wastewater collection and conveyance system :
owned by the Borough of Brentwood and to provide:
wastewater service to the public in the Borough of :
Brentwood in Allegheny County, Pennsylvania :

VERIFICATION

I, Patrick M. Cicero, hereby state that the facts set forth in the Office of Consumer Advocate's Answer to Pennsylvania-American Water Company's Motion to Compel, 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: October 25, 2023
*4860-2460-1994

Signature: _____



Patrick M. Cicero
Consumer Advocate

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