

PENNSYLVANIA PUBLIC UTILITY COMMISSION
Harrisburg, Pennsylvania 17120

Pennsylvania-American Water Company
- Wastewater

Public Meeting held February 22, 2024
3024058-OSA
Docket No. A-2021-3024058

MOTION OF VICE CHAIR KIMBERLY BARROW

This matter concerns the Application filed with the Commission by Pennsylvania American Water Company (PAWC or Company) on March 31, 2023, pursuant to Sections 507, 1102, and 1329 of the Public Utility Code (Code), 66 Pa. C.S. §§ 507, 1102, and 1329 (Application). In its Application, PAWC requested Commission approval of the acquisition of substantially all the assets, properties and rights related to the wastewater collection system (the System)¹ owned by the Borough of Brentwood (Borough or Brentwood), and the right of the Company to provide wastewater service in the areas served by the Borough. The Application also requested, pursuant to Section 1329(c)(2) of the Public Utility Code (Code), the Commission's approval to utilize fair market value for the ratemaking rate base of the System. Lastly, PAWC requested approval of an Asset Purchase Agreement (APA), as amended, dated March 2, 2023, the Cooperation Agreement between Brentwood and PAWC dated March 2, 2023,² as well as other municipal agreements to be assumed by PAWC as a result of the transaction, pursuant to Section 507 of the Code, 66 Pa. C.S. § 507.³

In the Recommended Decision issued on January 17, 2024, the ALJ recommended that the Commission deny the Application because PAWC did not meet its burden of establishing that there is an affirmative public benefit resulting from the acquisition of Brentwood's System.⁴ Today, the Commission considers the Exceptions filed by PAWC and the Borough.

¹ The System is located within, and is part of, the Allegheny County Sanitary Authority (ALCOSAN) regional interceptor system. Brentwood's customers receive wastewater treatment service from ALCOSAN through its wastewater treatment plant in Pittsburgh. The System receives sewage flow from two other municipalities, Whitehall Borough and the City of Pittsburgh via the Pittsburgh Water and Sewer Authority (the Upstream Municipalities), and discharges sewage flow into three other municipalities, Baldwin Borough, Whitehall Borough, and the City of Pittsburgh (the Downstream Municipalities). Brentwood does not charge the Upstream Municipalities for their flows into Brentwood's System, nor do the Downstream Municipalities charge Brentwood for Brentwood's sewage flows into their systems. Brentwood has entered into cost-sharing arrangements with other members of the ALCOSAN system for capital improvement projects. PAWC St. 2 at 6.

² As the Pittsburgh Zone Project Agreement of December 1, 1949, among ALCOSAN, the City of Pittsburgh, and the Borough (Z Agreement) cannot be directly assigned to PAWC, in order to ensure the preservation and enforcement of the Borough's rights and obligations under the Z Agreement, PAWC and Brentwood entered into the Cooperation and Allocation of Responsibilities Agreement (Cooperation Agreement), setting forth the rights and obligations under the Z Agreement that will be allocated to PAWC by Brentwood at the closing if the proposed transaction is approved. *See*, Application, Appendix A-25.3.

³ Application at ¶ 3; 66 Pa. C.S. § 507.

⁴ R.D. at 1.

PAWC Exceptions

In its Exception No. 1, PAWC, among other things, argues that the Recommended Decision erred in its conclusion that the net detriments of the transaction outweigh the net benefits for the public-at-large, the Borough's existing customers, and PAWC existing water and wastewater customers.⁵ In addition, PAWC contends that the Recommended Decision erred by not weighing the benefits against the detriments of the transaction as a whole.⁶

In its Exception No. 2, PAWC, *inter alia*, excepts to the Recommended Decision's finding that "[s]ome unknown portion of the Brentwood [inflow and infiltration] originates in upstream flows and PAWC is in error to argue that the facilities are used and useful."⁷

In its Exception No. 3, PAWC contends that the Recommended Decision erred by failing to rule on the several other issues presented by the Parties in the case, including Section 1329 issues and Section 507 approvals.⁸ The Company explains that the Commission does not have the benefit of the ALJ's reasoning on these issues that must be considered should the Commission disagree with the Recommended Decision.⁹

Brentwood's Exceptions

In its Exception No. 1, Brentwood argues that ALJ Dunderdale's Recommended Decision misapplies the legal standards in Section 1102 and 1103 as interpreted by Pennsylvania Courts. Brentwood's Exception No. 1 can best be viewed as suggesting ALJ Dunderdale failed to consider that Pennsylvania Courts have held a Certificate of Public Convenience does not have to be "absolutely necessary" as "not only would this approach be impractical and unrealistic, but it would also actually pose a danger to the health, safety, and welfare of the public."¹⁰

In its Exception No. 2, Brentwood argues that in addition to the erroneous standard it argues was applied, ALJ Dunderdale made erroneous factual findings that "ignore the clear, and numerous, public benefits that exist."¹¹ This trifurcated argument suggests the Recommended Decision: (1) did not consider all testimony given at the Public Input Hearings conducted in this matter; (2) mischaracterized the current service and capabilities of Brentwood; and (3) failed to consider all evidence of public benefits within the record.

In its Exception No. 3, Brentwood asserts the Recommended Decision seeks to supplant the reasoning and judgment of local elected officials by "creating a new legal standard and implementing public policy that requires a municipality to be providing worse service than the potential acquiring utility and/or to be in some form of financial distress for a transaction to be approved."¹²

⁵ PAWC Exc. at 7.

⁶ *Id.* at 8.

⁷ PAWC Exc. at 24 (quoting R.D. at 126-27).

⁸ PAWC Exc. at 28.

⁹ *Id.*

¹⁰ Brentwood Exc. at 10 (citing *Hess v. Pa. PUC*, 107 A.3d 246, 262 (Pa. Cmwlth. 2014)).

¹¹ Brentwood Exc. at 15.

¹² Brentwood Exc. at 24.

Disposition

I agree with the ALJ's recommendation to deny the Application because PAWC failed to present sufficient evidence to sustain a finding that substantial affirmative public benefits will result from the acquisition of the Brentwood System and the issuance of a Certificate of Public Convenience, pursuant to 66 Pa. C.S. §§ 507, 1102, 1103 and 1329. I also agree with the ALJ's conclusion that because there is not sufficient proof of a public benefit, the request to approve the APA, with the First Amendment, became moot because the APA is relevant only if the acquisition is approved. Furthermore, the ALJ determined that the other corollary issues became moot and so decided not to address them.¹³ I agree. Specifically, based upon the analyses under 66 Pa. C.S. §§ 1102 and 1103, that the alleged benefits to be realized from the proposed acquisition do not outweigh the resulting harms from it, it is not necessary to consider the additional approval requests under 66 Pa. C.S. §§ 507 and 1329.

For the above-mentioned reasons: (1) the Exceptions of PAWC and the Exceptions of Brentwood are denied; (2) the Recommended Decision is adopted; and (3) the Application of PAWC is denied, consistent with this Motion.

THEREFORE, I MOVE THAT:

1. That Exception No. 1 of Pennsylvania-American Water Company, filed on January 24, 2024, at Docket No. A-2021-3024058, is denied, consistent with this Motion.
2. That Exception Nos. 2 and 3 of Pennsylvania-American Water Company, filed on January 24, 2024, at Docket No. A-2021-3024058, are considered moot, consistent with this Motion.
3. That the Exceptions of the Borough of Brentwood, filed on January 24, 2024, at Docket No. A-2021-302058, are denied, consistent with this Motion.
4. That the Recommended Decision of Administrative Law Judge Katrina L. Dunderdale issued on January 17, 2024, at Docket No. A-2021-3024058, is adopted, consistent with this Motion.
5. That the Application filed by Pennsylvania-American Water Company pursuant to Sections 507, 1102, 1103, and 1329 of the Pennsylvania Public Utility Code, 66 Pa. C.S. §§ 507, 1102, 1103, and 1329 for approval of its acquisition of the wastewater collection system assets of the Borough of Brentwood, on March 31, 2023, and as amended on May 31, 2023, and July 7, 2023, at Docket No. A-2021-3024058, is denied, consistent with this Motion.

¹³ R.D. at 118-129.

6. The Office of Special Assistants prepare an Opinion and Order consistent with this Motion.

February 22, 2024
DATE


Kimberly Barrow, Vice Chair