



COMMONWEALTH OF PENNSYLVANIA

October 23, 2024

E-FILED

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

Re: Application of Appalachian Utilities, Inc. for a Certificate of Public Convenience Evidencing the Pennsylvania Public Utility Commission's Approval of the Transfer of 40% of Outstanding and Issued Stock in Appalachian Utilities, Inc. & Joint Application of Pennsylvania-American Water Company and Appalachian Utilities, Inc., Pursuant to Section 1102 of the Public Utility Code, for approval of (1) the transfer to American Water Works Company, Inc., by merger, of all property of Appalachian Utilities, Inc. used and useful in the public service; (2) the transfer to Pennsylvania-American Water Company, by merger, of all property of Appalachian Utilities, Inc. used or useful in the public service, (3) the right of Pennsylvania-American Water Company to begin to offer, render, furnish and supply water service to the public in the Borough of Avis and Townships of Pine Creek and Dunnstable, Clinton County, Pennsylvania, and (4) the abandonment by Appalachian Utilities, Inc. of all water service / Docket Nos. A-2024-3046068, A-2024-3046084, A-2024-3046092

Dear Secretary Chiavetta:

Enclosed please find the Main Brief, **PUBLIC VERSION**, on behalf of the Office of Small Business Advocate ("OSBA"), in the above-referenced proceedings.

Copies will be served on all known parties in these proceedings, as indicated on the attached Certificate of Service.

If you have any questions, please do not hesitate to contact me.

Sincerely,

/s/ Sharon E. Webb

Sharon E. Webb
Assistant Small Business Advocate
Attorney ID No. 73995

Enclosures

cc: Kevin Higgins
Parties of Record

Sharon E. Webb
Assistant Small Business Advocate
Attorney ID No. 73995

For: NazAarah Sabree
Small Business Advocate

Commonwealth of Pennsylvania
Office of Small Business Advocate
Forum Place
555 Walnut Street, 1st Floor
Harrisburg, PA 17101
(717) 783-2525
(717) 783-2831 (fax)

Date: October 23, 2024

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I. STATEMENT OF THE CASE

A. Procedural History

On February 1, 2024, the Pennsylvania-American Water Company. (“PAWC” or “Company”) and Appalachian Utilities, Inc. (“Appalachian”) filed an Application (“*Joint Application*”) with respect to the proposed (1) transfer to American Water Works Company, Inc. (“American”), by merger, of all of the property, of Appalachian Utilities, Inc. (“Appalachian”) used and useful in the public service; (2) the transfer, to PAWC, by merger of all property of Appalachian used or useful in the public service, (3) the right of PAWC to begin to offer, render furnish and supply water service to the public in the Borough of Avis and Townships of Pine Creek, and Dunnstable, Clinton County, Pennsylvania, and (4) the abandonment by Appalachian Utilities, Inc. of all water service to the public; and further grant all other approvals necessary, including affiliated interest approvals pursuant to Section 2102 of the Code, 66 Pa. C.S. §2102, for the transactions as described therein.

The Application was published in the February 17, 2024, Volume of the Pennsylvania Bulletin setting the date for filing protests and interventions for March 4, 2024. The OSBA filed a Formal Protest and Notice of Intervention on March 1, 2024.

Also on February 2, 2024, Appalachian Utilities, Inc. (“Appalachian” or the “Company”) filed for a Certificate of Public Convenience evidencing the Commission’s approval of the transfer by sale of title to 40% which is a minority of the issued and outstanding stock of Appalachian, a public utility providing water service in Pennsylvania, from present 100% majority stockholder Mr. Frank R. Sargent, Jr., President, Director and current Sole Shareholder of Appalachian Utilities, Inc. (“Seller”), to Mr. Kyle Gallagher, Co-Director, and Operations Manager of Appalachian Utilities (“Buyer”).

The Application was published in the February 17, 2024, Volume of the Pennsylvania Bulletin setting the date for filing protests and interventions for March 4, 2024. The OSBA filed a Notice of Intervention on March 1, 2024.

Administrative Law Judges (“ALJ”) Conrad Johnson and Charece Z. Collins were assigned to these proceedings and issued a Prehearing Conference Order on May 15, 2024, informing the parties that the initial Prehearing Conference on this case will be held on June 4, 2024. A prehearing conference was held on June 4, 2024, wherein a litigation schedule was established.

On August 7, 2024, a Notice of Judge Change was issued removing ALJ Collins from the proceeding.

The OSBA timely submitted the Direct (both Confidential and Public), and Surrebuttal (Public) Testimony its witness Kevin Higgins.

An Evidentiary hearing was held on October 2, 2024, at which the testimony of Mr. Higgins was admitted into the record.

The OSBA submits this Main Brief in accordance with the litigation schedule established in this case.

B. Overview of the Proposed Transaction

In the *Joint Application* PAWC and Appalachian requested that the Commission issue such Orders, Certificates of Public Convenience and other such relief as necessary to evidence its approval under Section 1102(a) of the Pennsylvania Public Utility Code (“Code”), 66 Pa. C.S. § 1102(a) by merger, of all property of Appalachian used or useful in public service. The merger

is to be accomplished by a capital stock transfer from Appalachian to PAWC.¹ As set out in further detail in Mr. Higgins' direct testimony, the agreed upon purchase price is [BEGIN

CONFIDENTIAL] [REDACTED]

[REDACTED] [END CONFIDENTIAL]²

Pennsylvania-American is a regulated public utility corporation duly organized and existing under the laws of the Commonwealth of Pennsylvania, and is engaged in the business of collecting, treating, storing, supplying, distributing, and selling water to the public, and collecting, treating, transporting, and disposing of wastewater and sewage for the public. Water and wastewater service is furnished by Pennsylvania-American to the public in a service territory encompassing more than 417 communities across the Commonwealth with a combined population of approximately 2,400,000. (*Joint Application*, p. 3)

Appalachian is a regulated public utility corporation since October 26, 1995 organized and existing under the laws of the Commonwealth of Pennsylvania engaged in treating, storing, supplying, distributing, and providing water service to approximately, 1,456 customers of which 1,353 are residential, 83 are commercial, 3 are industrial, 7 are public, 9 are fire protection and 1 is other within Avis Borough, Pine Creek Township, and Dunnstable Township, Clinton County ("System"). (*Joint Application*, p. 3-4)

II. Legal Standards

A. Burden of Proof

¹ Prior to the sale of the Company, Appalachian witness and owner Frank Sargent, Jr, requests to transfer 40% of the shares of Appalachian Stock to Mr. Kyle Gallagher, Co-Director and Operations Manager of Appalachian, prior to the sale of Appalachian to PAWC. (AUI Statement No. 1 at 2)

² OSBA Statement No. 1 (CONFIDENTIAL) at 6.

Section 332(a) of the Public Utility Code, 66 Pa. C.S. § 332(a), provides that the party seeking a rule or order from the Commission has the burden of proof in that proceeding. It is axiomatic that “[a] litigant’s burden of proof before administrative tribunals as well as before most civil proceedings is satisfied by establishing a preponderance of evidence which is substantial and legally credible.” *Samuel J. Lansberry, Inc. v. Pennsylvania Public Utility Commission*, 578 A.2d 600, 602 (Pa. Cmwlth. 1990).

B. Sections 1102 and 1103

Section 1102 of the Code states:

Upon the application of any public utility and the approval of such application by the commission, evidenced by its certificate of public convenience first had and obtained, and upon compliance with existing laws, it shall be lawful:

(1) For any public utility to begin to offer, render, furnish or supply within this Commonwealth service of a different nature or to a different territory....

(3) For any public utility or an affiliated interest of a public utility ... to acquire from, or transfer to, any person or corporation, including a municipal corporation, by any method or device whatsoever, including the sale or transfer of stock and including a consolidation, merger, sale or lease, the title to, or the possession or use of, any tangible or intangible property used or useful in the public service.

(66 Pa. C.S. §§ 1102(a)(1), (3)).

Furthermore, the Commission shall grant a certificate of public convenience “only if the commission shall find or determine that the granting of such certificate is necessary or proper for the service, accommodation, convenience, or safety of the public.” (66 Pa. C.S. § 1103(a)). In granting a certificate of public convenience, the Commission may impose such conditions as it deems to be just and reasonable. (66 Pa. C.S. § 1103(a)).

An applicant for a certificate of public convenience must demonstrate that it is technically, financially, and legally fit to own and operate the acquired public utility assets. *Seaboard Tank Lines v. Pa. Pub. Util. Comm'n*, 502 A.2d 762, 764 (Pa. Cmwlth. 1985); *Warminster Twp. Mun. Auth. v. Pa. Pub. Util. Comm'n*, 138 A.2d 240, 243 (Pa. Super. 1958). An applicant for a certificate of public convenience must also demonstrate that the transaction will “affirmatively promote the service, accommodation, convenience or safety of the public in some substantial way.” *City of York v. Pa. Pub. Util. Comm'n*, 449 Pa. 136, 151, 295 A.2d 825, 828 (1972).

III. Summary of Argument

The OSBA does not oppose the merger between PAWC and Appalachian with one caveat.

If the Commission approves the merger and PAWC seeks to include the Appalachian acquisition in rate base in a subsequent rate case, the OSBA recommends that the acquisition premium that is eligible for inclusion in rate base be limited to 34% above the depreciated original cost. While the PAWC’s overall rate base is not being determined in the instant proceeding, the OSBA is raising this issue because it believes it is appropriate for the Commission to consider the rate base implications as part of its assessment of the potential public benefits and detriments of the merger. (Higgins Direct p.p. 8-9).

IV. Argument

A. Substantial Public Benefits Test

The proposed merger and stock transfer will have no immediate effect on the rates for service to be charged to PAWC’s existing customers. (*Joint Application*, p. 11, ¶27).

Furthermore, according to the testimony of the Joint Applicant's witnesses, the Appalachian's owner plans to retire as soon as the proposed transactions are complete. (OSBA Statement No. 1, at 5).

Appalachian witness Mr. Sargent also testified that that upon purchase from the previous owners in 1995, Appalachian was not in compliance with the Clean Water Drinking Act and was facing daily fines from the Pennsylvania Department of Environmental Protection. Following the purchase, according to Mr. Sargent, Appalachian undertook a major system upgrade to bring the system into compliance in 1996, after which water quality complaints ceased. (OSBA Statement No. 1, p. 5)

Consequently, the OSBA does not oppose the Transaction set forth in the *Joint Application*.

B. Recommended Conditions for Approval

The OSBA recommends that the Commission adopt one condition as a condition for approval of the *Joint Application*. That is, if PAWC seeks to include the Appalachian acquisition in rate base in a subsequent rate case, the OSBA recommends that the acquisition premium that is eligible for inclusion in rate base be limited to only 34% above the depreciated original cost. Although PAWC's overall rate base is not being determined in this proceeding, it is appropriate for the Commission to consider the rate base implications as part of its assessment of the potential public benefits and detriments of the merger.

This amount, 34% above the depreciated original cost, is derived using the Reasonableness Review Ratio ("RRR"), which is a new valuation metric that the Commission has adopted as a guideline in its evaluation of Section 1329 applications. The RRR will be equal to the ratio of fair market value to depreciated original cost of a barometer group of similarly

situated investor-owned water utility companies. (OSBA Statement No. 1, at 19). The Commission calculates that the RRR is currently 1.68.³

The OSBA is cognizant of the fact that the Commission will use the RRR as a metric in evaluating Section 1329 cases, and technically it would not be directly applicable to an acquisition or merger between two investor-owned utilities as proposed in this proceeding. Nevertheless, the parties, the ALJ, and the Commission are all fully aware of the impact that Section 1329 has had on water and wastewater rates across the Commonwealth. Therefore, the OSBA recommends utilizing the proposed RRR in this manner to provide a useful benchmark for determining the appropriate acquisition premium that is eligible for inclusion in customer rates.

³ Docket No. M-2016-2543193, Tentative Supplemental Implementation Order, February 1, 2024, at 7.

V. Conclusion and Requested Relief

Wherefore, OSBA respectfully requests that ALJ and Commission approve the *Joint Application* with the condition recommended by the OSBA:

If PAWC seeks to include the Appalachian acquisition in rate base in a subsequent rate case, the acquisition premium that is eligible for inclusion in rate base shall be limited to only 34% above the depreciated original cost.

Respectfully submitted,

/s/ Sharon E. Webb
Sharon E. Webb
Assistant Small Business Advocate
Attorney I.D. No. 73995

Commonwealth of Pennsylvania
Office of Small Business Advocate
Forum Place
555 Walnut Street, 1st Floor
Harrisburg, PA 17101

Dated: October 23, 2024

APPENDIX A

FINDINGS OF FACT

Appendix A: PROPOSED FINDINGS OF FACT

1. Appalachian is certificated by the Commission to treat, store, supply and distribute water customers within its designated service territory.
2. Appalachian provides water service to approximately 1,456 water customers (1,353 residential, 83 commercial, 3 industrial, 7 public, 9 fire protection and 1 other within Avis Borough, Pine Creek Township, and Duddstable Township, Clinton County (“System”).

APPENDIX B

CONCLUSIONS OF LAW

Appendix B: PROPOSED CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter of, and the parties to, these application proceedings. 66 Pa. C.S. §§ 1102, 1103 and 1329.
2. The applicants have the burden of proof in these proceedings. 66 Pa. C.S. § 332(a).
3. The Commission may issue a certificate of public convenience upon a finding that “the granting of such certificate is necessary or proper for the service, accommodation, convenience, or safety of the public.” 66 Pa. C.S. § 1103(a).
4. A certificate of public convenience is required for “any public utility to begin to offer, render, furnish or supply within this Commonwealth service of a different nature or to a different territory than that authorized” 66 Pa. C.S. § 1102(a)(1).
5. A certificate of public convenience is required for “any public utility . . . to acquire from . . . any person or corporation, including a municipal corporation, by any method or device whatsoever . . . the title to, or possession or use of, any tangible or intangible property used or useful in the public service.” 66 Pa. C.S. § 1102(a)(3).
6. An applicant for a certificate of public convenience must demonstrate that it is technically, financially, and legally fit to own and operate the acquired public utility assets. *Seaboard Tank Lines v. Pa. Pub. Util. Comm’n*, 502 A.2d 762, 764 (Pa. Cmwlth. 1985); *Warminster Twp. Mun. Auth. v. Pa. Pub. Util. Comm’n*, 138 A.2d 240, 243 (Pa. Super. 1958).
7. An applicant for a certificate of public convenience must demonstrate that the transaction will “affirmatively promote the service, accommodation, convenience or safety of the public in some substantial way.” *City of York v. Pa. Pub. Util. Comm’n*, 449 Pa. 136, 151, 295 A.2d 825, 828 (1972).

8. In granting a certificate of public convenience, the Commission may impose such conditions as it may deem to be just and reasonable. 66 Pa. C.S. § 1103(a).

APPENDIX C

PROPOSED ORDERING PARAGRAPHS

Appendix C: PROPOSED ORDERING PARAGRAPHS

1. Consistent with Section 1103(a) of the Pennsylvania Public Utility Code, the Commission finds that it is just and reasonable to impose the following condition(s) prior to granting approval of the *Joint Application*.

2. If PAWC seeks to include the Appalachian acquisition in rate base in a subsequent rate case, the acquisition premium that is eligible for inclusion in rate base shall be limited to only 34% above the depreciated original cost.

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

Thomas J. Sniscak, Esquire
Todd S. Stewart, Esquire
Hawke McKeon & Sniscak, LLP
100 North 10th Street
Harrisburg, PA 17101
tjsniscak@hmslegal.com
tsstewart@hmslegal.com

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

DATE: October 23, 2024

/s/ Sharon E. Webb

Sharon E. Webb
Assistant Small Business Advocate
Attorney ID No. 73995