

MAURICE A. NERNBERG & ASSOCIATES

ATTORNEYS AT LAW

301 SMITHFIELD STREET
PITTSBURGH, PA 15222
TELEPHONE: (412) 232-0334
FACSIMILE: (412) 232-0710
email: naoffice@nernberg.com
website: www.nernberg.com

May 21, 2025

Via Electronic Filing:

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

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 treatment plant and collection system owned and operated by the Elizabeth Borough Municipal Authority, and (2) the rights of Pennsylvania American Water Company to begin to offer or furnish wastewater service to the public in the Borough of Elizabeth, Allegheny County, Pennsylvania
Docket No. A-2025-3052983

Motion to Dismiss EBMA's Objections to Forward Township's Discovery and Require Direct Answers

Dear Secretary Chiavetta:

Enclosed for electronic filing please find Forward Township's **Motion to Dismiss EBMA's Objections to Forward Township's Discovery and Require Direct Answers** for the above-captioned proceeding.

Copies are being served on parties per the attached Certificate of Service. Should you have any questions, please do not hesitate to contact me.

Respectfully Submitted,
MAURICE A. NERNBERG & ASSOCIATES

Date: 05/21/25

By: 
David M. Nernberg, Esq.

DMNjlw

Enclosure:

As stated, Certificate of Service.

Cc:

Per Certificate of Service.

BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

FORWARD TOWNSHIP,
Petitioner,

A-2025-3052983

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 treatment plant and collection system owned and operated by the Elizabeth Borough Municipal Authority, and (2) the rights of Pennsylvania-American Water Company to begin to offer or furnish wastewater service to the public in the Borough of Elizabeth, Allegheny County, Pennsylvania

**MOTION TO DISMISS EBMA'S
OBJECTIONS TO FORWARD
TOWNSHIP'S DISCOVERY
REQUESTS AND REQUIRE
DIRECT ANSWERS**

Filed on behalf of:
Forward Township, Petitioner.

Counsel of Record for this
Party:

Maurice A. Nernberg
Pa. I.D. No. 00127
David M. Nernberg
Pa. I.D. No. 205631

Maurice A. Nernberg & Associates
301 Smithfield Street
Pittsburgh, PA 15222
412-232-0334
man@nernberg.com
dmn@nernberg.com

Firm No. 331

BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

FORWARD TOWNSHIP,

A-2025-3052983

Petitioner,

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 treatment plant and collection system owned and operated by the Elizabeth Borough Municipal Authority, and (2) the rights of Pennsylvania-American Water Company to begin to offer or furnish wastewater service to the public in the Borough of Elizabeth, Allegheny County, Pennsylvania

**Motion to Dismiss EBMA's Objections to Forward Township's
Discovery and Require Direct Answers**

And now comes the Movant, Forward Township, and submits this motion for your consideration:

1. On May 14, 2025, Forward Township ("Forward"), an intervenor and protestor in the within proceedings, submitted discovery requests to Elizabeth Borough Municipal Authority ("EBMA").
2. On May 19, 2025 EBMA responded to the discovery request and objected to certain requests citing a Common Interest Agreement executed with Pennsylvania American Water Company "PAWC."
3. EBMA objected to Request for Production 4 which asked for all notes, communications, or otherwise related to the Asset Purchase Agreement between PAWC and EBMA that predate the first draft of the Asset Purchase Agreement.

4. The objection was solely based on the CIA claiming that all documents were privileged by virtue of the CIA (attached hereto as provided by PAWC).

5. The CIA is dated March 25, 2025, years after the first draft of the agreement.

6. The objections are without merit. A communication must be privileged in its own right to be excluded from discovery and a CIA may apply to communications seeking legal advice or between counsel of PAWC and EBMA but would not apply to communications between their representatives where no attorneys are on the conversation and/or no legal advice is being sought.

7. Furthermore, Counsel for Forward is unaware of any instance of a CIA being enforceable where parties are not defending an action. Here they are both proponents of a commercial transaction. And, it is for the PUC to determine whether the transaction is in the public interest. If a CIA could halt all discovery and factfinding, what would stop parties from entering into a CIA with all involved parties, leaving the public without any recourse?

8. Not only is a CIA inapplicable in this scenario, if it was, it would still not apply, because EBMA does not identify any privilege, attorney work product or otherwise, that would apply to the specific requests.

9. This issue has been litigated in the Commonwealth on numerous occasions. *Pa. PUC v. Energy*, 177 A.3d 438, (Pa. Commw. 2018) held that a CIA would only apply to attorney work product holding:

Although many issues concerning the joint defense or common interest privilege have yet to be addressed by our courts, various decisions have emphasized that a shared common business interest or an interest that is solely commercial is insufficient to warrant application of the privilege.

Citing. *In re Condemnation by City of Philadelphia in 16.2626 Acre Area*, 981 A.2d 391 (Pa. Commw. 2009). This is a solely commercial transaction. They are proponents. The CIA was not entered into until March of 2025. It cannot be used as a shield.

10. *Exec. Risk Indem., Inc. v. Cigna Corp.*, 81 Pa. D. & C.4th 410, 2006 Phila. Ct. Com.

Pl. LEXIS 328 described the situation to a T. While a CIA may protect counsel and parties, it only does so to the extent an attorney-client privilege is invoked.

The attorney-client privilege extends only to counsel and parties who have entered into a joint defense agreement and share a common interest in legal strategy. A shared common business interest is insufficient to afford protection. Most importantly, unless an individual attorney-client privilege independently shields material from discovery, the otherwise common interest among the parties is of no consequence.

Again, PAWC and EBMA are not defending anything. They are not defendants. This is a solely commercial transaction. And, no attorney-client privilege has been identified.

11. Even if a CIA did apply, EBMA did not provide any privilege log that would demonstrate that the parties were working with counsel or that any privilege would apply. They simply declared that any documents or communications shared among the parties is privileged. A CIA's purpose is to allow collaboration between attorneys without waiving work product. Not for the parties and their principals to have free rein to communicate without having to produce those communications in discovery.

WHEREFORE, it is Prayed that the Commission dismiss PAWC's objections and require PAWC to answer the discovery fully and, to the extent privilege would apply, prepare a privilege log.

Respectfully Submitted,

MAURICE A. NERNBERG & ASSOCIATES

Date: 05/21/25

By: 
David M. Nernberg, Esq.

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 treatment plant and collection system owned and operated by the Elizabeth Borough Municipal Authority, (2) the rights of Pennsylvania-American Water Company to begin to offer or furnish wastewater service to the public in the Borough of Elizabeth, and portions of the Borough of Lincoln, and the Townships of Elizabeth and Forward, in Allegheny County, Pennsylvania Docket No. A-2025-3052983

EBMA Objections to Forward Township Interrogatories, Requests for Production and Requests for Admission Directed to Elizabeth Borough Municipal Authority

EBMA OBJECTION TO REQUESTS FOR PRODUCTION

4. Provide all documents, notes, communications, or otherwise, as described in the instructions, related or pertaining to the Asset Purchase Agreement between representatives of EBMA and PAWC, including attorneys, that predate the first draft of the Asset Purchase Agreement.

OBJECTION:

EBMA objects to Request for Production Number 4 to the extent that it requests, documents, notes, communications or otherwise subject to the attorney-client privilege, the attorney work product doctrine, or other privilege as defined in the attached Common Interest Agreement.

/s/ Joseph R. Dalfonso

Joseph R. Dalfonso, Esquire (PA I.D. 311821)

Gary J. Matta, Esquire (PA I.D. 90750)

DODARO, DALFONSO,

MATTA & CAMBEST, P.C.

1900 Main Street, Suite 207

Canonsburg, PA 15317

jdalfonso@ddmclaw.com

gmatta@ddmclaw.com

Counsel for Elizabeth Borough Municipal Authority

COMMON INTEREST AGREEMENT

This Common Interest Agreement (“Agreement”) is entered into as of the 12th day of March, 2025, by and among Pennsylvania-American Water Company (“PAWC”) and the Elizabeth Borough Municipal Authority (the “Authority”). For purposes of this Agreement, PAWC and the Authority shall be referred to collectively as the “Parties” and, individually, as a “Party.”

WHEREAS, the Authority owns and operates a wastewater treatment plant and collection system (the “System”);

WHEREAS, PAWC and the Authority negotiated and entered into an Asset Purchase Agreement (the “APA”) dated as of January 10, 2023, pursuant to which the Authority would convey the System to PAWC and PAWC would begin providing wastewater service in the territory served by the System (the “Proposed Transaction”);

WHEREAS, the Parties are working together to prepare an application to be filed with the Pennsylvania Public Utility Commission (“PUC”) seeking all required approvals for the Proposed Transaction (along with all matters, efforts and endeavors related to the application, the “PUC Proceeding”), in which each Party expects to participate as an applicant or intervenor;

WHEREAS, the Parties acknowledge the possibility that opponents of the Proposed Transaction may file actions in the Allegheny County Court of Common Pleas, and/or other civil courts, challenging the Proposed Transaction (the “Civil Proceedings”) (the Civil Proceedings and the PUC Proceedings are collectively referred to herein as the “Proceedings”);

WHEREAS, the Parties have joint and common legal interests in the Proceedings, and cooperation and coordination between and among the Parties will offer the best chance of success with respect to the Proceedings;

WHEREAS, the Parties recognize that they have a common interest in assuring that their communications, and the documents they exchange, in connection with the Proceedings are fully protected from disclosure to third parties, including other parties to the Proceedings;

WHEREAS, until now, the Parties’ joint efforts in connection with the Proceedings have been subject to an oral agreement that the documents they exchange, and their communications, would be privileged under the joint defense, common interest, and community-of-interest doctrines (“Oral Agreement”); and,

WHEREAS, the Parties now wish to memorialize their agreement in writing.

NOW THEREFORE, in consideration of the mutual understandings and covenants set forth in this Agreement, the sufficiency of which is hereby acknowledged, and intending to be legally bound, the Parties hereby memorialize in writing this Agreement and the Oral Agreement for their common legal interests, effective as of the date upon which they first started to exchange documents and communicate regarding the Proceedings (“Effective Date”), as follows:

1. “Privileged Materials” means documents exchanged between the Parties, and communications between the Parties, in any form, whether oral or written, relating to the Parties’ efforts in connection with the Proceedings.

2. To facilitate the identification and protection of Privileged Materials, the Parties agree to mark Privileged Materials with the legend "Privileged and Confidential;" nevertheless, all materials relating to the Proceedings (including but not limited to drafts of pleadings and other submissions, and communications concerning strategy with respect to the Proceedings), that are exchanged between the Parties shall be deemed Privileged Materials unless a Party specifies that the particular materials are not exchanged pursuant to this Agreement.

3. To ensure the confidentiality of Privileged Materials and to preserve any and all of the privileges belonging to each Party, each Party agrees not to give, show, make available, or communicate in any way any such Privileged Materials to anyone other than: the signatories to this Agreement, their employees, counsel (including outside counsel), and consultants in connection with the Proceedings; *except* as permitted by this Agreement or with the express consent of the other Party.

4. The confidentiality obligations of the Parties under this Agreement shall not apply to specific information that:

(a) is now or hereafter becomes public knowledge or subject to public disclosure without violation of this Agreement;

(b) was already in a Party's possession prior to disclosure to that Party under or in contemplation of this Agreement; or,

(c) comes into a Party's possession, without violation of this Agreement, by means other than an exchange pursuant to or subject to this Agreement, except that information that is specifically covered by the provisions of a confidentiality agreement shall remain covered thereby.

5. Each Party agrees that all Privileged Materials are communicated in confidence for the purposes of securing or communicating legal advice and representation and shall not be used for any other purpose, and are therefore subject to: (a) any and all privileges belonging to the Party conveying or jointly developing the information, which privileges may not be waived without the prior written consent of such Party, which consent shall not be unreasonably withheld when requested by another Party; and (b) the terms of this Agreement. Any inadvertent or purposeful disclosure by any Party of Privileged Materials exchanged pursuant to this Agreement shall not constitute a waiver of any privilege of any other Party.

6. Each Party agrees that the sharing of Privileged Materials among the Parties pursuant to this Agreement does not waive (a) any privilege, or (b) the confidential or proprietary nature of documents or other information exchanged by the Parties that are not otherwise privileged but that are deemed confidential or proprietary pursuant to a protective order, and further, each Party agrees that no Party may claim such a waiver. Nothing in this Agreement shall constitute a transfer or conveyance of any proprietary rights a Party may have in documents, information or other things exchanged in accordance with this Agreement.

7. The Parties agree that the Privileged Materials disclosed pursuant to this Agreement may be used solely in pursuit of the common legal interest among the Parties in connection with the Proceedings; *provided, however*, that nothing in this paragraph shall limit the rights of the originating Party with regard to its Privileged Materials.

8. If there is a request in the Proceedings for Privileged Materials applicable to a particular Party or a Party deems it necessary or desirable to provide Privileged Materials in the Proceedings, such Party shall consult with the other Party as to appropriate process for disclosure/responding to the request including, but not limited to, providing the Privileged Materials pursuant to a protective order.

9. If a demand is made for the release of Privileged Materials pursuant to the Pennsylvania Right-to-Know Law, 65 P.S. §§ 67.101—67.3104, the Party to which the request or demand is addressed shall assert at its sole cost or expense all applicable privileges or legal exemptions, and shall immediately upon receiving the request or demand notify the other Party about the request or demand and indicate the Privileged Materials covered by the request or demand so as to afford each such other Party the opportunity to intervene in any proceeding to assert any applicable privilege or exemption on its own behalf and at its own cost or expense. In the event that disclosure is ordered notwithstanding the assertion of any applicable privilege, the Parties shall cooperate in seeking an appropriate protective order to limit the extent and nature of disclosure to the extent that such a protective order is available.

10. In the event any Party determines that it no longer chooses to participate in this Agreement, it shall promptly notify the other Party in writing of its withdrawal from this Agreement, and shall immediately return all Privileged Materials received from the other Party pursuant to this Agreement (and all copies of such Privileged Materials) to the originating Party, or, at the withdrawing Party's option, its counsel may supply a written statement certifying that such Privileged Materials have been destroyed, to the extent not prohibited by public record laws or other applicable law, and in any event shall not be disclosed except as specifically permitted by this Agreement. Notwithstanding the foregoing, the withdrawing Party may choose to retain (i) any Privileged Materials stored in electronic or other backup or archival media in accordance with the withdrawing Party's regular business processes and (ii) copies of such Privileged Materials as may be retained in accordance with the withdrawing Party's record retention policies or law and regulation, so long as all such retained Privileged Materials remain subject to the terms of this Agreement. This Agreement thereupon will be terminated as to the withdrawing Party; provided, however, that such termination shall in no way affect or impair the privileged status, or obligations of confidentiality with respect to, Privileged Materials previously furnished pursuant to this Agreement. The Parties further agree that, in the event that any Party withdraws from the Agreement, nothing in the Agreement shall create a conflict of interest so as to require the disqualification of any counsel from the representation of their respective clients; and counsel and their respective clients hereby waive any such conflict of interest.

11. Notwithstanding anything contained in this Agreement, each Party reserves the right to enforce its rights against any other Party or non-party, even if the enforcement of such rights involves matters that bear a substantial relationship to the joint defense and common interest activities furthered by this Agreement. If a dispute arises between or among the Parties in the future, no Party shall make direct use in that dispute of Privileged Materials provided to that Party under this Agreement unless expressly agreed in writing and permitted by the Parties. Nor shall any oral or written statements covered by this Agreement be deemed an admission in any civil, alternative dispute resolution, criminal, administrative, or other proceeding arising from that dispute or otherwise. However, nothing in this Agreement shall bar a Party from

seeking or using in any subsequent dispute any information obtained independently or through a legitimate discovery mechanism.

12. The Parties agree that, in addition to any other remedies available for breach of this Agreement, performance of this Agreement may be specifically ordered, a breach hereof may be enjoined, or both.

13. This Agreement shall terminate upon the termination of the Proceedings. Termination shall be deemed to occur on the date that all final orders or actions in the Proceedings are no longer subject to judicial review. All Privileged Materials received from another Party pursuant to this Agreement, and all copies of such Privileged Materials, shall, if requested, be returned to the originating Party within ninety (90) days after the termination of the Agreement. Alternatively, at the returning Party's option, counsel for a Party in possession of an originating Party's Privileged Materials may supply a written statement certifying that the Privileged Materials have been destroyed, to the extent permitted by public record laws or other applicable law, and in any event will not be disclosed except as specifically permitted by this Agreement. Notwithstanding the foregoing, a Party may choose to retain (i) any Privileged Materials stored in electronic or other backup or archival media in accordance with that Party's regular business processes and (ii) copies of such Privileged Materials as may be retained in accordance with that Party's record retention policies or law and regulation, so long as all such retained Privileged Materials remain subject to the terms of this Agreement. The provisions of this Agreement restricting use of Privileged Materials shall survive the termination of the Proceedings.

14. This Agreement may not be amended, except by an instrument in writing signed by all Parties.

15. This Agreement may be signed in separate counterparts, each of which shall be binding on the Parties.

16. This Agreement shall be construed and interpreted, and the rights of the Parties shall be determined, in accordance with the substantive laws of the Commonwealth of Pennsylvania without regard to the conflict of laws principles thereof or of any other jurisdiction. Venue for any litigation concerning this Agreement shall lie in the appropriate state or federal courts in Pennsylvania according to applicable venue rules.

[Signatures appear on next page.]

IN WITNESS WHEREOF, and intending to be legally bound, the duly authorized representatives of the Parties have caused this Agreement to be executed as of the Effective Date.

For PENNSYLVANIA-AMERICAN
WATER COMPANY

For ELIZABETH BOROUGH
MUNICIPAL AUTHORITY

Signature: T. Harold

Signature: Timothy Guffey

Printed Name: Teresa Harold

Printed Name: Timothy Guffey

Title: Director, Corporate Counsel

Title: Chairman, RBMA

Address: 852 Wesley Drive
Mechanicsburg, PA 17055

Address: 103 Harrison Street
Elizabeth PA 15037

BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

FORWARD TOWNSHIP,
Petitioner,

A-2025-3052983

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 treatment plant and collection system owned and operated by the Elizabeth Borough Municipal Authority, and (2) the rights of Pennsylvania-American Water Company to begin to offer or furnish wastewater service to the public in the Borough of Elizabeth, Allegheny County, Pennsylvania

CERTIFICATE OF SERVICE

I, David M. Nernberg, hereby certify that a true and correct copy of the within Motion to Dismiss EBMA's Objections to Forward Township's Discovery and Require Direct Answers was served upon all parties to the within matter, this date, via email, addressed as follows:

Via email:

Christy M. Appleby
Katie M. Kennedy
PA Office of Consumer Advocate
Forum Place
555 Walnut Street, 5th Floor
Harrisburg, PA 17101
CAappleby@PaOCA.org
KKennedy@PaOCA.org
Counsel for OCA

Michael Podskoch, Jr., Esq.
Pennsylvania Public Utility Commission
Bureau of Investigation and Enforcement
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120
MPodskoch@PA.gov
Counsel for I&E

Teresa K. Harrold
Pennsylvania-American Water Company
852 Wesley Drive
Mechanicsburg, PA 17055
Teresa.Harrold@AMWater.com

Steven C. Gray
Rebecca Lyttle
Office of Small Business Advocate
Forum Place
555 Walnut Street, 1st Floor
Harrisburg, PA 17101
SGray@PA.gov
ReLyttle@PA.gov
Counsel for OSBA

The Honorable Erin L. Gannon
The Honorable Steven K. Haas
Administrative Law Judges
Pennsylvania Public Utility Commission
400 North Street
Commonwealth Keystone Building
Harrisburg, PA 17120
EGannon@PA.gov
StHaas@PA.gov

David P. Zambito
Jonathan P. Nase
Cozen O'Connor
17 North Second Street, Suite 1410
Harrisburg, PA 17101
DZambito@Cozen.com
JNase@Cozen.com
Counsel for PAWC

Joseph R. Dalfonso
Gary J. Matta
Dodaro, Dalfonso, Matta & Cambest, P.C.
1900 Main Street, Suite 207
Canonsburg, PA 15137
JDalfonso@DDMCLaw.com
GMatta@DDMCLaw.com
Counsel for EBMA

Date: 05/21/25



David M. Nernberg, Esq.