



November 5, 2018

**VIA E-FILING**

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

**Re: Comments of Pennsylvania-American Water Company on the Tentative Supplemental Implementation Order in *Implementation of Section 1329 of the Public Utility Code*, Docket No. M-2016-2543193**

Dear Secretary Chiavetta:

Enclosed for filing with the Pennsylvania Public Utility Commission are the Comments of Pennsylvania-American Water Company in the above-referenced matter. As required by Ordering Paragraph No. 7, these comments are also being provided in Word-compatible format to Law Bureau. Copies have been served as shown on the attached certificate of service.

Thank you for your attention to this matter. If you have any questions about this filing, please direct them to me.

Sincerely,

COZEN O'CONNOR

By:  David P. Zambito

DPZ  
Enclosure

cc: Andrew L. Swope, Esq.  
Shaun Sparks, Esq., Law Bureau (Word-compatible version via email)  
Per Certificate of Service

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Implementation of Section 1329 : Docket No. M-2016-2543193  
Of the Public Utility Code :

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**COMMENTS OF PENNSYLVANIA-AMERICAN WATER COMPANY  
REGARDING THE TENTATIVE SUPPLEMENTAL IMPLEMENTATION ORDER**

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NOW COMES PENNSYLVANIA-AMERICAN WATER COMPANY (“PAWC”), pursuant to the Tentative Supplemental Implementation Order (“TSIO”) entered in this matter on September 20, 2018, to submit these Comments on the TSIO.

**I. INTRODUCTION AND BACKGROUND**

PAWC is the largest regulated public utility corporation duly organized and existing under the laws of the Commonwealth of Pennsylvania, engaged in the business of collecting, treating, storing, supplying, distributing and selling water to the public, and collecting, treating, transporting and disposing of wastewater for the public. It has completed two acquisition proceedings pursuant to Section 1329 and is currently preparing several additional Section 1329 applications.

PAWC’s comments will generally follow the order in which issues were discussed in the TSIO. PAWC, however, believes that the TSIO did not address certain key issues, including but not limited to the scope and standard for the Pennsylvania Public Utility Commission (“Commission”) to review Utility Valuation Expert (“UVE”) fair market valuations. Consistent with the organizational scheme used in the TSIO, PAWC’s Comments will address these additional issues in chronological order.

## II. NUMBER OF APPLICATIONS

One issue that the TSIO does not address is the number of applications that must be submitted when a municipality sells its water and wastewater systems to a single buyer in a single transaction. The Commission currently requires an applicant to submit two separate applications in this situation. PAWC respectfully submits that only one application should be required.

The Final Implementation Order (“FIO”) requires an applicant to submit extensive documentation to the Commission to support a single application. The TSIO would require an applicant to submit even more documentation to support a single application. These documents are not just provided to the Commission; they are provided to the statutory advocates, the Bureau of Technical Utility Services (“TUS”), the Administrative Law Judge (“ALJ”), and municipalities near the acquired system.

In a case in which a single municipality is selling both its water and wastewater systems to a single buyer in a single transaction, much of the information in the water application and the wastewater application is identical. It is unduly burdensome to require an applicant to submit two separate applications that are largely duplicative, especially considering that the water application and the wastewater application will be consolidated for purposes of hearing and adjudication. The unnecessary costs of preparing duplicative applications are passed on to ratepayers as transaction costs in the applicant’s next rate base proceeding. 66 Pa. C.S. § 1329(d)(iv). The Commission’s need for information can be satisfied more efficiently by requiring one application that includes all of the pertinent information concerning both the water system and the wastewater system (*e.g.*, the purchase price of both systems and the fair market value of both systems).

### III. CHECKLIST FOR APPLICATIONS

#### A. Seller Testimony

The TSIO would require the Seller to provide testimony supporting the transaction. TSIO p. 9. Although the TSIO states that the Seller is responsible for its own testimony, as a practical matter, the Buyer is frequently the sole applicant and the Seller subsequently petitions to intervene in the proceeding. As a result, the Buyer would be submitting the testimony of the Seller in the application.

The TSIO does not address the procedural and evidentiary issue of whether the Buyer may challenge the testimony of the Seller that must be included in the application. As the TSIO notes, the Buyer and the Seller are distinct parties in the litigation, with interests that sometimes diverge. The Buyer may not necessarily agree with the testimony of the Seller; in particular, the Buyer may believe that the Seller's UVE has established an inappropriate fair market value. Just because the Buyer is submitting the Seller's testimony in its application, that testimony should not become the Buyer's testimony, such that the Buyer is denied the right to challenge the testimony. The Commission should make clear that the Buyer's rights to challenge the Seller's testimony are not prejudiced by the requirement that the application include the Seller's testimony.

PAWC suggests that the Commission clarify that inclusion of Seller testimony with the application does not constitute sponsorship of the testimony by the Buyer. If the Seller intervenes in the proceeding, the Seller can sponsor its testimony. If the Seller declines to intervene and the Buyer declines to sponsor the Seller's testimony, the Commission should *sua sponte* enter the testimony into the evidentiary record, provided that it is properly authenticated through a verification or affidavit. In any event, the Buyer – as a matter of fundamental fairness and due

process – should have the opportunity to challenge the Seller’s testimony through rebuttal testimony.

**B. Notice to Affected Customers**

The TSIO requires the application to include the notice sent to affected customers describing the filing and the anticipated effect on rates. TSIO p. 9. The issue of notice to customers is particularly important in view of the Commonwealth Court’s recent decision in *McCloskey v. Pa. Pub. Util. Comm’n*, 1624 C.D. 2017 (October 11, 2018). The Commission needs to give the regulated community clear guidance on all aspects of this notice, and needs to do so quickly, so pending acquisitions are not unduly delayed while the Commission considers its response to this decision.

If the Commonwealth Court decision remains effective, the initial question that must be considered is who is to receive the notice. PAWC notes that notice to the seller’s customers may present challenges for a buyer to the extent that customer information is deemed confidential. The Commission should address the means by which the buyer can lawfully obtain customer information from the seller if it is going to require notice to the seller’s customers.

The next question is when customers should be notified. Customers should not be notified until the Application is accepted by the Commission, in case the application is not accepted for some reason.<sup>1</sup>

The third question is how customers should be notified. Unfortunately, the Commonwealth Court has left little discretion to the Commission on this issue. Unless the Commonwealth Court decision is overturned, individualized notice must be provided to all ratepayers, and they must be

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<sup>1</sup> This timing would be consistent with the required notice to the Pennsylvania Department of Environmental Protection and surrounding municipalities and municipal authorities.

given an opportunity to participate in the Section 1329 proceeding.<sup>2</sup> PAWC respectfully submits that a rate case-style bill insert would be unworkable from a practical standpoint, because that process takes a 30-day billing cycle to notify all customers. Considering that the first Tentative Implementation Order (“TIO”) and the FIO establish a litigation schedule by which hearings are held approximately 47 days after an application is accepted by the Commission, the process of notifying customers must be completed more promptly if the Commission maintains only its traditional form of evidentiary hearings. The alternative of a direct mailer to all customers would be extremely costly and such costs would be passed through to ratepayers as transaction costs.

A bill insert or even a bill message would be the most cost-effective and practical option of individualized ratepayer notice in compliance with the requirements of the Commonwealth Court’s *McCloskey* decision. However, unless the buyer and the seller voluntarily extend the six-month review period, this approach would require the Commission to modify its expectations for a litigation schedule and hearing process that complies with the six-month timeline mandated by Section 1329.

PAWC respectfully submits that the Commission should consider a two-track litigation schedule and hearing process for a Section 1329 proceeding. On the first track, notice of a Section 1329 application would continue to be given as it is currently given through the *Pennsylvania Bulletin*, newspaper publication, and direct service on the public advocates, the Pennsylvania Department of Environmental Protection, and surrounding municipalities and municipal authorities.

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<sup>2</sup> The Commonwealth Court decision in *McCloskey* defines the type of notice that is due but does not define what subsequent process is due.

On the second track, individual ratepayers would receive notice via a bill insert or bill message over the course of a 30-day billing cycle<sup>3</sup> and be afforded an opportunity to submit comments on the application within 14 days of the end of the billing cycle.<sup>4</sup> The comments would be entered into the evidentiary record and active parties to the proceeding could respond on the evidentiary record without undue delay to the proceeding. This approach would eliminate the need to extend the current deadline of approximately 16 days after publication in the *Pennsylvania Bulletin* for interested parties to intervene in the case. Moreover, it is consistent with well-established law in the Commonwealth that the requirements of due process are dependent upon the demands of the particular situation. *Pennsylvania Dental Assoc. v. Commonwealth, Ins. Dep't*, 551 A.2d 1148 (Pa. Cmwlth. 1988). A paper hearing through the submission of comments has been deemed to satisfy due process requirements. *Pennsylvania Soc. of Oral and Maxillofacial Surgeons v. Insurance Comm'r of Comm.*, 513 A.2d 1086 (Pa. Cmwlth. 1986)

Finally, the Commission needs to give clear guidance on what the notice must say. At the time of the acquisition, the rate impact of the acquisition on customers is unknowable. Utilities, therefore, are limited in the information they can give customers. In view of the limited information available at the time of the Application, a utility should be required to advise customers that (i) the Buyer has filed an application requesting Commission approval of the acquisition; (ii) the Buyer has requested permission to add up to \$X to its rate base in its next rate case as a result of the acquisition; (iii) the increase in rate base may impact customers' rates in the Buyer's next rate proceeding but the precise impact is unknowable at the present time; and (iv)

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<sup>3</sup> This assumes that the buyer or the seller bill monthly. If the buyer or the seller bill quarterly, a special mailing may be unavoidable.

<sup>4</sup> PAWC specifically opposes as unnecessary any rate case-style public input hearing on the application. Such a hearing is not normally held in an application proceeding and adding this proceeding to the already-packed litigation schedule would make it even more challenging for the Commission to meet the six-month deadline.

customers have the right to protest or intervene in the acquisition proceeding and will have an opportunity to participate in a future base rate proceeding in which the rates are actually set. The notice should also include information on how customers may submit comments in the acquisition proceeding, as proposed earlier in these comments.

### **C. UVE Testimony**

As noted in the TSIO, a UVE is independent of the entity hiring it. Consequently, a Buyer or a Seller cannot dictate to its UVE what the fair market valuation will conclude or what the UVE will say in its testimony. This yields the potentially awkward situation in which a Seller or a Buyer may disagree with the testimony of its own expert, and may want to challenge it. As a procedural and evidentiary matter, the TSIO should make clear that a Seller or a Buyer may challenge the testimony and/or report of its own UVE (as well as the other party's UVE), if so desired.

## **IV. PUBLIC MEETINGS AND THE SECTION 1329(D)(2) SIX-MONTH CONSIDERATION PERIOD**

Section 1329 requires the Commission to enter an order approving/disapproving a Section 1329 application within six months after it is filed. The Commission has already extended that period by giving TUS ten days to review an application and decide whether to accept it. In the TSIO, the Commission proposes extending the six-month deadline further by permitting TUS to extend the ten-day review period for up to an additional five days "if doing so will avoid the problem of establishing a consideration period of 170 days or less." TSIO p. 13. This extension seems unnecessary because the Commission can use notational voting to meet its statutory obligations. *Cmwlth., Dep't of Env'tl. Res. v. Butler County Mushroom Farm*, 454 A.2d 1 (1982) (an administrative agency has authority to exercise only those powers as the General Assembly

has granted expressly or by necessary implication, and it cannot exercise discretion when the General Assembly has taken it away by statute).

A related issue, which the TSIO does not mention, is the Commission's timeline for reaching a decision within the mandated six-month deadline. The TIO, at page 15, provided a suggested timeline for each step in the process of resolving a Section 1329 proceeding. The FIO adopted that timeline. PAWC respectfully requests that the Commission take this opportunity to re-consider the suggested timeline in view of its experience in processing cases during the past two years. In particular, PAWC respectfully requests that the parties be given additional time to prepare and litigate their cases. Under the present timeline, hearings are held approximately 48-49 days after a case is filed, and the record is closed approximately 79 days after the case is filed. That is only about 45% of the 180 days from the date a case is filed to the date a decision must be entered. The Commission should explore the use of alternative procedures, such as certification of the record, that could better balance the needs of the parties to develop an adequate record (and possibly negotiate a settlement) with the Commission's need to meet the six-month deadline.

## **V. REJECTION OF APPLICATIONS**

Another issue that is not discussed in the TSIO is the remedy in the event that TUS decides to reject an application on the ground it is incomplete. Such a staff decision is subject to Commission review pursuant to 52 Pa. Code § 5.44 ("petitions for reconsideration from actions of the staff"), but that section does not include a deadline for Commission action on staff's decision. Considering that Section 1329 provides for an expedited review of applications, and that the only issue for TUS to determine is whether the application is complete, the Commission should expedite its review of a TUS decision to reject an application. PAWC respectfully submits that

the Commission should rule on such an appeal from staff action within 30 days of the date it is filed.

## **VI. STANDARD DATA REQUESTS FOR APPLICATIONS SEEKING SECTION 1329 VALUATION**

### **A. Role of TUS**

PAWC supports the Commission's statement that "The Bureau of Technical Utility Services is to evaluate only whether the Application Checklist is complete and responsive to the data requested. It shall not refuse to perfect an application on the basis that the Bureau is dissatisfied with the quality of items submitted in response, or whether additional information may later be required." TSIO p. 15. As long as an applicant has made a good faith effort to comply with the checklist, TUS should not engage in a substantive analysis before accepting the application.

### **B. Need to Respond to TUS Data Requests**

The TSIO, pp. 15-16, notes "TUS is not precluded from asking subsequent data requests, provided that these are issued before the Commission receives a protest or opposition filing regarding the application." The TSIO does not address the situation, which PAWC has encountered several times, in which TUS issues data requests and the Commission receives a protest or opposition to the application before the responses are due.

In that situation, PAWC respectfully submits that the TUS data requests should be deemed withdrawn. The application is no longer with TUS and is instead assigned to the Office of Administration Law Judge ("OALJ") for hearings and a recommended decision.

The TUS data requests are frequently duplicative of the interrogatories that the applicant receives from protestants or other parties opposing the application. They also distract the applicant's attention from the issues that concern the protestants or other parties to the case. Since TUS will not be involved in the litigated proceeding, answering the data requests serves no practical purpose; answering the data requests in this situation merely increases the transaction costs to ratepayers with no corresponding benefit to ratepayers or the Commission.

Moreover, because TUS continues to act in an advisory capacity to the Commission, there is an increased risk that TUS will rely upon non-record evidence in the form of responses to its data requests in advising the Commission on the recommended decision of the presiding ALJ. Such a circumstance raises due process concerns.

### **C. Standard Data Requests**

The Commission should reconsider the standard data requests. Some of these data requests are unduly burdensome because they seek documentation that is not pertinent to the application proceeding. For example, a claim for transaction and closing costs incurred during the acquisition may be included in the Buyer's next rate base, but the amount of the transaction and closing costs are determined in the subsequent rate proceeding, not in the application proceeding. FIO, p. 14. Standard Data Request 10 requests documentation of transaction and closing costs incurred to date. This request for documentation is premature.

Other data requests seek information regarding future events. As a result, the answers will be speculative. For example, question 7 asks "In the next rate case, does buyer anticipate include [sic] the acquired system in a combined revenue requirement?" The Buyer's next base rate case

may be years away. PAWC submits that this question is premature at the time an application is filed.

Finally, standard data request 16d., requesting an electronic copy of any testimony in which the UVE testified on fair value acquisitions, seems unnecessary. Considering the limited role of TUS in application proceedings once a protest has been filed or other opposition to the application has been filed (and one has been filed in every 1329 proceeding filed with the Commission to date), PAWC does not see why TUS needs this information. The applicant must list all dockets in which a UVE submitted testimony to a public utility commission related to the appraisal of utility property. Standard Data Request 16.c. With that information, TUS staff can go to the Secretary's Bureau to get a copy of testimony the UVE submitted in any listed case before the Commission. The Commission must balance its need for information against the cost to the applicant (and ultimately the ratepayer) of providing it. PAWC respectfully submits that the cost of this standard data request outweighs the benefits.

#### **D. Discovery Rule Modifications**

PAWC supports the TSIO's refusal to establish modified discovery rules applicable to all Section 1329 proceedings. TSIO p. 16. Considering the extensive additional documentation that the TSIO would require an applicant to submit with an application (including responses to standard data requests), PAWC submits that a five-day turn-around on discovery in Section 1329 proceedings (which has become the norm) is not warranted in the future. The parties to a Section 1329 proceeding should be permitted to negotiate suitable discovery modifications, and, if a satisfactory resolution cannot be reached, they can take the issue to the ALJ, as in any other case. The Commission, nevertheless, should establish a presumption in the Final Supplemental

Implementation Order that a seven-day discovery response period is reasonable absent good cause shown.

## **VII. GUIDANCE TO UVEs AND JURISDICTIONAL EXCEPTIONS**

PAWC supports the TSIO's inclusion of an appendix providing guidelines for UVEs. PAWC also supports the PUC's adoption of Jurisdictional Exceptions pursuant to USPAP. This is an appropriate way for the Commission to advise UVEs that certain valuation techniques or assumptions are inappropriate. PAWC supports each of the Jurisdictional Exceptions listed on page 2 of Appendix C.

PAWC, however, is concerned about the procedure by which the Commission might create future Jurisdictional Exceptions. Since a Jurisdictional Exception has state-wide application, it should not be adopted in a specific case that only involves a limited number of parties. Instead, a new Jurisdictional Exception should be adopted through a proceeding, such as a supplemental implementation order proceeding or a policy statement proceeding, in which all interested parties are provided with notice and the opportunity to be heard.

## **VIII. SCOPE AND STANDARD OF COMMISSION REVIEW OF FAIR MARKET VALUATIONS**

The Commission has held that it has the authority to adjust fair market valuations. *Application of Aqua Pennsylvania Wastewater, Inc. pursuant to Sections 1102 and 1329 of the Public Utility Code for Approval of its Acquisition of the Wastewater System Assets of New Garden Township and the New Garden Township Sewer Authority*, Docket No. A-2016-2580061 (Opinion and Order entered June 29, 2017), *rev'd on other grounds, McCloskey v. Pa. Pub. Util. Comm'n*, 1624 C.D. 2017 (Pa. Cmwlth. October 11, 2018); *Application of Aqua Pennsylvania Wastewater,*

*Inc. Pursuant to Section 1102 and 1329 of the Public Utility Code for Approval of its Acquisition of the Wastewater System Assets of Limerick Township, Docket No. A-2017-2605434 (Opinion and Order entered November 29, 2017, Order on Reconsideration entered April 19, 2018). In order to prevent claims that the PUC is acting in an arbitrary and capricious manner, the PUC should establish guidelines on how it will exercise this authority. Establishing such guidelines would strengthen the Commission's position in the event its decision on a Section 1329 application is appealed.*

The Commission is an administrative agency charged with the regulation of public utilities under the provisions of the Pennsylvania Public Utility Code and Commission regulations. As an administrative agency, the Commission has authority to exercise only those powers that the General Assembly has granted expressly or by necessary implication, and it cannot exercise discretion when the General Assembly has taken it away by statute. *Cmwlth., Dep't of Env'tl. Res. v. Butler County Mushroom Farm, supra.*

The TSIO properly includes provisions to ensure that fair market valuations comply with Section 1329, the PUC's UVE registration requirements, and the FIO. For example, the TSIO requires the Buyer, the Seller, and their respective UVEs to establish that each UVE is registered with the PUC as a UVE, that each UVE is free from any conflict of interest, and that each UVE has verified that its valuation methods comply with the current edition of USPAP. TSIO, Appendix C.

PAWC submits, however, that the Commission must go further, and establish a scope and standard of review for its consideration of proposed adjustments to a UVE's valuation. Considering the very tight litigation timelines in Section 1329 proceedings, the Commission should limit the types of adjustments that other parties can propose in a fair market valuation. It

should only consider proposed adjustments to the valuations if the party proposing the adjustment can demonstrate that the UVE (i) made a mathematical error or other error of fact, (ii) abused its discretion under USPAP, or (iii) committed fraud or acted illegally or in bad faith (“Adjustment Grounds”). The Commission has authority to modify a fair market valuation if any of these Adjustment Grounds are established. The Commission, however, should not consider an adjustment if none of the Adjustment Grounds are established.

In short, PAWC respectfully submits that the Commission has authority to make adjustments to a UVE’s valuation, but its discretion in this regard is not unlimited. The Commission should define its scope and standard of review in the Final Supplemental Implementation Order. PAWC believes the scope and standard of review it has suggested is consistent with Section 1329.

It is improper under Section 1329 for the Commission to continue to permit parties to adjust selected portions of a UVE valuation for self-serving reasons. The UVE is independent and pre-qualified by the Commission. While there may be reasonable disagreements regarding how the UVE performed its appraisal, the UVE’s opinion should be respected in the absence of a preponderance of the evidence establishing one of the Adjustment Grounds. The more appropriate vehicle for adjustments to UVE practices is through USPAP “jurisdictional exceptions” that are applied on a consistent and uniform basis (as proposed in the TSIO), rather than litigating proposed adjustments in individual cases.

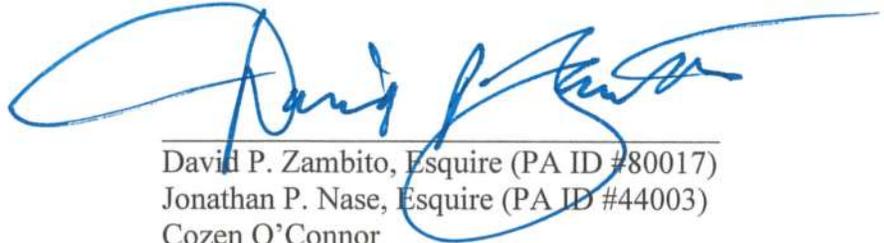
The goal of the Final Supplemental Implementation Order should be to provide clarity regarding the Section 1329 process. Without a clear scope and standard of review for UVE valuations, there can be no clarity and the Section 1329 process will continue to be bogged down by a continuous stream of creative adjustments designed to deflate artificially the true fair market

value of the assets to be acquired. Moreover, without a clear scope and standard of review, opponents of the Section 1329 process will have continual and unwarranted leverage to hold up transactions by the mere threat of an appeal that could take years to resolve. This surely was not the intent of the General Assembly in enacting Section 1329.

## IX. CONCLUSION

PAWC appreciates the opportunity to submit comments in response to the TSIO. PAWC agrees with the Commission that there is a need to address issues that have come to light during the years since Section 1329 was enacted. PAWC commends the Commission for its efforts to address these issues through a supplemental implementation order rather than attempting to address these issues through litigation on a case-by-case basis.

Respectfully submitted,



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Dated: November 5, 2018

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Implementation of Section 1329 of the  
Public Utility Code

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Docket No. M-2016-2543193

**Certificate of Service**

I hereby certify that I have this day served a true copy of the foregoing **Comments of Pennsylvania-American Water Company** upon the parties, listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

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Dated: November 5, 2018