



Matthew S. Olesh
215.665.3043
matthew.olesh@obermayer.com
www.obermayer.com

Obermayer Rebmann Maxwell & Hippel LLP
Centre Square West
1500 Market Street | Suite 3400
Philadelphia, PA 19102-2101
P: 215.665.3000
F: 215.665.3165

July 19, 2021

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17105-3265
rchiavetta.pa.gov

RE: Docket No. A-2021-3024681, et al. – Application of Pennsylvania-American Water Company to Acquire the Wastewater System Assets of the City of York

Dear Secretary Chiavetta:

We serve as counsel to West Manchester Township (the “Township”) in the above matter and are submitting, with this letter, the Township’s Protest in the above-referenced proceeding.

This document is being served on all parties of record. The document was also filed electronically with the Public Utility Commission on this date.

Very truly yours,

Matthew S. Olesh

cc: All parties of record

BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

In re: Application of Pennsylvania-American Water Company pursuant to Sections 507, 1102, and 1329 of the Pennsylvania Public Utility Code for Approval of (1) the transfer, by sale, to Pennsylvania-American Water Company, of substantially all the assets, properties and rights related to the wastewater collection treatment system owned by the York City Sewer Authority and operated by the City of York, (2) the rights of Pennsylvania-American Water Company to begin to offer or furnish wastewater service to the public in the City of York, Pennsylvania, and to three bulk service interconnection points located in North York Borough, Manchester Township, and York Township, York County, Pennsylvania, and (3) the rights of Pennsylvania-American Water Company to begin to offer and furnish Industrial Pretreatment Program to qualifying industrial customers in Manchester Township, Spring Garden Township, and West Manchester Township, York County, Pennsylvania

A-2021-3024681, *et al.*

In re: Petition of Pennsylvania American-Water Company under Section 508 of the Pennsylvania Public Utility Code to modify seven agreements with a corporation and municipal corporations to be assumed by Pennsylvania-American Water Company upon closing of its acquisition of substantially all of the assets related to the wastewater collection and treatment system owned by the York City Sewer Authority and operated by the City of York.

P-2021-3024681

PROTEST OF WEST MANCHESTER TOWNSHIP

Pursuant to 52 Pa. Code §§ 3.502, 5.51, 5.52 and 5.53, West Manchester Township (“West Manchester” or the “Township”) hereby files this Protest to the Application (the “Application”) of Pennsylvania-American Water Company (“PAWC”) to acquire the wastewater system assets of the City of York (the “City”) and to begin providing service to the public in the

City and to the bulk service interconnection points located in North York Borough, Manchester Township, and York Township (the “Proposed Transaction”).

Additionally, West Manchester files this Protest to the Petition (the “Petition”) of PAWC to modify its intermunicipal sewer agreement with the City to permit PAWC to assume all rights and obligations of the City under the Agreement and modify its rate formula. In support of this Protest, the Township states as follows:

1. West Manchester is a township with its principal place of business located at 380 East Berlin Road, York, Pennsylvania 17408.

2. West Manchester provides wastewater service to residential, commercial, government, and industrial customers within its boundaries.

3. West Manchester collects wastewater from its customers and transports the wastewater to the City’s sewage collection system, interceptors, and wastewater treatment plant (the “System”) for treatment.

4. West Manchester will be represented in this case by, and all documents should be served upon its counsel:

Thomas Wyatt
Matthew Olesh
Sydney Melillo
Centre Square West
1500 Market Street, Suite 3400
Philadelphia, PA 19102
Tel.: (215) 665-3000
Fax: (215) 665-3165
Thomas.Wyatt@obermayer.com
Matthew.Olesh@obermayer.com
Sydney.Melillo@obermayer.com

5. West Manchester transports wastewater to the System for treatment and disposal pursuant to the terms of an intermunicipal sewer agreement entered into by West Manchester and

the City on December 10, 1976 (the “Agreement”). The Agreement is attached to PAWC’s Application as Appendix A-25.4.

6. Under the terms of the Agreement, in the event that the 1976 York City Sewer Authority bonds, as well as any future bonds that may be issued in connection with the System, are retired, then the Agreement automatically terminates and “shall be entirely renegotiated” by West Manchester and the City. *See* Appendix A-25.4, Section 12.

7. Prior to the transfer in ownership of the System to PAWC via the Proposed Transaction, all outstanding debt associated with the System must be retired or defeased.

8. Pursuant to the terms of the Asset Purchase Agreement (“APA”) between PAWC and the City, the City agreed to repay the outstanding debts incurred in connection with the System on the date of closing. *See* Appendix A-24-a, section 11.01(b).

9. Thus, at the closing of the Proposed Transaction, and prior to the Transfer of the System to PAWC, the Agreement will terminate and the City – by the express terms of the Agreement – must renegotiate a new agreement with West Manchester. *See* Appendix A-25.4, Section 12; *see also* Direct Testimony of Bernard J. Grundusky, PAWC Statement No. 1, p. 14:4-6, 13-15.

10. If the City fails to agree to terms on a new agreement with West Manchester, there will no longer be any active agreement with West Manchester to transfer as part of the Proposed Transaction, which will seek to transfer rights that the City has no right to convey and PAWC has no right to receive.

11. Absent a new agreement with West Manchester, the Application is irreparably defective. By its own terms, the Application is premised on a valuation that assumes a revenue stream that is not provided for by any agreement or otherwise.

12. Despite understanding its obligation to renegotiate upon retirement of the outstanding debt, the City has never approached West Manchester to negotiate the terms of a new intermunicipal agreement, as required by section 12 of the Agreement.

13. Instead, the City took two actions that violate the terms of the Agreement, as well as governing law.

14. First, the City sent West Manchester a notice purporting to assign the Agreement to PAWC – notwithstanding that the Agreement does not permit assignment to a regulated utility – and instructing the Township negotiate the terms of a new agreement with PAWC.

15. The Agreement, by its clear terms, limits assignment of the City’s rights and obligations to “an agency or municipality.” *See* Appendix A-25.4, Section 21.

16. PAWC is neither an agency or municipality, and as a result the Agreement is not assignable to PAWC.

17. Second, the City introduced and approved Ordinance No. 15 on June 1, 2021 (the “Ordinance”), which purports to arbitrarily set “default” bulk service rates to be charged to West Manchester “unless otherwise provided for in a valid intermunicipal sewer service agreement between the City and the wholesale sewer customer” *See* Appendix A-18-b.4.

18. Based on the clear terms of the Agreement, as well as the arbitrary, excessive rates set forth in the Ordinance, the City’s only plausible purpose in passing the Ordinance was to exert leverage over West Manchester on behalf of PAWC, forcing West Manchester to negotiate unfavorable terms with PAWC under duress.

19. PAWC seeks to avoid these clear legal bars to the Proposed Transaction by requesting amendment of the Agreement (along with other similar agreements) through the

Commission's extraordinary authority under Section 508 of the Pennsylvania Public Utility Code.

20. As a threshold matter, PAWC's Application pursuant to Sections 507, 1102, and 1329 is entirely premature until PAWC's Petition pursuant to Section 508 is finally and conclusively decided.

21. As submitted, the Application is, at best, incomplete until all issues relating to the Agreement in PAWC's Section 508 Petition are resolved, as PAWC has no rights under the Agreement at present or any agreement with West Manchester, nor would it if the Proposed Transaction were to proceed to closing with no modification to the Agreement. At worst, and more likely, however, the Application is irreparably defective. The Application seeks approval of a contract that will not exist at closing and is premised on a valuation that anticipates a revenue stream that will not exist.

22. PAWC submitted its Section 508 Petition in clear recognition of the glaring deficiencies with its Application pertaining to the Agreement, knowing that the only way to rectify them is by asking the PUC to force terms upon West Manchester without its consent and against its will.

23. The PUC should decline this invitation to unilaterally modify the Agreement to benefit PAWC, which is not even a current party to it, in clear contravention of the public interest and governing principles of contract law.

24. Indeed, were the PUC to exercise its discretionary Section 508 authority and modify the agreement as requested by PAWC, it would essentially sanction the City's breaches of the Agreement through its phantom assignment and bogus Ordinance (undoubtedly undertaken in collusion with PAWC). It is flatly contrary to the public interest and the general

well-being of this Commonwealth to circumvent the settled expectations of contracting parties by forcing one of those parties – here, a municipality – to bend to the will of a private actor against its wishes, all because apparently renegotiating the Agreement per its clear terms is not convenient for the City.

25. Moreover, West Manchester has the clear right to seek legal recourse for the City’s breaches under the Agreement described above. Under the Agreement, the exclusive forum where the Township may do so is in arbitration. *See* Appendix A-25.4, Section 23. The relief requested by PAWC’s Petition seeks to void these clear legal rights as provided for by the Agreement.

26. In that respect, not only is PAWC’s Application premature, but its Petition is as well, as it seeks to circumvent the clear jurisdiction of the American Arbitration Association to hear and decide West Manchester’s claims regarding the City’s breaches of the Agreement – claims that West Manchester will soon bring in arbitration, and which should be decided before any action is taken on the Petition or Application.

27. Indeed, PAWC’s Petition is premised on its faulty assumption that “York will have lawfully assigned the contracts [including the Agreement] to PAWC.” *See* Direct Testimony of Bernard J. Grundusky, PAWC Statement. No.1, p. 16:15. Thus, in seeking to proceed with the Petition, PAWC asks the Commission to accept as gospel and/or tacitly approve its position that assignment of the Agreement is permissible, even though it is plainly not, and even though this is a threshold issue that must be determined in arbitration in any event.

28. PAWC itself acknowledges that issues related to assignment of the Agreement must be resolved prior to closing, and that these issues are subject to arbitration. *See* Direct Testimony of Bernard J. Grundusky, PAWC Statement. No.1, p. 13:7-11. There can thus be no

question that these issues must be conclusively decided in arbitration before the Petition or Application move forward, since assignment of the agreements is a threshold issue to both.

29. Finally, West Manchester respectfully submits that the Proposed Transaction will undoubtedly result in rate increases for its customers, and will otherwise not substantially and affirmatively benefit them.

30. Thus, West Manchester submits this Protest in opposition to the Proposed Transaction for the following reasons:

- A. PAWC's Application is premature, and it should be stayed until such time as all issues raised in the Petition and any protests or other responses thereto are resolved;
- B. Even if not premature, PAWC's Application is defective because by the express terms of the Agreement, the City must renegotiate the terms of the Agreement when all debt associated with the System is retired or discharged (which is an express condition to closing the Proposed Transaction under the APA); therefore, absent renegotiations with West Manchester, the Agreement will be a nullity and no longer effective at closing of the Proposed Transaction;
- C. The City had communicated, through its words and actions, that it will not engage in discussions to renegotiate the Agreement; consequently, the Proposed Transaction cannot be approved under 66 Pa.C.S. § 507 because the City will have no ability to convey any rights or obligations under it;
- D. Moreover, even if it did not terminate, the City cannot assign its obligations to treat and dispose of West Manchester's wastewater under the Agreement to PAWC because the City may only assign its rights and obligations to "an agency

or municipality”—and, as a regulated public utility corporation, PAWC is neither an agency or municipality;

- E. PAWC’s Petition is premature, and it should be stayed until such time as all issues regarding the Agreement raised in arbitration by West Manchester are resolved;
- F. Even if not premature, PAWC’s Petition should be denied, as no obligations, terms, or conditions of the Agreement are unjust, unreasonable, inequitable, or otherwise contrary or adverse to the public interest and the general well-being of this Commonwealth;
- G. PAWC’s requested amendments to the Agreement by way of its Petition are unjust, unreasonable, inequitable, or otherwise contrary or adverse to the public interest and the general well-being of this Commonwealth;
- H. Through its Petition, PAWC attempts to unilaterally amend the terms of an agreement that will not exist at the time of closing of the Proposed Transaction;
- I. It is not in the public interest for PAWC and the City to attempt to force West Manchester to renegotiate terms of the Agreement under duress by way of the Ordinance;
- J. The Proposed Transaction is not consistent with the public convenience and necessity for PAWC to acquire the assets and contracts of the City, in violation of 66 Pa C.S. § 1101, *et seq.*;
- K. The acquisition of the City’s assets and contracts by PAWC would not provide an affirmative benefit to the public, but instead, the Proposed Transaction would be detrimental to the public, including West Manchester and its customers, in

violation of the section 1103 requirement that a proposed transaction will promote the service, accommodation, convenience or safety of the public in some substantial way.

31. Counsel consents to the service of documents by electronic mail at the e-mail addresses listed above, as provided in 52 Pa. Code § 1.54(b)(3).

WHEREFORE, West Manchester respectfully requests that the Commission (a) accept this Protest for filing; (b) allow West Manchester to become party to this proceeding; (c) stay review of PAWC's Application until all issues with its Petition are resolved; (d) stay review of PAWC's Petition until all arbitration proceedings filed by West Manchester are concluded; (e) deny PAWC's Petition; (f) investigate and hold full public input hearings on the Application if and when the Commission issues a Secretarial Letter indicating its final acceptance; and (g) deny PAWC's Application.

Respectfully submitted,

**OBERMAYER REBMANN MAXWELL &
HIPPEL LLP**

/s/ Matthew Olesh

Thomas Wyatt
Matthew Olesh
Sydney Melillo
Centre Square West
1500 Market Street, Suite 3400
Philadelphia, PA 19102
Tel.: (215) 665-3000
Fax: (215) 665-3165
Thomas.Wyatt@obermayer.com
Matthew.Olesh@obermayer.com
Sydney.Melillo@obermayer.com

Dated: July 19, 2021

VERIFICATION

I, Kelly Kelch, the Township Manager for West Manchester Township, hereby verify that the statements of fact made in the foregoing Protest 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 the statements made herein are subject to the penalties of 18 Pa. C.S. § 4904 (relating to unsworn falsification to authorities).


Kelly Kelch

Dated: July 17, 2021



CERTIFICATE OF SERVICE

I, Matthew Olesh, Esq., hereby certify that I have served a true and correct copy of the foregoing Protest upon the parties listed below in accordance with the requirements of 52 Pa. Code §§ 1.54 (relating to service by a party) via electronic mail.

David P. Zambito
Jonathan P. Nase
Cozen O'Connor
17 North Second Street, Suite 1410
Harrisburg, PA 17101
dzambito@cozen.com
jnase@cozen.com

Susan Simms Marsh
Pennsylvania-American Water Company.
852 Wesley Drive
Mechanicsburg, PA 17055
Susan.marsh@amwater.com

Allison Kaster,
PUC Bureau Of Investigation And Enforcement
400 North Street, 2nd Floor West
Harrisburg, PA 17120
akaster@pa.gov

Erin K. Fure
Office of Small Business Advocate
555 Walnut Street, 1st Floor
Harrisburg, PA 17101
efure@pa.gov

Christine M. Hoover
Office of Consumer Advocate
555 Walnut Street, 5th Floor
Harrisburg, PA 17101
choover@paoca.org

/s/ Matthew Olesh

Matthew Olesh, Esquire

Dated: July 19, 2021