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John F. Walko
Steven J. English
Michael A. Luongo
Kevin M. McGrath
Robert M. Sebia
Graham R. Bickel

OF COUNSEL:
J. Scott Maxwell
Edward Rubin

LANSDALE
ACTS Center – Blue Bell
375 Morris Road
Post Office Box 1479
Lansdale, PA 19446-0773
Phone 215-661-0400
Fax 215-661-0315

LIMERICK
HARRISBURG

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November 5, 2018

Via PaPUC E-Filing
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

Re: Comments to Tentative Supplemental Implementation Order
Docket No. M-2016-2543193

Dear Pennsylvania Public Utility Commission:

The Pennsylvania Municipal Authorities Association ("PMAA") appreciates the opportunity to submit comments to the Tentative Supplemental Implementation Order, dated September 20, 2018, at Docket M-2016-2543193 ("Order"). The Order was published in the October 6, 2018 Pennsylvania Bulletin, and, consistent with the thirty (30) day comment period upon publication in the Pennsylvania Bulletin, PMAA respectfully submits the following comments for consideration.

PMAA is an association that represents over 700 sewer and water authorities in the Commonwealth of Pennsylvania, which collectively provide water and sewer infrastructure services to over six million Pennsylvania citizens. PMAA's mission is to assist water and sewer authorities in providing services that protect and enhance the environment and promote economic vitality and the general welfare of the Commonwealth of Pennsylvania and its citizens.

In submitting its comments, PMAA will make reference to two (2) recent court decisions in Pennsylvania that are germane to this matter: (1) the Supreme Court's ruling in *Pennsylvania Environmental Defense Foundation v. Commonwealth*, 161 A.3d 911 (2017) ("PEDF"), and (2) the Commonwealth Court's opinion in *Tanya J. McCloskey, Acting Consumer Advocate v. Pennsylvania Public Utility Commission*, No. 1624 C.D. 2017 (Pa. Cmwlth. October 11, 2018) ("*McCloskey*"). [1]

[1] This case addresses Aqua Pennsylvania Wastewater Inc.'s ("Aqua") application for the acquisition ("Application") of the wastewater system assets of New Garden Township and New Garden Sewer Authority (collectively "New Garden"). During the underlying proceedings before an Administrative Law Judge and, subsequently, the Public Utility Commission, the Office of Consumer Advocate ("OCA"), among others, filed protests to Aqua's Application, contending that the sale was not in the public interest. Among the arguments made by the OCA was that "unwarranted additional burdens" would be placed on Aqua's existing ratepayers, because, in part, Aqua froze for a period of two years the rates that it would charge to New Garden ratepayers. *McCloskey*, at p. 8. In addition, OCA contended that Aqua's costs of acquiring New Garden, "would far exceed the revenues from the New Garden customers, necessitating that Aqua ratepayers' rates will be further increased." *McCloskey* at p. 9. Accordingly, OCA argued that the Application was "against the public interest" because "of

By way of background, Section 1329 of the Public Utility Code, which is the focal point of the Order, was signed into law on April 14, 2016, and became effective on June 13, 2016. *See* 66 Pa C.S. §1329. As the Commonwealth Court noted in *McCloskey*, Section 1329 of the Public Utility Code "provide[s] how municipal or authority-owned water and wastewater systems assets are to be valued for ratemaking purposes when those assets are acquired by investor-owned water and wastewater utilities or entities." *McCloskey* at p. 2. In other words, "[s]ection 1329 allows a private utility to acquire a government utility's assets at its fair market value rather than at the original cost of assets minus the accumulated depreciation and then add that amount to the rate base." *Id*. at p. 20. Simply put, Section 1329 changes the historical valuation methodology based on depreciation of the asset and, instead, "allows a utility to cover the full costs of its investment in purchasing the new system from ratepayers." *Id*. at p. 3.

As part of the "new" Section 1329 valuation process, the Public Utility Commission ("PUC") must issue a final order within six (6) months of the filing date of an application requesting approval of the acquisition of a municipal or authority-owned system. PMAA is concerned about the impact of such a transaction on the customers/ratepayers of its member authorities and believes that six (6) months is an insufficient period of time for the PUC to fully consider and adjudicate upon such an application under current guidelines. To that end, PMAA agrees with the PUC that its "procedures and guidelines can be improved in order to create more certainty in the [application] process" and that "the initial application should include enough relevant information so that statutory advocates and other stakeholders can examine the application and present their cases within the strict statutory timelines under Section 1329." *Order*, at pp. 1-2.

Based on the aforementioned, PMAA supports certain of the changes that the PUC proposes in its Order, specifically those that require a proposed purchaser of a public water or wastewater system to provide more detailed information regarding the proposed acquisition. However, PMAA believes that the Order should include additional criteria to ensure that any application contains sufficient information in order for the proposed transaction to be thoroughly vetted by those impacted, and to evaluate whether the proposed transaction is in the best interests of Pennsylvania's residents and ratepayers:

1. There should be at least one public meeting in the municipality where the municipal or authority-owned water or wastewater system subject of the acquisition is located, with a representative of the acquiring entity present to respond to any public comments regarding the proposed transaction. The person attending the meeting on behalf of the acquiring entity must have sufficient knowledge of the proposed transaction in order to be able to answer all reasonable questions regarding the transaction.

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the effect the acquisition would have on both Aqua's existing ratepayers and New Garden ratepayers." *McCloskey* at p. 9. Ultimately, the Public Utility Commission approved the transaction, which approval was vacated by the Commonwealth Court.

2. Timely individualized notice should be provided to (1) all ratepayers of the municipal or authority-owned system subject of the proposed acquisition, and (2) all of the acquiring entity's existing ratepayers, irrespective of geographic location, in order to provide such persons with sufficient opportunity to review all applicable documentation regarding the proposed transaction and submit any comments thereto. Any notice of the proposed transaction published in the Pennsylvania Bulletin or newspaper of general circulation should not be deemed sufficient. Moreover, as the Commonwealth Court stated in *McCloskey*, "[b]ecause an increase in rates involves a substantial property right, ratepayers are entitled to notice of a Commission's administrative proceeding in which a decision is made to increase rates in a subsequent rate base proceeding." *McCloskey,* at p. 23 *(citation omitted).* As the Commonwealth Court noted throughout its opinion, and as history teaches us, an investor-owned utility's acquisition of a public water or wastewater system in one part of the Commonwealth, may have an effect on the rates of its existing ratepayers in another part of the Commonwealth; therefore, it is imperative that all of the acquiring entity's existing ratepayers, as well as its potential new ratepayers, be provided an opportunity to participate in Section 1329 proceedings.

3. The acquiring investor-owned entity must provide current and future rates applicable to those ratepayers impacted by a proposed transaction and an explanation of those rates. Any proposed or actual deferment in rate increases must be clearly stated, because such deferment may impact the ratepayers at some future date. Following the guidance of the Commonwealth Court in *McCloskey*, no application that relies upon a later rate base proceeding should be considered. Indeed, in vacating the PUC's decision approving the acquisition of the New Garden system by Aqua, the Commonwealth Court noted that "by approving the sale and then putting off the consideration of the impact on rates to a later rate base proceeding, the Commission cannot do the balancing test required by Section 1102 of the Code to weigh all the factors for and against the transaction, including the impact on rates, to determine if there is a substantial public benefit." *McCloskey*, at p. 22.

4. The PUC should consider the Pennsylvania Supreme Court's decision in *PEDF,* referred to earlier, in any evaluation of a proposed transaction, including whether such transaction promotes a substantial public benefit. This case focused on Pennsylvania's Environmental Rights Amendment (Article 1, Section 27 of the Pennsylvania Constitution) ("ERA"), which provides that: "[t]he people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic-values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for

the benefit of all the people." In *PEDF*, the Pennsylvania Supreme Court considered whether revenue generated from oil and gas leases could be used, as the Commonwealth argued, for any use that "benefit[s] all the people of the Commonwealth, even if those uses do nothing to 'conserve and maintain' our public natural resources." *PEDF*, 161 A.3d 911, 934. The Supreme Court interpreted the ERA to mandate that the Commonwealth "as a trustee, 'conserve and maintain' our public natural resources in furtherance of the people's specifically enumerated rights" and that "the phrase 'for the benefit of all the people' . . . clearly indicates that assets of the trust are to be used for conservation and maintenance purposes." *PEDF*, 161 A.3d at 934-5. Taking this analysis one step further, the Supreme Court noted that "[o]nly within those parameters, clearly set forth in the text of Section 27 [ERA], does the General Assembly or any other Commonwealth entity, have discretion to determine the public benefit to which trust proceeds – generated from the sale of trust assets – are directed." *PEDF*, 161 A.3d at 935. Therefore, the Supreme Court rejected the Commonwealth's aforementioned argument, finding that "[t]he phrase 'for the benefit of all the people' may not be read in isolation and does not confer upon the Commonwealth a right to spend proceeds on general budgetary items." *Id*. at 934.

It should be noted that in *McCloskey*, the Commonwealth Court observed that "municipal authorities are not subject to the Commission's jurisdiction, their rates are not set on a rate base, rate of return and reconciliation of revenue expenses. Rather, municipal authorities set rates based on the revenues and expenses that are needed to operate the system and pay for its capital costs." *McCloskey*, at pp. 25-26. In other words, revenues generated by municipal authorities, with respect to a water or wastewater system, are put back into the system to ensure, for example, the integrity of the system's infrastructure and maintenance of the system. By law, with limited exceptions, municipal authorities are not entitled to use money "for any purposes other then a service or project directly related to the mission or purpose of the authority…" *See* 53 Pa. C.S. §5612(a.1).

In any event, the PUC should evaluate any proposed transaction involving a public natural resource, *e.g.* water, consistent with the Supreme Court's opinion in *PEDF*.

5. As the PUC's Order makes clear, any proposed acquisition of a municipal or authority-owned water or wastewater system by an Acquiring Public Utility must "be in the public interest." *Order*, at p. 3, citing 66 Pa. C.S. §1103(a). Along these lines, in *McCloskey*, the Commonwealth Court noted that "[c]entral to this appeal is the question of what factors the Commission must consider before approving an acquisition of a public system by a private utility under Section 1329 of the Code." *See McCloskey*, at p. 16. In analyzing this issue, the Commonwealth Court

> noted that the Pennsylvania Supreme Court has made clear that "Sections 1102 and 1103 of the Code, together with Section 1329, require an applicant not only show that no harm will come from the transaction but also to establish that substantial affirmative benefits flow to its ratepayers." *See McCloskey*, at p. 16, citing *City of York v. Pennsylvania Public Utility Commission*, 295 A.2d 825, 828 (Pa. 1972). Significantly, the Commonwealth Court in *McCloskey* did not limit, geographically or otherwise, which of the acquiring entity's ratepayers must be part of such an analysis. Indeed, as discussed earlier, the Commonwealth Court noted in its opinion that individualized notice must be given to all ratepayers (and potential new ratepayers) of a proposed sale, to give them an opportunity to participate in a Section 1329 proceeding. *See McCloskey*, at p. 26. Therefore, consistent with McCloskey, in any Section 1329 proceeding, the entity seeking to acquire a municipal or authority-owned system must clearly demonstrate a substantial affirmative benefit to <u>all</u> of its ratepayers, not just those in the municipality of the proposed transaction.

Once again, PMAA appreciates the opportunity to submit the above-referenced comments. If you have any questions, please contact the undersigned.

Very truly yours,

HAMBURG, RUBIN, MULLIN,
MAXWELL & LUPIN

By: _____
STEVEN A. HANN

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