PENNSYLVANIA AMERICAN WATER

**Elizabeth Rose Triscari**
*Director, Corporate Counsel*
Pennsylvania-American Water Company
852 Wesley Drive, Mechanicsburg, PA 17055
P: 717.550.1574 F: 717.531.3399 C: 717.585.1934
elizabeth.triscari@amwater.com

July 15, 2020

**VIA ELECTRONIC FILING**

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

**In Re: Application of 52 Pa. Code § 3.501 to Certificated Water and Wastewater Utility Acquisitions, Mergers, and Transfers**
**Docket No. L-2020-3017232**

Dear Secretary Chiavetta:

In accordance with the April 30, 2020 Advanced Notice of Proposed Rulemaking Order, please find the Comments of Pennsylvania-American Water Company.

Should you have any questions, please feel free to contact me.

Sincerely,

Elizabeth Rose Triscari

cc: Christian McDewell, Law Bureau *(via electronic mail)*
Sean Donnelly, Bureau of Technical Utility Services *(via electronic mail)*

**BEFORE THE**
**PENNSYLVANIA PUBLIC UTILITY COMMISSION**

| | | |
|---|---|---|
| **Application of 52 Pa. Code § 3.501 to Certificated Water and Wastewater Utility Acquisitions, Mergers, and Transfers** | : : : : | **L-2020-3017232** |

---

**PENNSYLVANIA-AMERICAN WATER COMPANY'S COMMENTS IN RESPONSE TO THE ADVANCED NOTICE OF PROPOSED RULEMAKING ORDER**

---

## I. INTRODUCTION AND GENERAL COMMENTS

Pennsylvania-American Water Company ("PAWC" or the "Company") appreciates the opportunity provided by the Pennsylvania Public Utility Commission's ("Commission") Advanced Notice of Proposed Rulemaking Order ("ANOPR Order") to offer comments on how to improve the process for experienced and capable water and wastewater public utilities to obtain certificates of public convenience. *See* ANOPR Order at 5. ("Particularly, the Commission is interested in comments addressing whether the documentation requirements required of well-established service providers are too extensive.") As explained below, the Commission's policy goal "to improve water and wastewater service to Pennsylvania residents through the regionalization of water and wastewater services" is best served, and will be substantially enhanced, by reassessing and reducing the filing requirements imposed on "well-established service providers" seeking certificates of public convenience to serve areas added through their acquisition of existing water distribution and wastewater collection systems and to extend their facilities to underserved areas. Significantly, such an easing of burdensome, but unnecessary, filing requirements is entirely consistent with existing Pennsylvania appellate court authority holding that, while an applicant for a certificate of

public convenience must establish that it is technically, legally and financially fit to provide proposed service, an existing certified public utility is entitled to a presumption of such fitness. *See, e.g., McCloskey v. Pa. Pub.Util.Comm'n*, 195 A.3d 1055, 1058 (Pa. Cmwlth. 2018).

The Commission's regulations at 52 Pa. Code §3.501 ("Section 3.501") were promulgated in 1976. At that time, the Commission had to deal with the proliferation of small water and wastewater utilities being formed by developers of residential and "resort" communities across the state. Notably, the Commission and the Pennsylvania Department of Environmental Protection ("DEP") had not yet begun to coordinate their efforts to assure the financial and technical capability of those new entrants to the public utility business.

Given the historical context in which it was created, Section 3.501 was designed to elicit information and documents that the Commission, at the time, determined was necessary to assess the fitness of applicants for certificates of public convenience seeking approval to provide to begin to offer, render, furnish, or supply water or wastewater service within this Commonwealth. *See* Section 3.501(a) and 66 Pa. C.S. § 1101 (Organization of Public Utilities and Beginning of Service). However, over time, as the proliferation of new water and wastewater utilities subsided, a new set of problems emerged, and the Commission confronted the legacy of seriously deficient service left by numerous small systems across the Commonwealth. As the Commission recognized, the only viable solution to this problem was to encourage larger utilities to acquire smaller, frequently troubled systems and, with their greater financial and technical resources, make the substantial investments needed to assure that the acquired customers obtained safe, reliable and reasonable service.

As acquisitions became much more prevalent, applicable bureaus of the Commission began to look to Section 3.501 for guidance to determine what an application for a certificate of public

convenience to serve new, acquisition-related service areas should contain. As a consequence, the information and documents listed in Section 3.501, which were meant to provide the basis for assessing the capability of *new* entrants seeking certificates of public convenience under 66 Pa. C.S. § 1101, morphed into *de facto* filing requirements for experienced, capable and well-established public utilities seeking certificates of public convenience under 66 Pa. C.S. § 1102(a)(1) and (3) to serve areas acquired in furtherance of the Commission's consolidation and regionalization policies. In short, in the absence of filing requirements more precisely targeted at acquisitions and service extensions by existing, certificated water and wastewater utilities, the Commission tacitly defaulted to the terms previously established in Section 3.501.

As experience has now shown, the provisions of Section 3.501 are overly-broad and largely unnecessary when applied to acquisitions or service extensions by experienced, capable well-established public utilities. Accordingly, the Commission has correctly determined that it is critically important at this juncture to review and revise Section 3.501 and Section 3.502 (dealing with protests). Revisions are clearly needed to establish filing requirements that are better adapted to the current regulatory environment. Moreover, when Section 3.501 was promulgated, electronic access to the extensive records of the Commission, DEP, other state agencies and municipalities was not available. Under those circumstances, Section 3.501's requirements that an applicant preemptively submit copies of documents or compilations of information that might be useful in reviewing an application was probably understandable. That is no longer the case. That information is now available to anyone with internet access, including Commission staff. Section 3.501 should be amended to recognize that fact.

The Commission no longer confronts the proliferation of new public utilities as it did in 1976. Today, it must address the problem of substantial and chronic underinvestment in essential

infrastructure by many smaller systems that are constrained by limited or non-existent access to sources of funding. As the ANOPR Order recognizes, the solution to that problem lies in the Commission's commitment to continue the process of consolidation and regionalization in the water and wastewater industries. In order for the Commission's efforts to be successful, the delay and regulatory burdens that are unnecessarily imposed by Section 3.501 should be alleviated. The Commission should streamline the process for issuance of certificates of public convenience to well-established public utilities, which have a long, public and entirely transparent track record that is fully accessible to the Commission. To that end, the Company urges the Commission to carefully consider, and adopt, the specific revisions to Sections 3.501 and 3.502 discussed in detail in Section III hereafter.

## II. PAWC Is Directly and Adversely Affected By The Application of Section 3.501 To Its Applications For Certificates Of Public Convenience

PAWC provides service to approximately 668,658 water customers and 74,754 wastewater customers within its certificated service territory, which encompasses portions of thirty-six counties across the Commonwealth. As a Pennsylvania public utility, PAWC is subject to the regulatory authority of the Commission. In addition, the Company must comply with drinking water, environmental and operational standards established by DEP and the United States Environmental Protection Agency ("EPA"). Through the years, the Company has played a major role in furthering the Commission's goals of regionalization and consolidation of water and wastewater systems through acquisition, including the acquisition of non-viable water and wastewater systems.

The Company is actively engaged in furthering the Commission's goals of regionalization and consolidation of water and wastewater systems through acquisitions. Over the last 20 years, PAWC has applied for certificates of public convenience in connection with the acquisition of more than 60 water and wastewater systems. Most recently, since the Company's 2017 base rate case,

PAWC has applied for certificates of public convenience in connection with the acquisition of three (3) water systems (Municipal Authority of the Borough of Turbotville, Steelton Borough Water Authority and Winola Water Company) and six (6) wastewater systems (Municipal Authority of the City of McKeesport, Sadsbury Township, Turbotville Borough, Exeter Township, Kane Borough Authority and Delaware Sewer Company). These applications were all made pursuant to Sections 529, 1102 and/or 1329 of the Code. The Company has recently entered into asset purchase agreements to acquire three additional wastewater systems (Royersford Borough, Valley Township and Upper Pottsgrove Township) and one water system (Valley Township) and has or will be submitting applications for a certificate of public convenience in connection with those acquisitions in the near future.

As previously stated herein, the Commission has historically encouraged larger utilities to acquire smaller, frequently troubled systems and, with their greater financial and technical resources. PAWC has and continues to be one of those experienced, capable, well-established public utilities that has acquired such systems. Specifically, the Company has acquired several small and troubled Commission-regulated companies including, but not limited to, Nittany Water Company, Birch Acres Water Company, Wildcat Park Water Association, Lake Spangenburg Water Company, All Season Water Company, Olwen Heights Water Company, Clean Treatment Sewage Company and Berry Hollow Water Company.

Furthermore, the Company has filed numerous applications for extension of its certificated service territory to serve additional customers in need of safe and reliable water and/or wastewater service and will continue to do so as the need arises. The Company's service territory encompasses many areas where the legacy of coal mining, natural gas and oil drilling, heavy industry and agricultural run-off have caused serious deterioration of the quantity and quality of water available

to homeowners and businesses with on-lot wells. PAWC has worked collaboratively with municipalities and the Pennsylvania Office of Consumer Advocate ("OCA") to address those conditions, which may also require the Company to obtain approval to extend its service area to locations without access to public water or wastewater service.

The Company has found the process for approval of its applications for certificates of public convenience in the context discussed above to be unduly burdensome and a barrier to the Commission's stated policy goals of regionalization and consolidation. As previously explained, the filing requirements imposed by Section 3.501 are ill-adopted to the kinds of applications PAWC is filing and in need of revision. It has been PAWC's experience that applications although unprotested, often generate multiple rounds of data requests from the Commission's Bureau of Technical Utility Services ("TUS"). While PAWC appreciates the need for TUS to conduct the due diligence it deems necessary, the Company believes that a good bit of those information requests are triggered by a perceived need to further develop information listed in Section 3.501 that, as a practical matter, is not relevant when an established utility is acquiring another, smaller water or wastewater system or is extending facilities into underserved areas. Consequently, paring back the unnecessary information and documentation requirements of Section 3.501 should have the collateral benefit of relieving TUS of its perceived necessity to issue data requests to pursue inquiries that are not material or relevant to assessing whether the Commission should grant the application of an established, seasoned utility with a long track record of furnishing safe and reliable service.[1]

[1] Protested applications are referred to the Office of Administrative Law Judge. Typically, in these cases, the Company is subject to extensive discovery from the public advocates and some degree of litigation prior to resolution. While these situations are relatively case-specific, the Company believes that the scope of litigated issues could be narrowed if application filing requirements were properly limited and focused on relevant issues. A simplified application process may also limit any duplication of efforts resulting from TUS-issued data requests prior to a protest being filed and discovery requests by the public advocates after protests are filed, thereby reducing the Company's legal and consulting costs that may ultimately be passed on to ratepayers.

Given its involvement in numerous acquisitions and service extensions requiring the issuance of certificates of public convenience, PAWC welcomes this opportunity to assist the Commission in improving the application process for well-established, existing certificated utilities Accordingly, in its capacity as a Pennsylvania water and wastewater public utility, PAWC submits these comments to the ANOPR for the Commission's consideration..

## III. PAWC'S COMMENTS RESPONDING TO SPECIFIC QUESTIONS

### A. Specific Updates to Sections 3.501 and 3.502

#### 1. How might the Commission simplify the requirements of Section 3.501 for well-established utilities without hindering the traditional policy goals of Section 3.501 and 3.502?

The traditional policy goals of Section 3.501 are threefold: (1) to ensure the fitness and viability of utilities providing water and wastewater service in the Commonwealth while discouraging the creation of new small, non-viable systems; (2) promoting regionalization and consolidation through acquisition and merger of water and wastewater systems; and (3) ensuring compliance with the regulations and mandates of DEP and other governmental entities. These policy goals can still be achieved and even encouraged by streamlining the process to exempt experienced, capable and well-established public utilities from unduly burdensome filing requirements designed to confirm viability, technical fitness and compliance that can appropriately be presumed.

For experienced, capable and well-established public utilities, PAWC respectfully suggests that the following requirements of Section 3.501 be eliminated and/or modified as follows:

- Eliminate requirement of business plan required by DEP. § 3.501(a)

Section 3.501(a)(1) Plant in service

- Eliminate requirement of a breakdown of the sources of funds used to finance construction of facilities.

Section 3.501(a)(2) Map of service area

- Modify mapping requirements to be consistent with requirements of PA One Call System. §3.501(a)(2)(i)
- Eliminate the need for elevations of major facilities and service areas. §3.501(a)(2)(iv)
- Eliminate requirement of DEP permitted productive or treatment capacity, pipe sizes and materials type – eliminate for service territory, reference asset information. §3.501(a)(2)(v)
- Eliminate requirement of a copy of the county comprehensive plan, municipal comprehensive plan and applicable zoning designations if requested, or alternatively, clarify when a request is necessary and appropriate. Allow provision of a link to access plans electronically rather than requiring a copy be provided. §3.501(a)(2)(vi)

Section 3.501(a)(3) Customers

- Eliminate need for projected future connections and usage estimates for 10 years. §3.501(a)(3)(ii)
- Eliminate requirement for utility to demonstrate ability to provide adequate service. §3.501(a)(3)(iii)

Section 3.501(a)(4) Rates

- Clarify that notice in the Pennsylvania Bulletin and newspapers in general circulation in the subject area for two consecutive weeks is adequate notice to customers of the filing of the application and the rates filed for all acquisitions with the exception of

those acquisitions seeking an addition to rate base of fair market value under Section 1329 of the Code, which requires individual notice to customers. As discussed below in the Company's comment to Section 3.501(d), the Commission should also consider electronic alternatives to traditional hard-copy newspaper legal notices.

Section 3.501(a)(6) Proof of compliance

- Eliminate requirements for copies of NPDES permits, operators' certificates, 5-year compliance history with DEP and 5-year DEP compliance history of the applicant. Technical fitness and compliance with DEP can be presumed. Alternatively, require a statement of whether the acquired utility has any current DEP violations and how the acquiring utility will address such violations.

Section 3.501(a)(7) Additional documentation

- Modify to remove overly broad and unduly burdensome requirements for experienced, capable, well-established public utilities. The Company suggests a requirement instead that an application indicates which governmental entities' mandates and requirements the acquired utility is subject to, whether the acquired entity has any existing violations and if so, how will the acquiring utility address such violations.

Section 3.501(a)(8) Affected persons

- Modify to "within 1 mile of the applicant's proposed *service area*," rather than "proposed facilities" to be consistent with Section 3.501(f)(2).

Section 3.501(c) Filing

- Modify to require Commission review of applications for completeness within 10 business days. Codify current TUS practice of notifying utility of information or

documents deemed missing and give the opportunity for those to be provided without rejecting an application.

Section 3.501(d) Notice

- Modify to shorten protest period to 15 days.
- Consider alternatives to daily notice for consecutive weeks in a newspaper of general circulation, including electronic news sources, social media, etc. The current notice requirements are prohibitively expensive and are unlikely to actually provide notice given modern levels of newspaper readership. Clarify that the requirement that "the utility or applicant shall individually notify existing customer of the filing of the application," is accomplished through the notice procedures otherwise described in this section and does not require notice to be sent to each individual customer as required in Section 1329 acquisitions.

Section 3.501(e) Application form

- Any standard applications forms developed pursuant to this section should serve to ease the application process and not be a vehicle to make it more onerous and require an extensive checklist of filing requirements similar to what is currently required for Section 1329 acquisitions.
- Consider a simple application form with limited requirements, especially for small acquisitions relative to the size of the acquiring utility. For example, for acquisitions or extensions of service territory which result in less than a 2% increase in customers served or a projected increase in revenues of less than 2%, the acquiring utility could be required to file only the relevant agreements, service territory map, description of rates charged to the new customers, and proof of publication.

- The Commission should further consider an application form that permits quicker review and approval for acquisitions that involve a small and troubled system that poses an immediate threat to the public health and safety. For such applications, the Commission should afford additional flexibility in all aspects of the application process – including with regard to required notice. These acquisitions are often not beneficial to the acquiring utilities' ratepayers and shareholders, and the costs of such acquisitions should be limited to the maximum extent possible.[2]

Section 3.501(f) Copies

- Modify to permit electronic copies to be provided. Many applications are voluminous and the resources to print and mail hard copies are cost prohibitive. The Company has been contacted in the past by entities required to be served with a copy of the application inquiring as to why they have received it, whether they need to take any action and sometimes even whether they can just dispose of it. It would be more efficient to be able to provide an electronic version and a hard copy only upon request.
- Consider reducing the number of entities upon which copies are required to be served. This is another burdensome requirement with limited value. The same goals could be accomplished by requiring notice to certain entities of the application filing and that a copy will be provided upon request.

New Section – Timeline for Application Approval

- Consider a new provision providing that an unprotested application for extension of service territory will be decided within three months and if no action is taken by the Commission, the applications will be deemed approved as filed and a certificate of

[2] Likewise, TUS data requests on such acquisitions should be limited.

public convenience issued. Similarly, PAWC suggests a six-month deadline for a Commission decision on an unprotested application for approval of an asset acquisition under Section 1102. In recent years, it has become common for such applications to take much longer for approval. It is not uncommon for multiple rounds of data requests to be issued by TUS for a simple extension of service territory despite the Company's applications becoming cumulatively more and more comprehensive based on past data requests. The Company is committed to providing that information which is necessary for a certificate of public convenience to be appropriately issued; however, those requirements seem to continue to become increasingly difficult to meet. The goalpost keeps moving. PAWC suggests a reasonable time frame for approval of applications to manage the level of review that is actually necessary for well-established utilities looking to extend service to customers that need it and/or to acquire water and wastewater systems in furtherance of the Commission's stated goal of consolidation and regionalization. The legislature has acknowledged the need for reasonable timeframes for Commission approval of applications as evidenced by the passage of Section 1329 with a requirement of a final Commission order within six months of filing of an application. 66 Pa. C.S. §1329(d)(2). Despite some initial challenges, the Section 1329 timeline has proven to be workable. Other applications for a certificate of public convenience, including those that are protested, should also be decided within a reasonable timeframe.

2. What are the expected benefits of reducing requirements applicable to existing utilities? How would those benefits be passed on to ratepayers?

Reducing the requirements applicable to experienced, capable, well-established public utilities will translate to shorter periods of time for Commission approval for faster delivery of water and wastewater service by a competent provider to those customers supporting the request, whether it be for new development, commercial/industrial users, to address water/wastewater service or quality issues, acquiring troubled systems, etc. In the case of troubled systems, reduced time to close acquisitions minimizes further system degradation and associated regulatory and customer service issues.

Reduced requirements will also benefit ratepayers by reducing the costs, in certain application proceedings, to prepare, file and serve the applications and to respond to data requests with information and documents that can arguably be viewed to be unnecessary. A simpler application process may reduce the Company's need to retain outside legal, engineering and accounting professionals as well as reduce the Company's internal staff time and resources. In addition, reducing requirements can more efficiently use the Commission's resources to avoid burdensome reviews of complicated applications.

3. What, if any, issues arise from allowing existing utilities the option to meet the requirement of 3.501(a)(1)(ii)(A) following the completion of an original cost study after the transaction has closed, in lieu of submitting this information with an application?

PAWC does not see any negatives to permitting existing utilities the option of completing an original cost ("OC") study after a transaction has closed in order to meet the requirements of 3.501(a)(1)(ii)(A). It is common for sellers to have projects under construction that will not be

completed until nearer to close or even after close. Therefore, the actual construction costs may not be known until the time these projects are completed. In addition, municipal sellers' depreciation schedules/asset lists (if available) are almost always incomplete. It is not reasonable, or even possible, to file an accurate, all-inclusive OC study when the application is filed.

The Company believes that an OC study for an acquisition adjustment in a rate case should remain, consistent with 52 Pa. Code §69.711 and §69.721.

4. What alternative documentation could be provided as evidence an application complies with the following subsections of Section 3.501:

- 3.501(a)(2)(vi): Providing a copy of county comprehensive plan, municipal comprehensive plan and applicable zoning designations.

PAWC notes that the subsection only requires that a copy of the above-referenced plans be provided *if requested*. As mentioned above, the Company recommends elimination of this requirement, or alternatively, that the Commission clarify when a request is necessary and appropriate. For the acquisition of an existing system or the certification of a line extension, these filings are unnecessary. Review of the county comprehensive plan, municipal comprehensive plan and applicable zoning designations would have been performed as part of the permitting process for the construction of the system. If such plans are deemed to be necessary, the requirement to provide the plans should be permitted to be complied with by providing an electronic link to the applicable county/municipal planning sites rather than a hard copy of the actual plans.

- 3.501(a)(3)(ii): Identifying the future number of connections anticipated for the next 10 years.

As mentioned above, PAWC suggests that this requirement be eliminated for experienced, capable and well-established utilities. For the acquisition of an existing system or the certification of a line extension, this is unnecessary. An experienced, capable and well-established utility performs proper planning as part of its normal operations and is responsible for providing service in the applied-for area. Such a utility can be presumed to understand that it has a requirement to meet future capacity needs and can do so under its tariff. If such information is deemed to be necessary, at least for acquisitions of wastewater systems with a wastewater treatment plan, Chapter 94 reports would provide some level of future projections and could serve as alternative documentation. Otherwise, identification of future connections is speculative. A projection could be made by a utility with respect to estimated future growth in the subject area, but no definitive documentation can be provided as evidence of compliance with this requirement. If future viability, rather than adequate capacity, is the concern seeking to be addressed by this requirement, such utilities have an established customer base and are not in jeopardy of becoming too small to be viable.

- 3.501(a)(6)(iv): Providing a Pennsylvania Department of Environmental Protection (DEP) 5-year compliance history of other utilities owned or operated, or both, by the applicant, including affiliates, and their parent corporations regarding the provision of utility service.

This requirement should be eliminated for experienced, capable and well-established utilities. DEP compliance can be presumed and any violations promptly addressed.

- What are the costs and benefits of any proposed alternative documentation?

Alternative documentation results in limited costs or benefits. As mentioned above, this requirement should be eliminated for experienced, capable and well-established public utilities. DEP receives notice of applications for a certificate of public convenience and the opportunity to file a protest if there are compliance issues it believes need to be addressed.

- What potential costs and benefits exist by applying these sections to Class A water utilities when those Class A utilities are solely applying for a certificate of public convenience to acquire a non-certificated water or wastewater service provider?

There are limited to no benefits to applying these sections to Class A water utilities when those Class A utilities are solely applying for a certificate of public convenience to acquire a non-certificated water or wastewater service provider. Similarly, there is no benefit when these sections are applied to the acquisition of a certificated system or the certification of an extension of service territory for a line extension. These requirements are simply unnecessary. A responsible Class A utility performs proper planning as part of its normal operations and is responsible for providing service in the applied for area in compliance with DEP regulations.

The costs of applying these sections to Class A utilities are described in response to No. 2 above and should be avoided.

5. What are the potential costs and benefits to addition of a requirement to Section 3.501(a)(6) requiring the applicant to provide a copy of any DEP-approved Sewage Facilities Planning Modules and/or the current Act 537 Official Sewage Facilities Plan, if applicable? What

alternative documentation could be provided to show that an application complies with Act 537 and what are the costs and benefits of these alternatives?

PAWC does not see any benefit in adding requirements to already burdensome filing requirements. For Section 1329 acquisitions, the Commission's checklist of filing requirements does include the current Act 537 Plan, when applicable. The reason for inclusion appears to be so the Commission can confirm that the applied for service area is consistent with the Act 537 Plan of the municipality or municipalities. PAWC notes that DEP has jurisdiction over the Act 537 Plan process; however, the Commission's review process, over the past several years, has ventured further and further through data requests into areas over which DEP properly has jurisdiction.

DEP requires a minor update to the Act 537 Plan to reflect the change in ownership in all wastewater acquisitions. For wastewater line extensions, DEP reviews and approves the planning modules and other permits associated with the construction of the extension. Considering it is DEP's responsibility for review and approval of these plans and permits, it seems unnecessary or duplicative that utilities also be required to be file the current Act 537 Plan as part of an application with the Commission. The current Act 537 Plan may be outdated and will be addressed by DEP, the acquired system and the acquiring utility through approval of an Act 537 special plan study. The Company suggests that the Commission condition its application approval upon the acquiring utility's obtaining all necessary DEP approvals prior to closing, rather than requiring and doing its own review of the Act 537 Plan. In addition, notice of applications for a certificate of public convenience is given to DEP which has the opportunity to file a protest with any concerns.

6. What alternative documentation could be provided by wastewater utilities in an application which assures compliance with the requirements of Section 5 of the Pennsylvania Sewage Facilities Act (35 P.S. § 750.5) and what are the costs and benefits of these alternatives?

Please see response to No. 5 above.

7. Should Section 3.501(a)(6) be revised to include providing evidence of DEP Chapter 105 Permits for water systems that have or will have impoundments with dams or reservoirs in accordance with DEP regulations in 25 Pa. Code § 105?

PAWC does not see any benefit in adding requirements to already burdensome filing requirements. Any permits required to be transferred to the applicant are typically listed on a schedule to the asset purchase agreement and the transfer of permits is reviewed and approved by DEP prior to closing. Additional regulatory oversight by the Commission is unnecessary. The Company suggests that the Commission condition its application approval upon the acquiring utility's obtaining all necessary DEP permits and approvals prior to closing. In addition, notice of applications for a certificate of public convenience is given to DEP which has the opportunity to file a protest with any concerns.

8. What alternative documentation could be provided by applicants to satisfy the present requirements of Section 3.501(a)(7) and what are the costs and benefits of these alternatives?

As mentioned above, the requirements of Section 3.501(a)(7) are overly broad and unduly burdensome, especially with respect to experienced, capable and well-established utilities. The Company suggests an alternative requirement that such utilities indicate which governmental

entities' mandates and requirements the acquired utility is subject to, whether the acquired entity has any existing violations and if so, how will the acquiring utility address such violations. In addition, notice of applications for a certificate of public convenience is given to DEP and other governmental entities who have the opportunity to file a protest with any concerns.

9. Should Section 3.501(d) be revised to use a less than 60-day protest period for an application either in limited circumstances or in all circumstances?

Yes, PAWC recommends a shorter protest period for an application, 15 days unless otherwise provided.

10. Should Section 3.501(d) be revised to require publication of the notice of an application once a week for two consecutive weeks in a newspaper of general circulation located in the territory covered by the application, rather than the requirement in Section 3.501(d) to publish daily for two consecutive weeks?

Yes, as mentioned above the requirements of Section 3.501(d) should be reconsidered. At a minimum, it should be revised to limit the required publication of the notice of an application to once a week for two consecutive weeks in a newspaper of general circulation located in the territory covered by the application. However, alternatives to newspaper notice should also be considered. Electronic media is quickly replacing traditional hard copy newspapers, resulting in publication challenges. Moreover, newspaper legal notice publication is increasingly expensive because of declining subscriptions.

11. Should applicants be required to provide evidence that anticipated subdivisions and land developments to be served by the utility in the requested service territory have been granted preliminary and final plan municipal approval?

No. Typically developers do not approach utilities until such approvals have been granted. Municipalities are involved in planning via the planning approval and DEP permitting process. In addition, the municipality will be notified via publication of the application notice and have the option to intervene if they have concerns. This is under the purview of the planning commissions and local municipalities and does not require additional regulatory oversight by the Commission.

12. Parties should discuss the extent to which Section 3.501 should apply to applications filed pursuant to Section 1329 of the Public Utility Code, 66 Pa. C.S. § 1329, and the Commission's Section 1329 Application Filing Checklist, and what changes to Section 3.501 might be made in order to better comport with 66 Pa. C.S. § 1329.

Section 5.301 should not apply to applications filed pursuant to Section 1329, for which there is already a comprehensive Application Filing Checklist that covers most if not all of the requirements of Section 3.501. The Commission's Section 1329 Application Filing Checklist has proven itself to be unduly burdensome and costly, and bears no resemblance to the limited filing requirements in the actual statute. It operates as a barrier and a hindrance to fair market value acquisitions and should not be used as a model for Section 3.501 requirements if the Commission's goal is to promote regionalization and consolidation. On the contrary, limiting the requirements under Section 3.501 for experienced, capable, and well-established public utilities should cause the Commission to reconsider the Section 1329 application process as well. The legislature intended a six-month approval process for Section 1329 applications, which has been extended by several

months by the requirement of individual notice to customers as well as TUS's review of applications for completeness. Rate cases, which also have a statutory deadline for a final Commission decision, do not have a similar "completeness review" of filing requirements to start the clock for approval. Although the Secretary has the authority under 52 Pa. Code § 53.51(c) to perfect or reject a base rate case filing, the nine-month approval process starts on the day of filing. Applications under Section 1329 should similarly not be unreasonably delayed by the filing process.

13. Parties should discuss whether applicants should follow additional processes and procedures regarding property owners that would be required to connect to an applicant's system upon application approval but which have not requested service from the utility, including, but not limited to, property owners located in municipalities which have adopted a mandatory connection ordinance.

No such additional processes and procedures are necessary. Property owners are represented by local elected officials and given the opportunity to participate in the municipal ordinance adoption process. Mandatory connection ordinances are generally passed to address environmental compliance issues or to assure proper funding for projects that address environmental compliance issues. Once local elected officials have voted to adopt a mandatory connection ordinance it would not be in the public interest to allow for additional process or procedures beyond the required notice of the application filing.

14. Parties should discuss if an acquiring utility should identify the existence of lead service lines (LSLs) or damaged wastewater service laterals (DWSLs) and the projected costs to remove LSLs or replace DWSLs within the territory to be acquired.

Acquiring utilities should not be required to identify the existence of LSLs or DWSLs and the projected costs to remove or replace within the territory to be acquired. Records of LSLs and/or DWSLs are generally limited to non-existent. If even possible, it would be exceedingly time consuming and costly to do prior to closing an acquisition. At closing, acquired customers are eligible for PAWC's Commission-approved lead service line replacement program.

15. Parties should propose any changes to Section 3.502 they deem relevant.

PAWC would propose conforming changes to the protest period in Section 3.502(d).

**B. The Commission's Goals of Regionalization and Consolidation**

1. Parties should discuss how the Commission's goals of regionalization and consolidation may be further improved to promote the acquisition of systems with fewer than 3,300 connections by larger more viable systems.

The Commission's policy statement at 52 Pa. Code §69.711 outlines certain incentives for acquisitions of small (less than 3,300 customer connections) non-viable systems in violation of statutory or regulatory standards and that have failed to comply within a reasonable time with DEP or Commission orders. 52 Pa. Code § 69.711(a)(1) & (3). The purchase price for such systems must be fair and reasonable and the acquisition conducted through arms-length negotiations. 52 Pa. Code §69.711(a)(5). The acquiring utility must be itself viable and the acquisition cannot impair

such viability. 52 Pa. Code §69.711(a)(2). The acquiring utility should provide improved service to the acquired system's ratepayers following necessary plant improvements completed within a reasonable period of time. 52 Pa. Code §69.711(a)(4).

If all of the above criteria are met, the Commission will *consider* the following acquisition incentives: rate of return premiums, acquisition adjustment (when the acquisition cost differs from the depreciated original cost after contributed plant), deferral of acquisition improvement costs (to phase in rate recovery of improvement costs) and a plant improvement surcharge. 52 Pa. Code § 69.711(b). Such incentives are considered in a subsequent rate case with the burden of proof resting on the acquiring utility and therefore are not known or guaranteed at the time of acquisition. 52 Pa. Code §69.711(c). The policy statement further outlines the documentation required to support an acquisition adjustment in a utility's rate case, including an original cost plant-in-service study. 52 Pa. Code §69.711(d).

This policy statement follows Section 1327 of the Code, which creates a rebuttable presumption that for acquisitions of small, non-viable systems, any excess acquisition cost over the depreciated original cost is reasonable and thus properly recovered in rate base. 66 Pa. C.S. § 1327 Section 1327 is an exception to the general rule in Section 1311(b) that only depreciated original cost may be recovered in rate base. 66 Pa. C.S. § 1311(b). PAWC would support a legislative solution that affords the same rebuttable presumption when the acquired system is larger (over 3,300 customers) or is viable (*i.e.*, at the time of acquisition, is furnishing and maintaining adequate, efficient, safe and reasonable service). In order to further incentivize consolidation and regionalization of water and wastewater systems, acquisition adjustments should also be available for acquisitions of larger as well as smaller viable systems. Larger and more viable small systems are often highly depreciated and/or have high amounts of contributed assets and therefore have a

depreciated original cost after contributed plant ("DOC") that is quite low and does not incentivize them to sell. Similarly, experienced, capable and well-established utilities do not have any incentive to pay above DOC because there is currently no chance for recovery of the excess paid over DOC. The incentive that does currently exist, however, is for such systems to continue to degrade until they become not viable and qualify for treatment under Section 1327 or are forced into a Section 529 proceeding and possible receivership. 66 Pa. C.S. §529.

In addition to extending acquisition incentives to larger and smaller more viable systems, there should also be an additional incentive for all acquisitions in the form of allowance for recovery in rate base of contributed plant. No statutory authority precludes recovery in rate base of depreciated original cost *before* contributed plant and the Commission has the authority to allow this in order to further its goals of consolidation and regionalization. There are many systems in the Commonwealth that would be looking to be acquired and that large well-established utilities would be interested in acquiring if only they could recover in rate base the depreciated original cost before contributed plant. Such acquisitions are consistent with the Commission's policy goals, are in the public interest, and result in an acquisition cost that is reasonable, with cost per customer much lower than that which has been approved in acquisitions under Section 1329.

2. Parties should discuss the development of safety net programs to deal with nonviable or abandoned water systems as referenced in 52 Pa. Code § 69.701(b)(5). Specifically, parties should address the prospect of creating a fund dedicated to covering costs associated with receivership proceedings conducted pursuant to Section 529 of Public Utility Code, 66 Pa. C.S. § 529.

PAWC supports the creation of a fund dedicated to covering the costs incurred by a receiver appointed pursuant to Section 529 of the Code. 66 Pa. C.S. § 529, provided that it is funded by general public funds and administered by DEP. The environmental concerns created by a system in need of receivership are of general public concern and the costs of which should not be shouldered by the receiver's ratepayers or even ratepayers generally through PUC assessments. *See* Pennsylvania Environmental Rights Amendment, Pa. Const. art. I, § 27.

When well-established utilities are called upon by the Commission to act as receiver for a nonviable or abandoned water/wastewater systems, they should have certainty that the associated costs will be recovered in a reasonable amount of time. Often the system in receivership does not have the funds in reserve to pay these costs and does not generate enough revenue from customers to do so. Utilities are then forced to seek recovery of receivership costs from their own customers (without any benefit to those customers) in a subsequent rate case.

In addition, the Commission should consider enhanced incentives for larger more viable systems to acquire systems that are subject to Section 529 proceedings, which systems otherwise are undesirable and uneconomic to acquire. Some examples of potential Section 529 acquisition incentives are: at closing, allow the acquiring utility to record pre-closing capital improvements made and funded by the acquiring utility as receiver, as valid rate base; allow acquiring utility to record post in service AFUDC and deferred depreciation on capital improvements made as receiver or owner until its next base rate case after the acquisition; treat the Section 529 Plan for Improvements as a petition for modification to the acquiring utility's LTIIP for DSIC-eligible expenditures; permit rates to be charged post-closing in excess of the acquired utility's existing rates; permit recovery of the transaction costs of the acquisition, including all operating costs and depreciation costs incurred during the receivership. *See, e.g., Investigation Instituted per Section*

*529 Into Whether the Commission Shall Order a Capable Public Utility to Acquire Delaware Sewer Company*, Docket No. I-2016-2526085, Order on Petition for Reconsideration entered March 26, 2020.

3. Should the Commission consider seeking to modify the 1993 Memorandum of Understanding between the Commission and the Department of Environmental Protection? If so, in what ways? Should the scope of the memorandum be broadened to also include wastewater service?

Yes. The Memorandum of Understanding ("MOU") is outdated and should be modified to focus on the policy of regionalization and consolidation of water and wastewater systems of all types and sizes through acquisition. The MOU should be modified with the goal of streamlining and making easier both the Commission and the DEP acquisition processes to avoid unnecessary filing requirements and duplicative regulatory review and oversight of experienced, capable and well-established utilities.

**C. Cross-Connections and Back Flow Prevention**

1. What methods within the Commission's jurisdiction might be used to reduce or eliminate the presence of contaminants such as lead, PFOA/PFOS and Legionella from the drinking water supplies of systems subject to approval under Sections 3.501 and 3.502?

PAWC requires that all institutional, industrial and commercial customers that have a risk of backflowing contaminants into the drinking water distribution system install a backflow/cross-connection control device per DEP requirements and monitors the periodic testing of such devices.

In addition, each year a certified backflow technician conducts on-site surveys of new institutional, industrial and commercial customers to determine if a backflow/cross-connection control device is required. It is suggested that acquired utilities be required to comply with similar requirements.

2. Whether the Commission should exercise its authority pursuant to 66 Pa. C.S. §§ 501 and 504 to require public utilities to provide copies of current cross-connection control programs approved by the Department of Environmental Protection pursuant to 25 Pa. Code § 109.709(b) for systems subject to approval under Sections 3.501 and 3.502.

For acquired systems that have current cross connection control programs approved by DEP that can be obtained through reasonable and customary due diligence, it would be reasonable to require that copies be provided. However, it is often the case that acquired utilities do not have such programs, especially with respect to municipal systems.

3. Whether it would be reasonable for the Commission to condition approval of acquisition applications filed pursuant to 66 Pa. C.S. § 1102(a)(3) and 52 Pa. Code §§ 3.501 and 3.502 upon implementation of a DEP-approved cross-connection control program and/or a Commission-approved cross-connection control plan.

No, it would not be reasonable for the Commission to condition approval of acquisitions upon implementation of a DEP- or Commission-approved cross-connection control program. In the event that the utility being acquired does not have a cross-connection control program that meets DEP requirements, the Commission should allow a mutually agreed-upon timeframe post-closing to

bring the acquired utility into compliance with the acquiring utility's DEP-approved program and to file a compliance letter with the Commission.

## IV. CONCLUSION

PAWC thanks the Commission for this opportunity to comment on the ANOPR Order and for consideration of its suggestions herein. The Company would also welcome the opportunity to participate in a working group to discuss the issues presented in stakeholder comments prior to issuance of a proposed rulemaking order.

Date: July 15, 2020

Respectfully submitted,

Susan Simms Marsh (Pa. No. 44689)
Deputy General Counsel
Elizabeth Rose Triscari (Pa. No. 306921)
Director, Corporate Counsel
Pennsylvania-American Water Company
852 Wesley Drive
Mechanicsburg, PA 17055
E-mail: susan.marsh@amwater.com
elizabeth.triscari@amwater.com