

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA

JENNIFER FOSTER

vs.

NO. 2023-18907

THE BOARD OF SUPERVISORS TOWAMENCIN TOWNSHIP

COVER SHEET OF MOVING PARTY

Date of Filing November 08 2023

Moving Party THE BOARD OF SUPERVISORS TOWAMENCIN TOWNSHIP

Counsel for Moving Party JAMES J RODGERS, Esq., ID: 21635

Document Filed (Specify) MOTION FOR STAY OF PROCEEDINGS

Matter is: (Appealable) | (Interlocutory)

Discovery Needed: (Yes) | (No)

If applicable, Civil Case Management Order Discovery Deadline: _____

CERTIFICATIONS - Check **ONLY** if appropriate:

Counsel certify that they have conferred in a good faith effort to resolve the subject discovery dispute. (Required by Local Rule 208.2(e) on motions relating to discovery.)

Counsel for moving party certifies that the subject **civil motion** is **uncontested** by all parties involved in the case. (If checked, skip Rule to Show Cause section below.)

By: _____
Counsel for Moving Party

RULE TO SHOW CAUSE - Check **ONE** of the Choices Listed Below:

_____ Respondent is directed to show cause why the moving party is not entitled to the relief requested by filing an **answer** in the form of a **written response** at the **Office of the Prothonotary** on or before the _____ day of _____, 20__.

_____ Respondent is directed to show cause, in the form of a **written response**, why the attached Family Court Discovery Motion is not entitled to the relief requested. Rule Returnable and Argument the _____ day of _____, 20__ at **1:00 p.m.** at **321 Swede Street, Norristown, PA.**

_____ Respondent is directed to file a **written response** in conformity with the Pennsylvania Rules of Civil Procedure.

_____ Rule Returnable at time of trial.

By: _____
Court Administrator

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**COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA -
CIVIL DIVISION**

JENNIFER FOSTER
KOFI OSEI
MARTIN COHEN

Plaintiffs,

v.

THE BOARD OF SUPERVISORS OF
TOWAMENCIN TOWNSHIP
Defendant, and

PENNSYLVANIA-AMERICAN WATER
COMPANY, Intervenor-Defendant

No. 2023-18907

**MOTION FOR STAY OF PROCEEDINGS OF DEFENDANT THE BOARD OF
SUPERVISORS OF TOWAMENCIN TOWNSHIP**

Defendant The Board of Supervisors of Towamencin Township (“Defendant” or the
“Board”) files this Motion for Stay respectfully requesting that this Court stay all proceedings in

this civil action pending the entry of a final and unappealable order by the Pennsylvania Public Utility Commission (“PUC”) in the pending proceeding regarding the application of Pennsylvania American Water Company (“PAWC”) for approval of its proposed acquisition (“Acquisition”) of the Towamencin Sewer System (the “Sewer System”), which is described more fully below, and which is the precipitating reason for the instant litigation. The PUC, as the expert agency on issues involving public utilities in the Commonwealth, has primary jurisdiction to determine in the first instance whether the Acquisition comports with the Public Utility Code, including whether it is in the public interest. This is a question that Plaintiffs posit as a matter of direct relevance to the central issue that this Honorable Court is being asked to make in this proceeding (*i.e.*, whether the Home Rule Charter, described herein, would unconstitutionally impair an existing contract).

I. BACKGROUND

1. In 2016, the General Assembly enacted Act 12, which made certain amendments to the Public Utility Code (66 PA. Cons. Stat. §1329 (2016)) (Act 12 of 2016), including implementing an expedited process for consideration by the PUC of applications to approve the acquisition of water and sewage treatment assets owned by municipalities (including municipal authorities) by investor owned utilities. In doing so, the General Assembly expressed a legislative intent to encourage such transactions, subject to the oversight of the PUC.

2. Many municipalities in Pennsylvania which operated their own water or sewage treatment systems have elected to explore the opportunity created by Act 12 to sell their systems on favorable economic terms to investor-owned utilities regulated by the PUC. Such sales allow municipalities to shift increasingly burdensome management responsibilities and the cost of the replacement of aging infrastructure and environmental compliance to investor owned utilities and their broader rate bases, thus avoiding future borrowings and/or tax increases.

3. On or about May 25, 2022, the Township's Board of Supervisors held a public meeting at which they voted to approve a sale of the Sewer System to NextEra Energy, Inc. ("NextEra"). The Board of Supervisors also adopted Ordinance 22-04 (the "Sewer Sale Ordinance").

4. On or about June 14, 2022, the Township entered into an Asset Purchase Agreement ("APA") with NextEra.

5. NextEra subsequently decided to withdraw from the wastewater business and sell its Pennsylvania rights and assets. NextEra never intended to abandon the APA, but instead sought an appropriate party to which it could assign its rights under the APA, including the right to acquire the Sewer System. NextEra found the appropriate party in PAWC and subsequently entered into negotiations with PAWC to convey its Pennsylvania rights and assets. Once PAWC and NextEra agreed to the conveyance of those rights and assets, they notified the Township and proposed the approval of the assignment of the APA by NextEra to PAWC.

6. On March 8, 2023, the Board of Supervisors provided an update on the sewer sale, alerting the public to NextEra's intention to convey its Pennsylvania assets to PAWC and the need to consider the approval of an assignment agreement (the "Assignment Agreement"), an amendment to the APA (the "Amendment to the APA"), and an amendment to the Sewer Sale Ordinance (the "Amendment to the Sewer Sale Ordinance"). After public comment, the Board authorized the Township Solicitor and Special Counsel to take all needed steps to prepare for consideration of the Assignment Agreement, the Amendment to the APA, and the Amendment to the Sewer Sale Ordinance at the Board's March 22, 2023 meeting.

7. At the Board's meeting on March 22, 2023, the Board of Supervisors approved the Assignment Agreement and the Amendment to the APA, and adopted the Amendment to the Sewer

Sale Ordinance. The Assignment Agreement and Amendment to the APA were executed by the parties.

8. On May 15, 2023, PAWC filed with the PUC an Application to Acquire the Towamencin Sewer System, seeking approval of the transfer of assets to PAWC pursuant to the executed Amendment to the APA, which approval would establish the right of PAWC to offer or furnish wastewater service in the territory currently served by the Towamencin Sewer System. That application has been docketed by the PUC at No. A-2023-3039900 (the “PAWC Application”).

9. Since the filing of the PAWC Application, PAWC has interacted with the staff of the PUC to provide clarification and additional information that would be relevant to the PUC’s consideration of the Application.

10. As provided in Act 12, once the PUC determines that the Application is substantially complete, the PUC is required to conduct its review of the Application and to make a decision to grant or deny the application within six (6) months. 66 Pa. C.S. § 1329(d)(2).

II. PROCEDURAL HISTORY

11. On August 21, 2023, Plaintiffs Jennifer Foster and Kofi Osei (“Plaintiffs”) filed the Complaint initiating this action.

12. In their Complaint, Plaintiffs sought relief from this Court to prevent the consummation of the proposed sale of the Towamencin Sewer System, asserting three counts.

13. Plaintiffs’ initial Complaint requested that this Court issue mandamus and/or a declaratory judgment to require the Township to terminate the executed APA, arguing that the Township is precluded from consummating the transaction because such an act is barred by the Township’s Home Rule Charter (HRC). The HRC was adopted by a referendum on May 6, 2023 and became effective on July 1, 2023.

14. In addition, the Complaint requested that the Board's actions on March 8, 2023 and March 22, 2023 relating to the approval of the assignment of the APA from NextEra to PAWC and the amended APA between the Township and PAWC be stricken because of alleged violations of the Sunshine Act in connection with the March 8, 2023 meeting.

15. On September 12, 2023, Defendant filed Preliminary Objections to the Complaint. *See* Docket No. 4.

16. On September 12, 2023, PAWC filed a petition to intervene as a party with a substantial, direct, and immediate interest in the outcome of this litigation. *See* Docket No. 5.

17. The Court entered a Rule directing any party opposing PAWC's Petition to file a response on or before October 23, 2023. *See* Docket No. 8.

18. No party filed an opposition to PAWC's Petition to Intervene and intervention was granted by order dated October 27, 2023. *See* Docket No. 13.

19. On October 2, 2023, Plaintiffs Jennifer Foster, Kofi Osei, and newly-added Plaintiff Martin Cohen filed the Amended Complaint. *See* Docket No. 10. The Amended Complaint did not materially change the relief sought or the asserted grounds on which relief was sought.

20. The Amended Complaint expanded upon the allegations of the Original Complaint with respect to questions of whether the proposed acquisition will serve the public interest, particularly through discussion of the actions of the PUC and the Commonwealth Court in *Cicero v. Pennsylvania Pub. Util. Comm'n*, 300 A.3d 1106 (Pa. Commw. 2023), which are asserted as reasons why this Court should act to block the Sewer Sale. *See* Docket No. 10 at ¶¶ 146-155. Petitions for allocator to the Supreme Court of Pennsylvania were filed in the *Cicero* case by the PUC, Aqua Pennsylvania, Inc., and East Whiteland Township on October 26, 2023.

21. On October 23, 2023, Defendant filed Preliminary Objections to the Amended Complaint, arguing that Plaintiffs failed to state a legally sufficient claim for mandamus relief, declaratory relief, or relief under the Sunshine Act. Further, Defendant alleged that the relief sought by Plaintiffs would violate the Contracts Clause of the Pennsylvania and United States Constitutions. Finally, Defendant argued that Plaintiffs' Sunshine Act claims are barred by the applicable statute of limitations. *See* Docket No. 12.

22. On November 3, 2023, Plaintiffs filed a Second Amended Complaint. The allegations of the Second Amended Complaint track *verbatim* the allegations of the Amended Complaint, and also add a count seeking a Declaratory Judgment that the Common Interest Privilege Agreement ("Common Interest Agreement") executed on or about June 3, 2023 between the Township and PAWC is invalid and unenforceable. The Second Amended Complaint also contains new allegations of fact concerning the Township's alleged non-compliance with the Sunshine Act but, except for the count relating to the Common Interest Agreement, seeks no relief not previously sought in the prior pleading. *See* Docket No. 12.

23. Because the Plaintiffs' allegations and claims for relief in this action are all focused on preventing the consummation of the executed Asset Purchase Agreement between the Township and PAWC, the Township seeks a stay of potentially wasteful and duplicative proceedings in this Court pending the PUC's determination as to whether the proposed acquisition may go forward under the standards specified in the Public Utility Code, an issue peculiarly within the purview of the PUC.

III. LEGAL STANDARD

24. A grant of stay is warranted when: (1) in a context such as this, where the stay is not sought pending appeal, the petitioner makes a showing of a substantial case on the merits; (2) the petitioner shows that, without the requested relief, it will suffer irreparable injury; (3) the

issuance of a stay will not substantially harm other interested parties; and (4) the issuance of a stay will not adversely affect the public interest. *Pa. Pub. Util. Comm'n v. Process Gas Consumers Grp.*, 502 Pa. 545, 552-53 (1983). *See Chambers Dev. Co., Inc. v. Commonwealth Dep't of Env'tl. Res.*, 545 A.2d 404 (Pa. Commw. 1988).

25. The court should exercise its discretion to grant a stay so that injustice will not follow from the court's decision. *Reading Anthracite Co. v. Rich*, 525 Pa. 118, 124 (1990).

IV. DISCUSSION

A. Defendant Has Made a Substantial Case on the Merits.

26. Defendant has made a substantial case on the merits for the reasons stated in Defendant's Preliminary Objections to Plaintiffs' Amended Complaint. *See* Docket No. 12. Nothing in the Second Amended Complaint undercuts this showing, in particular, as the only claim added in the Second Amended Complaint does not affect the central issue common to this action and the PUC proceeding, i.e., whether the Sewer Sale should go forward.

27. Defendant has shown that Plaintiffs' claims are insufficient as a matter of law, as Plaintiffs fail to state a valid cause of action.

28. Plaintiffs' mandamus claim fails because Plaintiffs seek to undo action taken by Defendant in good faith and in the exercise of legitimate jurisdiction, contrary to Pennsylvania case law. *See Kaufman Const. Co. v. Holcomb*, 55 A.2d 534, 537 (Pa. 1947) (holding that mandamus cannot be used to undo action taken by an official in good faith and in the exercise of legitimate jurisdiction), *see also Pennsylvania Dental Ass'n v. Commonwealth Ins. Dep't*, 516 A.2d 647, 652 (Pa. 1986) (holding that mandamus should not be used to direct the retraction or reversal of an action already taken).

29. Plaintiffs' declaratory relief claim fails because Plaintiffs seek an injunction disguised as declaratory relief, a form of relief prohibited by the Declaratory Judgments Act. *See Eagleview*

Corp. Ctr. Ass'n v. Citadel Fed. Credit Union, 150 A.2d 1024, 1029 (Pa. Commw. 2016) (“A declaratory judgment, unlike an injunction, does not order a party to act”).

30. Plaintiffs’ Sunshine Act claims to invalidate the Township’s consent to the APA fail as a matter of law because Plaintiffs failed to timely bring such claims and any alleged violation of the Sunshine Act was cured by a later, open meeting. *See Smith v. Twp. of Richmond*, 82 A.2d 407, 417 n.10 (Pa. 2013) (“[I]t is the prevailing law of this Commonwealth that the Sunshine Act does not authorize courts to invalidate official action taken at a subsequent public meeting that conforms to the Act’s requirements, based on an earlier, improper closed-door meeting”).

31. Finally, Plaintiffs now seek a declaratory judgment with respect to the Common Interest Privilege Agreement. To the extent that Plaintiffs have standing to seek such relief, which Defendant disputes, that dispute is tangential to the ongoing proceedings before the PUC, as well as to the various Right-to-Know Law matters that are described in the Second Amended Complaint, but which are not material to any of the claims for relief asserted in this action. This added claim provides no basis for denying a stay of proceedings here in deference to the PUC’s consideration of the proposed sale.

B. Defendant Will Suffer Irreparable Harm if a Stay is not Granted.

32. Defendant will suffer irreparable injury if a stay is not granted because Plaintiffs ask this Court to rule on an issue properly subject to review in the first instance by the PUC.

33. The matters raised in Plaintiffs’ Amended Complaint are inextricably tied to the facts underlying the proceedings on the PAWC Application before the PUC.

34. The PUC, under its primary jurisdiction¹ pursuant to the Pennsylvania Public Utility Code (*see* 66 Pa. C.S. § 1102), makes determinations on whether a transaction is in the public interest and a Certificate of Public Convenience should be issued.

35. In order to resolve the matters herein, the Court may be called upon to engage in a “public interest” determination as part of its analysis under the Contracts Clause of the Pennsylvania and United States Constitutions.

36. Under both the Pennsylvania and United States Constitutions, no *ex post facto* law can be made that impairs the obligations of existing contracts. *See* Pa. Const. art. I, § 17; U.S. Const. art. I, § 10. *See also Workers' Comp. Judges Prof'l Ass'n v. Exec. Bd. of Commonwealth*, 39 A.3d 486, 493 (Pa. Commw. 2012), *aff'd*, 66 A.3d 765 (Pa. 2013).

37. A violation of the Contracts Clause is demonstrated where a change in state law would effect a substantial impairment of a contractual relationship. Thus, Contract Clause analysis requires three inquiries: (1) whether there is a contractual relationship; (2) whether a change in a law has impaired that contractual relationship; and (3) whether the impairment is substantial. *Corman v. Nat'l Collegiate Athletic Ass'n*, 74 A.3d 1149, 1170 (Pa. Commw. 2013).

38. Here, there is no doubt that a contract exists between the Township and PAWC. Further, Plaintiffs invoke a change in the law (*i.e.*, the adoption of the HRC). And finally, the impairments of contractual rights which Plaintiffs seek is not only substantial, but total.

39. If a state regulation constitutes a substantial impairment, to survive a challenge under the Contracts Clause, the State, in justification, may argue that it had a significant and legitimate *public purpose* behind the regulation, for example, if the intent behind the governmental

¹ *See DiSanto v. Dauphin Consolidated Water Supply Company*, 436 A.2d 197, 202 (Pa. Super. 1981); *Vertis Group v. Pa. PUC*, 840 A.2d 390, 395 (Pa. Commw. 2003); *Elkin v. Bell Telephone Company*, 420 A.2d 371, 376 (Pa. 1980); *Feingold v. Bell of Pennsylvania*, 383 A.2d 791, 801 (Pa. 1977); *County of Erie v. Verizon North, Inc.*, 879 A.2d 357, 364 (Pa. Commw. 2005).

action was to remedy a broad and general social or economic problem. *EmergyCare, Inc. v. Millcreek Twp.*, 68 A.3d 1, 4–5 (Pa. Commw. 2013).

40. Therefore, in order to properly make a decision on such a proffered justification, this Court would need to determine whether or not the HRC, and its *ex post facto* prohibition on a sewer system sale, meets that public interest-driven test.

41. Furthermore, Plaintiffs themselves directly place at issue here whether the Sewer Sale is in the public interest. *See, e.g.*, Docket No. 13 at ¶¶ 168-69 (“It is obvious based on the representations of the Township, there is no actual public benefit to the sale of the Sewer System...The Township is also fruitlessly, frivolously, and wastefully spending taxpayer funds to push a sale forward that provides no public benefits, which is a losing argument as evidence[d] by the holding in *Cicero*.”) (emphasis added).

42. It is the duty of the PUC, not this Court, to determine whether PAWC’s application to acquire the Sewer System and to offer or furnish wastewater service is in the public interest. *See Reading & Sw. St. Ry. Co. v. Pa. Pub. Util. Comm’n*, 77 A.2d 102, 104 (Pa. Super. 1950) (“The Public Utility Commission’s...duty is to determine the public interest.”); *Allport Water Auth. v. Winburne Water Co.*, 393 A.2d 673, 674-75 (Pa. Super. 1978) (“Initial jurisdiction in matters concerning the relationship between public utilities and the public is in the PUC not in the courts.”) (internal citations omitted).

43. Regardless of any decision this Court may make regarding the public interest of the Sewer Sale, the losing party would likely appeal the decision as this Court lacks proper jurisdiction to make such a decision at this time.

44. Defendant will suffer irreparable harm in prolonged litigation and legal fees if this case proceeds into discovery and other phases of litigation without deference to the PUC’s primary

jurisdiction to make a determination whether the Sewer Sale is in the public interest. A stay is necessary to avoid a conflict between this Honorable Court and the PUC with respect to the sequence in which they each exercise their respective jurisdictional duties.

45. The danger of duplicative litigation expenses is presaged by the fact that the Office of Consumer Advocate and the Office of Small Business Advocate have already served interrogatories in the proceeding before the PUC.

46. Allowing these proceedings to continue will lead to duplicative discovery demands in the instant Action.

47. Further, Plaintiffs own conduct in serially amending its Complaint necessitates a stay of these proceedings.

48. To date, Plaintiffs have twice responded to Defendant's filed preliminary objections by amending the Complaint rather than allowing the preliminary objections to be heard.

49. Such action suggests a pattern aimed at prolonging the proceedings to drive up legal costs and resentment against Defendant rather than a swift adjudication of the relevant proceedings.

50. Therefore, the second prong of *Process Gas* supports a stay of these proceedings.

C. The Issuance of a Stay Will Not Harm Plaintiffs because Any Claims Properly under this Court's Jurisdiction are not Affected by Staying the Action until the PUC Determines whether the Sewer Sale is in the Public Interest.

51. As stated *infra*, the PUC is the proper forum for a determination of whether the Sewer Sale is in the public interest.

52. Plaintiffs are completely protected from any substantial harm if a stay is issued in the instant Action because all public interest concerns will be heard in the PUC.

53. Plaintiffs will have ample opportunity to voice their concerns regarding whether the Sewer Sale is in the public interest in the PUC's review of the PAWC's application.

54. To the extent Plaintiffs have claims in this litigation that are not within the primary jurisdiction of the PUC, such claims will be preserved notwithstanding the PUC's determination of whether the Sewer Sale is in the public interest.

55. Furthermore, as the PUC is required to make its determination whether to grant or deny the application, including an analysis of whether the transaction is in the public interest, within six (6) months, the Plaintiffs will not suffer any undue delay in the adjudication of their claims. 66 Pa. C.S. § 1329(d)(2).

56. Therefore, the third prong of *Process Gas* supports a stay of these proceedings.

D. The Issuance of a Stay Will Not Adversely Affect the Public Interest.

57. There is a strong public interest in this Court not extending its jurisdiction to make determinations properly made by the PUC.

58. The public interest is best served by allowing the PUC to exercise its primary jurisdiction over matters concerning the relationship between public utilities and the public. *Allport Water Auth.*, 393 A.2d at 674-65.

59. Further, the public interest is best served by preventing a waste of judicial and administrative resources.

60. It is without question that allowing the PUC to exercise its primary jurisdiction as to whether the transaction is in the public interest will not only prevent the waste of judicial and administrative resources, it will *preserve* those resources moving forward.

61. Indeed, the PUC's determination whether the transaction is in the public interest will assist this Court in its analysis under the Contracts Clause—thereby streamlining the instant litigation.

62. Furthermore, as discussed *infra*, any determination by this Court regarding whether the Sewer Sale is in the public interest will likely be appealed because this Court lacks the jurisdiction to make such a determination in the first instance.

63. To prevent unnecessary waste of this Court's and the Pennsylvania court system's limited resources, this Action should be stayed until the PUC makes a decision on whether to grant PAWC's Application.

64. Therefore, the fourth prong of *Process Gas* supports a stay of these proceedings.

V. CONCLUSION

For the reasons set forth herein, the Court should stay this Action until the PUC makes a decision on the PAWC Application.

DILWORTH PAXSON LLP

Date: November 8, 2023

By: /s/ James J. Rodgers
James J. Rodgers, Esq.
Attorney for Defendant

DEASEY MAHONEY & VALENTINI, LTD.

By: /s/ Rufus A. Jennings
Rufus A. Jennings, Esq.
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on this date, I caused a true and correct copy of the foregoing Preliminary Objections to be served on the following via the Court's ECF system:

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Date: November 8, 2023

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