



July 19, 2016

VIA HAND DELIVERY AND ELECTRONIC MAIL

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**Re: In re: Joint Application of Pennsylvania-American Water Company and the Sewer Authority of the City of Scranton for Approval of (1) the transfer, by sale, of substantially all of the Sewer Authority of the City of Scranton's Sewer System and Sewage Treatment Works assets, properties and rights related to its wastewater collection and treatment system to Pennsylvania-American Water Company, and (2) the rights of Pennsylvania-American Water Company to begin to offer or furnish wastewater service to the public in the City of Scranton and the Borough of Dunmore, Lackawanna County, Pennsylvania  
Docket No. A-2016-2537209**

**MAIN BRIEF OF JOINT APPLICANTS, PENNSYLVANIA-AMERICAN WATER COMPANY AND THE SEWER AUTHORITY OF THE CITY OF SCRANTON**

Dear Secretary Chiavetta:

Enclosed for filing with the Commission is the Main Brief of the Joint Applicants in the above-referenced matter. Copies have been served upon parties in accordance with the attached Certificate of Service. I have also enclosed a CD-Rom of the filing for your convenience.

Thank you for your attention to this matter. Please date-stamp the extra copy and return it with our courier. Please do not hesitate to contact me if you have any questions.

Sincerely,

COZEN O'CONNOR

By: David P. Zambito  
Counsel for Pennsylvania-American Water Company

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Enclosure

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July 19, 2016

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cc: Honorable David A. Salapa via Electronic Mail (including Word version) and First Class Mail)  
Honorable Steven K. Haas via Electronic Mail (including Word version) and First Class Mail)  
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**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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Administrative Law Judges  
David A. Salapa and  
Steven K. Haas

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In re: Joint Application of Pennsylvania-American Water :  
Company and the Sewer Authority of the City of Scranton :  
for Approval of (1) the transfer, by sale, of substantially all :  
of the Sewer Authority of the City of Scranton's Sewer :  
System and Sewage Treatment Works assets, properties and :  
rights related to its wastewater collection and treatment :  
system to Pennsylvania-American Water Company, and (2) :  
the rights of Pennsylvania-American Water Company to :  
begin to offer or furnish wastewater service to the public in :  
the City of Scranton and the Borough of Dunmore, :  
Lackawanna County, Pennsylvania :

Docket No. A-2016-2537209

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**MAIN BRIEF OF JOINT APPLICANTS,  
PENNSYLVANIA-AMERICAN WATER COMPANY AND  
THE SEWER AUTHORITY OF THE CITY OF SCRANTON**

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## **I. INTRODUCTION AND PROCEDURAL HISTORY**

Pennsylvania-American Water Company (“PAWC” or the “Company”) is a public utility regulated by the Pennsylvania Public Utility Commission (“Commission”). PAWC provides water and wastewater service to more than 400 communities in Pennsylvania, including water service to the City of Scranton and Borough of Dunmore. PAWC St. No. 1, 3:20 – 4:19.

The Sewer Authority of the City of Scranton (the “Authority” or “SSA”) is a municipal authority organized under the laws of Pennsylvania. SSA St. No. 1, 2:15-16. The Authority owns and operates a wastewater collection and treatment system providing wastewater service to the City of Scranton (the “City” or “Scranton”) and the Borough of Dunmore (the “Borough” or “Dunmore”) (the “Combined Wastewater System”). SSA St. No. 1, 3:14. The Authority provides wastewater service to approximately 31,000 customers. SSA St. No. 1, 3:18-20.

The majority of the current SSA service area is served by combined sewers, which collect and convey a combined wastewater stream consisting of flows of sewage from homes and businesses infiltration and inflow, and stormwater (“Combined Wastewater”). The remainder of the SSA’s Combined Wastewater System (not including the MS4 System which the Authority is not selling to PAWC) consists of sanitary sewer mains which discharge wastewaters into the combined sewer mains. PAWC St. No. 6-R, 12:3-7. The Combined Wastewater System is subject to a consent decree (“Consent Decree”) between SSA, the Pennsylvania Department of Environmental Protection (“PADEP”), the U.S. Environmental Protection Agency (“EPA”), and the U.S. Department of Justice (“DOJ”) (the “Consent Decree”). PAWC Ex. DRK-1. Among other things, the Consent Decree requires short- and long-term system improvements and on-going operating requirements to assure proper treatment and control discharges of the system’s wastewater in compliance with applicable federal and state environmental laws.

On March 29, 2016, PAWC and the Authority entered into an asset purchase agreement (“APA”) for the sale of substantially all of the Authority’s assets, properties, and rights related to the Combined Wastewater System (the “Transaction”). PAWC St. No. 1, 5:8-21; PAWC Ex. BGJ-

1. The APA represented the culmination of a more-than-15-month-long process in which the Authority issued requests for proposals for alternative forms of transactions involving (a) an operation and maintenance services contract for Combined Wastewater System, (b) a long-term lease/concession of the Combined Wastewater System, or (c) purchase the Combined Wastewater System. Four competing proposals were submitted, and after a “best and final offer” step, the Authority ultimately selected PAWC as the winning proposer and thereafter PAWC and the Authority executed the APA after conducting arms-length negotiations. PAWC St. No. 1, 5:8-21. PAWC St. No. 1, 5:8-21; SSA St. No. 1, 5:20-23.

On March 30, 2016, PAWC and the Authority (collectively, the “Joint Applicants”) filed with the Commission a joint application (the “Joint Application”) requesting that the Commission approve PAWC’s acquisition of substantially all the assets of the Authority’s System and authorize PAWC to render wastewater service in the areas served by the Authority pursuant to Section 1102 of the Pennsylvania Public Utility Code (“Code”), 66 Pa. C.S. § 1102. Notice of the Joint Application was published in the *Pennsylvania Bulletin* on April 9, 2016. See 46 Pa.B. 1882. The notice set April 25, 2016, as the deadline for filing protests, petitions to intervene, and answers to the Joint Application. PAWC and the Authority also published notice of the Joint Application in the *Scranton Times* on April 12, 2016, and April 19, 2016. Proof of publication was filed with the Commission on April 25, 2016.

On April 5, 2016, the Office of Consumer Advocate (“OCA”) filed a protest and public statement. On April 8, 2016, the Commission’s Bureau of Investigation and Enforcement (“I&E”) filed a notice of appearance. On April 25, 2015, the Office of Small Business Advocate (“OSBA”) filed an answer, notice of intervention, and public statement.

Administrative Law Judges (“ALJs”) David A. Salapa and Steven K. Haas held an in-person prehearing conference on May 10, 2016, at 10:00 a.m. Counsel for PAWC, the Authority, I&E, OCA, and OSBA attended the prehearing conference. As a result of the prehearing conference, ALJs Salapa and Haas issued Prehearing Order No. 2, which established a litigation and briefing schedule for this matter.

On May 13, 2016, PAWC and the Authority filed a joint motion to amend the *pro forma* tariff attached as Exhibit L to the Joint Application to include additional tariff supplement pages relating to an industrial pretreatment program (“IPP-S”) to be implemented by PAWC for the Authority’s industrial customers upon consummation of the Transaction. No party filed a response to the motion to amend and it was granted by order of the ALJs dated June 15, 2016. A further revised IPP-S was provided by supplemental direct testimony of PAWC witness David R. Kaufman served on the ALJs and the parties on June 1, 2016.

Pursuant to Prehearing Order No. 2, evidentiary hearings in this matter were held on July 6, 7, and 8, 2016, in Hearing Room 2, Commonwealth Keystone Building in Harrisburg, Pennsylvania. During this hearing, the ALJs received testimony and exhibits from PAWC witnesses Bernard J. Grundusky, Jr., David R. Kaufman, James F. Sheridan, Rod P. Nevirauskas, James S. Merante and James C. Elliott. The Authority presented testimony and exhibits from Eugene Barrett, William Courtright, and Gerald Cross. All witnesses testified regarding various aspects of the Transaction; the combined nature of the Combined Wastewater System; PAWC’s technical, financial, and legal fitness to own and operate the Combined Wastewater System; and the public benefits of approving the Transaction and authorizing PAWC to own and operate the Combined Wastewater System.

The Joint Applicants submit the following as their Main Brief in accordance with the schedule set forth in Prehearing Order No. 2. As described below, the Commission should approve the Joint Application, as amended, in its entirety without modification.

## **II. QUESTIONS PRESENTED**

**A.** Under PAWC ownership and operation of the Combined Wastewater System, will the Commission have jurisdiction over the Combined Wastewater service provided by PAWC?

*Suggested Answer: Yes.*



**B.** If the Commission has jurisdiction over the Combined Wastewater service provided by PAWC, may the Commission, under Code Section 1311(c), 66 Pa. C.S. § 1311(c), allocate a portion of the Combined Wastewater service revenue requirement of the Combined Wastewater System to PAWC's combined water and wastewater customer base if in the public interest and upon PAWC's request in future proceedings? *Suggested Answer: Yes.*

**C.** Is PAWC financially, technically, and legally fit to own and operate the Combined Wastewater System and to provide wastewater service in the applied-for service territory? *Suggested Answer: Yes.*

**D.** Would PAWC ownership and operation of the Combined Wastewater System and provision of wastewater service in the applied-for service territory produce an affirmative public benefit of a substantial nature? *Suggested Answer: Yes.*

**E.** Should the Commission issue a Certificate of Public Convenience under Code Sections 1102(a)(1) and 1102(a)(2), 66 Pa. C.S. § 1102(a)(1), (2), for PAWC to own and operate the Combined Wastewater System and to provide wastewater service in the applied-for service territory? *Suggested Answer: Yes, but only if the Commission finds that (i) it has jurisdiction over Combined Wastewater service and (ii) PAWC's Combined Wastewater service revenue requirement relating to the former SSA system may be allocated to PAWC's combined water and wastewater customer base pursuant to 66 Pa. C.S. § 1311(c).*

**F.** Aside from the threshold issues related to Commission jurisdiction over a Combined Wastewater system, should issues related to rates to be charged by PAWC be reserved for future PAWC base rate proceedings? *Suggested Answer: Yes.*

**G.** Are the APA and PAWC's proposed agreements with municipal corporations (including the related assignment and assumption agreements) reasonable, legal, and valid such that the Commission should issue Certificates of Filing under Code Section 507, 66 Pa. C.S. § 507, in connection therewith and decline to institute a further investigation? *Suggested Answer: Yes.*

### III. LEGAL STANDARDS

As discussed in more detail below, the Joint Applicants must demonstrate by a preponderance of the evidence that the Transaction will result in an affirmative public benefit of a substantial nature and that PAWC is technically, financially, and legally fit to own and operate the Combined Wastewater System. To that end, several standards apply.

#### A. *Burden of Proof*

First, if the Joint Applicants present evidence found to be of greater weight than the other parties, then they will have carried their burden of proof. *Burleson v. Pa. Pub. Util. Comm'n*, 443 A.2d 1373 (Pa. Cmwlth. 1982). That is, the Joint Applicants' evidence must be more convincing, by even the smallest amount, than the evidence presented by the other parties. *Se-Ling Hosiery, Inc. v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950).

Second, although the burden of going forward with the evidence may shift back and forth during a proceeding, the burden of proof always remains on the party seeking affirmative relief from the Commission. *Milkie v. Pa. Pub. Util. Comm'n*, 768 A.2d 1217 (Pa. Cmwlth. 2001). How the burden of production shifts between parties has been succinctly explained as follows:

The "burden of proof" is composed of two distinct burdens: the burden of production and the burden of persuasion. *Hurley v. Hurley*, 2000 Pa. Super. 178, 754 A.2d 1283 (2000). The burden of production, also called the burden of producing evidence or the burden of coming forward with evidence, determines which party must come forward with evidence to support a particular proposition. This burden may shift between the parties during the course of a trial. If the party (initially, this will usually be the complainant, applicant, or petitioner, as the case may be) with the burden of production fails to introduce sufficient evidence the opposing party is entitled to receive a favorable ruling. That is, the opposing party would be entitled to a compulsory nonsuit, a directed verdict, or a judgment notwithstanding the verdict. Once the party with the initial burden of production introduces sufficient evidence to make out a prima facie case, the burden of production shifts to the opposing party. If the opposing party introduces evidence sufficient to balance the evidence introduced by the party having the initial burden of production, the burden then shifts back to the party who had the initial burden to introduce more evidence favorable to his position. The burden of production goes to the legal sufficiency of a party's case.

*Joint Petition of Metropolitan Edison and Pennsylvania Power Co. for Approval of Smart Meter Technology Procurement and Installation Plan*, Docket No. M-2009-2123950 (Initial Decision of ALJ Colwell, issued Jan. 28, 2010) (subsequent case history omitted).

Third, once the applicant establishes a *prima facie* case by presenting substantial record evidence in support of the proposed action, the burden of production shifts to the opponent. If the opponent presents evidence of co-equal value or weight, the burden of going forward with some additional evidence to rebut the opposing party's evidence then would shift back to the applicant. *Id.*; *Burleson, supra*; *Milkie, supra*. However, once the applicant establishes a *prima facie* case and if contrary evidence is not presented by the opposing party, there is no requirement that the applicant produce additional evidence in order to sustain its burden of proof. *See, e.g., Application of Pa. Power & Light Co.*, Docket Nos. A-110500F0196, *et al.*; 1994 Pa.PUC LEXIS 65 (Pa. P.U.C., Oct. 21 1994) (holding that a public utility-applicant met its burden to prove there was an immediate need for the reinforcement of the power supply where the need for the project was uncontested and no party presented any evidence challenging need for the project).

Finally, any decision rendered in this matter must be supported by substantial record evidence. Substantial evidence is that quantum of evidence that a reasonable mind might accept as sufficient to support a conclusion. *See Petition of UGI Penn Natural Gas Inc. for a Finding that Structures to Shelter Pipeline Facilities in the Borough of Vest Wyoming, Luzerne County, To the Extent Considered To be Buildings under Local Zoning Rules, are Reasonably Necessary for the Convenience or Welfare of the Public*, Docket No. P-2013-2347105, Slip Op. at 21 (Opinion and Order entered Dec. 19, 2013); *O'Connor v. Pa. Pub. Util. Comm'n*, 582 A.2d 427, 433 (Pa. Cmwlth. 1990). Substantial evidence is more than a mere trace of evidence or a suspicion of the existence of a fact that a party seeks to establish. *Norfolk & Western Ry. Co. v. Pa. Pub. Util. Comm'n*, 489 Pa. 109, 413 A.2d 1037 (1980).

**B. Scope and Standard of Review for Approval of the Joint Application**

In addition to the burden of proof, Code Section 1103, 66 Pa. C.S. § 1103, provides that the Commission may issue a certificate of public convenience upon a finding that “the granting of such certificate is necessary or proper for the service, accommodation, convenience, or safety of the public.” That is, the Joint Applicants must demonstrate that the Transaction and PAWC’s ownership/operation of the Combined Wastewater System will “affirmatively promote the service, accommodation, convenience, or safety of the public in some substantial way.” *City of York v. Pa. Pub. Util. Comm’n*, 449 Pa. 136, 151, 295 A.2d 825, 828 (1972). The “substantial public interest” standard is satisfied by a preponderance of the evidence. *Popowsky v. Pa. Pub. Util. Comm’n*, 594 Pa. 583, 611, 937 A.2d 1040, 1057 (2007).

Additionally, Code Section 1103, 66 Pa. C.S. § 1103, requires that the Joint Applicants demonstrate how PAWC is technically, financially, and legally fit to own and operate the Combined Wastewater System. *Seaboard Tank Lines v. Pa. Pub. Util. Comm’n*, 502 A.2d 762, 764 (Pa. Cmwlth. 1985); *Warminster Township Mun. Auth. v. Pa. Pub. Util. Comm’n*, 138 A.2d 240, 243 (Pa. Super. 1958). However, as a currently certificated public utility, PAWC’s fitness is presumed. See e.g., *South Hills Movers, Inc. v. Pa. Pub. Util. Comm’n*, 601 A.2d 1308, 1310 (Pa. Cmwlth. 1992).

**C. Scope and Standard of Review for Approval of Agreements with Municipal Corporations**

With respect to public utility agreements, Code Section 507, 66 Pa. C.S. § 507, requires that contracts between a public utility and a municipal corporation, except for contracts to furnish service at regular tariff rates, be filed with the Commission at least 30 days before the effective date of the contract. The Commission approves the contract by issuing a certificate of filing unless it decides to institute proceedings to determine whether there are any issues with the reasonableness, legality, or any other matter affecting the validity of the contract. Should the Commission initiate proceedings, the contract or agreement is not effective until the Commission

grants its approval. 66 Pa. C.S. § 507. Code Section 507 is a filing requirement and does not require service of the filing on any potentially interested parties.

#### **IV. SUMMARY OF ARGUMENT**

There is no question the Joint Applicants have demonstrated by a preponderance of the evidence that: (a) PAWC is financially, technically, and legally fit to acquire the Combined Wastewater System and to begin service in the applied-for service territory; and, (b) the Transaction will produce affirmative public benefits of a substantial nature. Specifically, Scranton-area customers will benefit from enhanced services, a financially-stronger owner with better access to capital markets than the Authority, and an operator with extensive technical expertise. The Joint Applicants have further demonstrated additional and important public benefits associated with the proposed transaction's relationship to achieving the objectives in the state-mandated Act 47 recovery plan in helping to relieve the financially-distressed City of Scranton. The opposing parties have not presented evidence to the contrary.

As a threshold matter, however, the Commission's jurisdiction over Combined Wastewater service and PAWC's ability to use the ratemaking tools of Act 11 of 2012, 66 Pa. C.S. § 1311(c), ("Act 11") are important issues that must first be resolved in this proceeding. If the Commission finds that it lacks jurisdiction over Combined Wastewater service (which it should not), PAWC would be left with significant stranded and unrecoverable costs associated with integrated stormwater service and the Transaction therefore would not be in the public interest. Likewise, if PAWC is unable to request Commission authorization to spread the costs of the Combined Wastewater service under Act 11, an important component of the Transaction would be undermined and PAWC could have to pay a significant Variance Adjustment (*i.e.*, a purchase price adjustment based upon the 1.9% compound annual growth rate ("CAGR") as set forth in Section 7.07 of the APA). Additionally, rates for Scranton-area customers would not be phased-in in a reasonable and gradual manner.

The Code broadly defines a “public utility” as “[a]ny person or corporation now or hereafter owning or operating in this Commonwealth equipment or facilities for . . . Sewage collection, treatment, or disposal for the public for compensation.” 66 Pa. C.S. § 102 (regarding definitions). The Code, however, does not define the term “sewage,” leaving interpretation of that term to the Commission, which has already equated it in modern parlance with the term “wastewater” through recent updates to Commission regulation. Similarly, the Code broadly defines “facilities” as “[a]ll the plant and equipment a public utility, including all tangible and intangible real and personal property without limitation, and any and all means and instrumentalities in any manner owned, operated, leased, licensed, used, controlled, furnished, or supplied for, by, or in connection with, the business of any public utility.” *Id.* Under these definitions, the Commission – as the Commonwealth’s expert agency for public utility matters – has broad discretion to determine the scope of its own jurisdiction in order to promote the regulatory scheme envisioned by the General Assembly.

As explained in extensive detail by the credible, and largely unrebutted, expert testimony of PAWC witnesses David R. Kaufman and James C. Elliott, the Combined Wastewater System is a combined system that is used and useful for the collection and treatment of wastewater. All of the sanitary sewage, wastewater, industrial wastewater, infiltration and inflow, and stormwater entering Scranton’s combined sewer system comingle and immediately become wastewater (the industry- and Commission-preferred term for “sewage”) as defined and regulated under pertinent federal and state environmental laws. Further, the Combined Wastewater System serving the Scranton area is a “sewerage facility” as defined by the state environmental regulations. That system is an integrated wastewater system, and its functions cannot be reasonably segregated by the type of flows or otherwise on either an operational or economic basis.

All of the facilities that comprise the Combined Wastewater System are used in providing wastewater services and are directed toward the collection and conveyance of such wastewaters to the wastewater treatment plant (“WWTP”) in order to treat and remove pollutants and minimize discharges of such wastewater into streams from overflow points. As such, the service to be

rendered by PAWC through its ownership and operation of the Combined Wastewater System will be Commission-jurisdictional service.

The Commission's authority to regulate integrated Combined Wastewater, including the facilities used to provide such service, is expressly provided by – and necessarily implied from – the Code. Moreover, in addition to having express and implied jurisdiction over Combined Wastewater service, the Commission's ancillary jurisdiction provides a legal foundation for jurisdiction over the Combined Wastewater System. Uncontroverted evidence demonstrates a direct, logical, and functional relationship between all facilities and aspects of the system and the collection, treatment, and environmentally-responsible management of wastewater.

If the Commission did not have or fails to exercise jurisdiction over Combined Wastewater service, there would be a clear gap in the intended wastewater regulatory scheme for the Commonwealth. There are Combined Wastewater systems in approximately 130 communities across the Commonwealth, at least 11 of which are financially-distressed and enrolled in Pennsylvania's Act 47 program. The absence of Commission jurisdiction over Combined Wastewater systems would deprive those communities of the opportunity of being acquired by investor-owned utilities and of expert regulation by the Commission. Such a result would be contrary to the public interest.

Since the Commission clearly has jurisdiction over Combined Wastewater service, PAWC has a legal right under Act 11 to claim in a future base rate proceeding its wastewater revenue requirement (including the revenue requirement associated with Combined Wastewater service) from the combined water and wastewater customer base if such allocation is in the public interest. 66 Pa. C.S. § 1311(c). "Wastewater" in Act 11 includes the stormwater component of Combined Wastewater service. However, a determination in this proceeding – before an actual rate proceeding – that PAWC must allocate the costs of the Combined Wastewater System related to integrated stormwater sewage service only to Scranton-area customers is both improper and unlawful. Once determined to be jurisdictional, the revenue requirement associated with the Combined Wastewater System legally may be spread to PAWC's combined water and wastewater

customer base under Act 11. I&E's and OCA's preemptive efforts to proscribe PAWC's use of Act 11 are contrary to the intent of the legislation (*i.e.*, to encourage acquisitions of troubled wastewater systems and regionalization) and are an inappropriate attempt to transform this acquisition application proceeding into a mini-rate case.

Traditional ratemaking issues related to an acquisition adjustment, recovery of the Variance Adjustment from ratepayers, recovery of expenses associated with new jobs, and rate gradualism are properly reserved for a future PAWC base rate proceeding. PAWC has committed in the APA to propose rates that it believes would bring Scranton-area customers in-line with PAWC's average system rates over a reasonable period of time. Nevertheless, nothing contained in the APA would bind the advocacy of the parties or determinations of the Commission in future base rate cases. In order to seek rate recovery for the Combined Wastewater System, PAWC will have to prepare and submit a depreciated original cost of plant-in-service study in advance of a base rate filing. Accordingly, it is premature to address rate issues in this application proceeding.

The APA and the agreements with municipal corporations which PAWC intends to assume are reasonable, legal, and otherwise valid. As such, Certificates of Filings should be issued for both the APA and the inter-municipal agreements to be assumed by PAWC. Code Section 507 only imposes a filing requirement upon PAWC. 66 Pa. C.S. § 507. No party opposed the inter-municipal agreements to be assumed by PWC and there is no basis in the record which would justify the institution of further proceedings with regard to the agreements. The agreements would nonetheless be subject to future Commission scrutiny if warranted.

The Combined Wastewater System is subject to extensive environmental mandates that will require millions of dollars of investment over the next twenty-five years that will challenge the Authority's financial resources. In contrast, PAWC is financially and managerially well-suited to accomplish the required improvements in an efficient and prudent manner that is likely to lead to substantial long-term benefits to both Scranton-area customers as well as PAWC's other water and wastewater customers. Moreover, Scranton's distressed financial situation, particularly its longstanding 25-year tenure under "Act 47" protection (described in detail later in this brief), will



be ameliorated by the prompt closing of the Transaction and by the economic development benefits of the 100 new jobs in the Scranton area that have been promised by PAWC. Benefits will also be realized by PAWC's other customers. The addition of approximately 31,000 additional wastewater customers will allow for the further spreading of the Combined Wastewater System's costs among a larger customer base than can be accomplished by the Authority today. While Scranton-area customers may benefit in the short term, all of PAWC's customers will benefit over the long term from projects for other communities that the Scranton-area customers will help to fund. The Commission should not view this Transaction from a 10- or 13-year perspective but, instead, from a 50- or 100-year perspective.

The Joint Applicants have clearly carried their burden of proof in demonstrating by substantial record evidence that the Transaction is in the public interest and consistent with the Code. Therefore, the Joint Application, as amended, should be approved without modification.

## **V. ARGUMENT**

The Commission should approve the Transaction for the reasons set forth below. First, the Commission has jurisdiction over Combined Wastewater service by the express terms of the Code and by necessary implication from the Code's provisions, and at the same time has ancillary jurisdiction over all aspects of the Combined Wastewater System which have a direct, logical and functional relationship to wastewater. Second, the Joint Applicants have demonstrated that (a) PAWC is financially, technically, and legally fit to acquire the Combined Wastewater System and to begin service in the applied-for service territory and that (b) the Transaction will produce affirmative public benefits of a substantial nature. Third, the Commission should reject the jurisdictional arguments and rate issues raised by the parties opposing the Transaction because the claim that the Commission lacks jurisdiction over Combined Wastewater service is without merit and the rate issues are not properly before the Commission.

**A. *The Commission has Jurisdiction Over Combined Wastewater Service and Facilities.***

The Commission has jurisdiction over the Combined Wastewater service and facilities that PAWC seeks to acquire from the Authority. Before discussing the Commission's jurisdiction, the Commission may benefit from a detailed description of the nature of the Combined Wastewater System.

The Combined Wastewater System is primarily a gravity fed collection system that consists of more than 317 miles of collection sewers and large interceptors, 80 combined sewer overflows ("CSOs"), seven pumping stations, and a WWTP. The Combined Wastewater System conveys wastewaters – which includes domestic (also known as sanitary) wastewater, and (during wet weather events) both infiltration and inflow and stormwater – through a collection of interconnected piping either to the WWTP or to permitted CSO outfalls under the National Pollutant Discharge Elimination System permit No. PA0026492 ("NPDES Permit"). PAWC St. No. 2, 5:4-6; PAWC St. No. 6-R, 10:6-14. The WWTP discharges treated wastewater effluent to the Lackawanna River and its tributaries under the NPDES Permit. PAWC St. No. 2, 4:6-8; PAWC St. No. 6-R, 10:6-14. Under high wet-weather flow conditions that exceed the capacities of downstream facilities, the regulators direct combined sanitary sewage and stormwater to receiving streams. In all other circumstances, wastewater flows to the WWTP. PAWC St. No. 2, 4:3-6.

Thus, the Combined Wastewater System is an *integrated wastewater system* that is designed and operated to collect and treat pollutants in wastewaters collected throughout the system's service area.

**1. The Commission Has Express Authority Over Combined Wastewater Service.**

With that background in mind, the question becomes whether the Commission has jurisdiction over Combined Wastewater service. The answer is "yes."

The Commission has authority to exercise such powers as the General Assembly has granted expressly or by necessary implication. *Cmwlth., Dep't of Env'tl. Res. v. Butler County Mushroom Farm*, 499 Pa. 509, 454 A.2d 1 (1982); *Green v. Milk Control Comm'n*, 340 Pa. 1, 16 A.2d 9 (1940).

The starting point for evaluating the Commission's powers is its enabling statute (*i.e.*, the Code). That analysis involves statutory interpretation. The goal of all statutory interpretation is to determine the intent of the General Assembly. When the language of a statute are clear, courts must apply the words in the statute. *See* Section 1921(b) of the Statutory Construction Act, 1 Pa. C.S. § 1921(b); *Meier v. Maleski*, 670 A.2d 755 (Pa. Cmwlth. 1996). When the words of a statute are not explicit, a court attempting to ascertain legislative intent may consider such matters as the occasion and necessity for the statute, the object to be obtained, the consequences of a particular interpretation and administrative interpretations of the statute. 1 Pa. C.S. § 1921(c); *Meier, supra*.

When an agency's enabling statute is involved, the courts defer to the agency's interpretation:

It is well settled that when the courts of this Commonwealth are faced with interpreting statutory language, they afford great deference to the interpretation rendered by the administrative agency overseeing the implementation of such legislation. *American Airlines v. Commonwealth Bd. of Fin. and Revenue*, 542 Pa. 1, 9, 665 A.2d 417, 420-21 (1995). *See also Rohrbaugh v. Pennsylvania Pub. Util. Comm'n*, 556 Pa. 199, 727 A.2d 1080 (1999) (rule adopted pursuant to agency's legislative rulemaking power is binding on court as a statute and court is not at liberty to substitute its own discretion for agency's unless regulation appears entirely at odds with fundamental principles as to be expression of whim rather than exercise of judgment). Thus, our courts will not disturb administrative discretion in interpreting legislation within an agency's own sphere of expertise absent fraud, bad faith, abuse of discretion or clearly arbitrary action. *State College Manor Ltd. v. Commonwealth Dep't of Pub. Welfare*, 92 Pa. Commw. 89, 498 A.2d 996, 998 (Pa. Commw. Ct. 1985). The Insurance Department is specifically delegated administration and enforcement of insurance matters, including the MVFRL. 75 Pa. C.S. § 1704(b). Pursuant to that authority, the Insurance Department has previously sanctioned an interpretation of section 1731(c.1) that the Superior Court was, therefore, obliged to afford great deference.

*Winslow v. Maryland Insurance Group*, 61 Pa. 629,634, 752 A.2d 878, 881 (2000).

Thus, the appellate courts have adopted a “strong deference” standard for reviewing agency interpretations of statutes. *Scanlon v. Department of Public Welfare*, 739 A.2d 635 (Pa. Cmwlth. 1999). An agency’s interpretation of a statute for which it has enforcement authority will not be reversed unless it is clearly erroneous. *Armstrong Communications, Inc., v. Pa. Pub. Util. Comm’n*, 768 A.2d 1230 (Pa. Cmwlth. 2001).

With those standards in mind, the Commission has jurisdiction over a “public utility” and (among other things) its “facilities” under the Code. 66 Pa. C.S. §102. Under Code Section 102, a “public utility” includes (among others) “[a]ny person or corporations now or hereafter **owning or operating** in this Commonwealth **equipment or facilities for: ... (vii) [s]ewage collection, treatment, or disposal** for the public for compensation.” 66 Pa. C.S. §102(1)(v) (emphasis added). The term “sewage” is not defined in the Code, leaving its meaning and interpretation to the Commission. Both the Commission, and Act 11 of 2012, have equated the term in modern parlance with “wastewater.”

The term “facilities” is broad and includes “[a]ll the plant and equipment of a public utility, including **all tangible and intangible real and personal property** without limitation, and any and **all means and instrumentalities** in any manner owned, **operated**, leased, licensed, **used**, controlled, furnished, or supplied for, by, or **in connection with**, the business of any public utility.” *Id.* §102 (emphasis added).

In turn, public utilities can recover through rates a return on and of their property which is used and useful in public utility service and the costs associated with providing that service. *See* 66 Pa. C.S. §102 (defining “rate base” as “[t]he value of the whole or any part of the property of a public utility which is **used and useful in the public service.**”); *id.* §1311 (providing that the Commission has jurisdiction to fix “**the value of the whole or any part of the property of any public utility, insofar as the same is material to the exercise of the jurisdiction of the commission**, and may make revaluations from time to time in the value of rate base of a public utility on account of all **new construction, extensions, additions and retirements to the property of any public utility**”); *Barasch v. Pa. Pub. Util. Comm’n*, 532 A.2d 325, 338 (Pa. 1987).

Simply put, the Commission has jurisdiction over sewage services. There is no dispute in the record that the Combined Wastewater System consists of equipment and facilities designed for sewage collection, treatment and disposal. That is dispositive of the Commission's jurisdiction without further analysis.

Lest there be any doubt, the definitions of "facilities" and "service" by a "public utility" compel a conclusion that a combined system like the Combined Wastewater System here includes facilities used and useful in the provision of jurisdictional sewage collection, treatment, and disposal whether or not those facilities also collect stormwater that commingles with sanitary sewage from homes and industrial wastewaters from businesses. The Combined Wastewater System collects, treats, and disposes of wastewater (sewage) even if those facilities also collect, treat, and dispose of stormwater or other commingled flows. In other words, the fact that the Combined Wastewater System collects and transports stormwater in addition to sewage should not change the character of the lines, mains, and other facilities used for public sewage collection, treatment, or disposal services.

These straightforward conclusions are consistent with the General Assembly's broader view of Commission regulation over "wastewater" in general as expressed in Act 11 and the Commission's broader view of the terms "sewer" and "sewage" as expressed in a relatively recent rulemaking. To illustrate:

- *First*, Act 11 uses the term "wastewater" as opposed to "sewer" or "sewage" in connection with the combined revenue provisions for water and wastewater utilities. *See, e.g.*, 66 Pa. C.S. § 1311.
- *Second*, the Commission published final form regulations in 1998 in which the Commission removed the terms "sewage" and "sewer" and replaced them with the term "wastewater" as part of a larger Commission project to update its regulations. 28 Pa.B. 801.<sup>1</sup> In the "Regulatory Analysis Forms" submitted to the Independent Regulatory Review Commission along with the proposed changes, the Commission stated that it changed the regulations to: *(i) make the terms of the Commission's regulations consistent with current industry standards; and (ii) "establish consistency with other states that currently use the words 'waste water.'"*

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<sup>1</sup> *See also* Commission Docket No. L-00950112.

In view of these changes, the Commission should conclude that both the General Assembly and the Commission understood that the use of "sewage" in Code Section 102 includes all wastewater and, as a practical matter, the prior use of the limiting terms "sewer" and "sewage" was no longer industry standard. In other words, both the General Assembly and the Commission envision a broader understanding of the wastewater industry which the Commission regulates by treating "sewage" and "wastewater" synonymously or using the terms interchangeable in Code Section 102 and Act 11. The change of terminology from "sewer" and "sewage" to the broader term "wastewater" should also be read to take cognizance of the high number of combined sewer systems in Pennsylvania that collect, treat and manage Combined Wastewater. The EPA, for example, has noted that there are approximately 860 municipalities across the United States, mostly in the Northeast, with combined sewer systems.<sup>2</sup> Pennsylvania leads or has led the nation in the number of combined sewer systems.<sup>3</sup>

Applying the express language of the Code, the Combined Wastewater System is used and useful in providing sewage/wastewater services such that the Commission has express jurisdiction over the Combined Wastewater System that collects and manages comingled wastewaters. The components of the Combined Wastewater System and how they are used in providing wastewater services were described by PAWC witness James C. Elliott, who testified on behalf of PAWC, as follows:

- **Combined Flows.** The majority of the current SSA service area is served by combined sewers, typical of those installed in many older Pennsylvania communities, which *collect and convey a combined wastewater stream consisting*

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<sup>2</sup><https://www.epa.gov/npdes/combined-sewer-overflows-csos>;  
<https://www.epa.gov/npdes/combined-sewer-overflow-frequent-questions>.

<sup>3</sup> According to a 2001 Joint Legislative Air and Water Pollution Control and Conversation Report, Pennsylvania had 152 combined sewer systems at the time of the report. *Report on Combined Sewer Overflows in Pennsylvania*, November 2001, p. 6. According to the database compiled by PADEP (PAWC Ex. JCE-3), currently Pennsylvania has approximately 129 combined sewer wastewater systems. PAWC St. No. 6-R, 18:1-2. Of those, PADEP classifies some 75 wastewater systems as "major" combined sewer wastewater systems. PAWC St. No. 6-R, 18:2-4.

*of flows from homes, businesses and stormwater.* The remainder of the SSA's Combined Wastewater System consists of sanitary sewer mains which discharge wastewaters into the combined sewer mains. PAWC St. No. 6-R, 12:3-7.

- ***Combined Catch-Basin Facilities for All Wastewater Flows.*** Along the Combined Wastewater System, the assets include what are known as "catch basins." Combined sewer catch basins consist of devices designed concurrently to accept the inflow of stormwater and to capture grit in order to protect the capacity of the sewer lines and treatment plant, as well as "hoods" that are designed to capture floatable materials and prevent the escape of sewer gases from the wastewaters flowing through the combined sewer system. ***These catch basins are not just stormwater inlets; they are designed and operated in a manner integral to the sewerage facilities in terms of effectively and safely conveying and managing wastewaters within the system.*** Such catch basins are used to capture grit and other solids that might otherwise clog or reduce the ability of the sewer lines to effectively and efficiently convey wastewaters, and also manage and trap sewer gasses emanating from sewage in the lines. PAWC St. No. 6-R, 12:8-18.
- ***Combined Storage and Diversion Facilities for All Wastewater Flows.*** The Combined Wastewater System includes a series of structures known as regulators, which consist of a number of on-line and off-line storage units used to divert and store a portion of wastewater flows when flows are high, in order to minimize overflows of that wastewater into streams from overflow points. PAWC St. No. 6-R, 12:19 - 13:1. As described in the Official Statement associated with the 1968 bond for the Authority's Combined Wastewater System, the purpose of the regulators to be constructed was "(1) insure that all dry weather sewage flows are discharged to proposed intercepting sewers and treatment facilities and (2) to limit the volume of wet weather flows discharged to said facilities." PAWC Ex. JCE-2. Such regulators typically consist of a multi-chambered concrete structure having diversion weirs (*i.e.*, plates) that direct a portion of the wastewater to the interceptor conveyance sewer and a portion to the Lackawanna River or other receiving stream. There are several others that are of a simpler design. On-line storage and off-line storage facilities consist of various sized tanks and concrete basins, often installed underground. On-line storage tanks are designed such that the wastewater flows directly into and out of the tank, where it is held until after a rain event; whereas the off-line storage requires pumping to redirect the excess wastewater back into the sewer following a precipitation event. ***All such facilities are used to regulate the flow of wastewater containing pollutants, providing for storage and management of such wastewaters in order to minimize discharge of pollutants and help protect nearby streams and the environment.*** These flow control and overflow prevention and minimization facilities are integral to wastewater management in such a combined sewer system. PAWC St. No. 6-R, 13:1 - 13:18.
- ***Combined Equipment and Facilities for Treatment of All Wastewater Flows.*** Finally, certain assets being acquired by PAWC include equipment and facilities that are utilized to implement obligations imposed on the operator of WWTP and the Combined Wastewater System under the NPDES Permit and the Consent

Decree with PADEP, EPA and the U.S. Department of Justice, relating to the control of wastewater discharges via combined sewer overflows. PAWC St. No. 6-R, 13:21 – 14:2. Those obligations include a set of activities and measures set forth in the Nine Minimum Controls Plan (described in PAWC St. No. 2, 7:10-12 and 9:3 - 10:14) and the Long Term Control Plan (described in PAWC St. No. 2, 9:15-23, 11:6-16). For example, SSA currently owns and operates a series of vacuum trucks that are used to cleanout catch basins, removing grit and other materials that might otherwise inhibit or block wastewater flows in the sewer lines. These activities are undertaken directly by the wastewater system operator because they are crucial to protecting the flow capacity of the sewer lines conveying wastewater. PAWC St. No. 6-R, 14:-8. Similarly, SSA currently operates several street sweepers, not to maintain the streets, but as part of the Nine Minimum Controls Plan to intercept grit and materials that would otherwise threaten the conveyance capacity of the Combined Wastewater System or potentially inhibit the WWTP's capacity. Preserving an efficient flow of wastewater throughout the Combined Wastewater System is directly useful to, and indeed requisite for, proper delivery of wastewater collection and treatment services. PAWC St. No. 6-R, 14:9-14.

In short, all of the equipment, assets and facilities being acquired by PAWC in the Transaction are used and useful in providing wastewater services. (Even the OCA's witness, Terry Fought, referred to the system as an "integrated wastewater system[]." OCA St. No. 1S, 7:21-22.). Each of the components and facilities that comprise the Combined Wastewater System being acquired by PAWC is used and useful in providing wastewater utility services and therefore subject to the express jurisdiction of the Commission to regulate entities providing "sewage" collection and treatment to or for the public even if stormwater commingles with sewage flows in an integrated Combined Wastewater system such as the Authority's. 66 Pa. C.S. § 102.

**2. The Commission has Necessarily Implied Authority over Combined Wastewater Service.**

Assuming for argument's sake that there is some question about the Commission's express jurisdiction over a combined system that collects and treats sewage and stormwater, the Commission's authority over Combined Wastewater service and related systems is necessarily implied. *Feingold v. Bell* 383 A.2d 791, 795 (1977) (explaining that agencies may exercise power that are necessarily implied in their enabling legislation). For the reasons explained herein, the



Commission should find that its jurisdiction to regulate Combined Wastewater service is demanded by the regulatory scheme envisioned by the Code.

In addition to the usual rules of statutory interpretation, the Commission may consider the currently accepted definitions of those terms which are not defined in the Code or Commission regulations in interpreting and applying its regulatory jurisdiction over wastewater systems. See Section 1921(b) of the Statutory Construction Act, 1 Pa. C.S. § 1921(b); *Meier v. Maleski*, 670 A.2d 755 (Pa. Cmwlth. 1996). At the same time, the Commission must be cognizant of, and seek consistency and compatibility with, counterpart environmental regulations that govern such systems. Public utility regulation does not exist in a vacuum; where possible, the statutes governing utility regulation and environmental regulation should be read together to assure the objectives of both regulatory regimes can be achieved to meet the General Assembly's intent.

As described in more detail below, the Commission has jurisdiction over Combined Wastewater service under both accepted wastewater engineering definitions and environmental regulations, all of which treat sewage and stormwater or other the fluids flowing within the system as "wastewaters," and regulated as such under the Federal Clean Water, Pennsylvania Clean Streams Law, and permits issued pursuant to those laws (which is also consistent with Act 11's use of the phrase "wastewater" and the Commission's recent regulatory changes to terminology from "sewage" to "wastewater").

**a. Based on Accepted Regulatory Definitions of "Sewage" and "Wastewater," any Water, Including Stormwater, When Mixed With Sewage or Other Wastewater, Becomes Wastewater.**

It is an undisputable fact that any water that commingles with sewage in the Combined Wastewater System becomes "wastewater." This is fully consistent with the Joint Applicants' expert James Elliott who, based on more than 40 years of experience in water and wastewater system engineering, design, operation and regulation (including direct experience with the

Combined Wastewater System), opined that any water, when mixed with sewage or wastewater, itself becomes sewage or wastewater. PAWC St. No. 6-R, 4:13-15.

As explained by Mr. Elliott, this is clearly true from the perspective of both accepted definitions in the field of wastewater management and applicable environmental regulation. Any mixture of sanitary waste, industrial wastewater, infiltration/inflow of stormwater and groundwater into a sewer line, and stormwater flowing into such lines, constitutes wastewater, and all such wastewater is regulated under the provisions of the Pennsylvania Clean Streams Law, the Sewage Facilities Act, and PADEP regulations relating to sewage. PAWC St. No. 6-R, 4:11-20.

**b. The Accepted Definitions of Sewage and Wastewater Support the Commission's Jurisdiction over the Combined Wastewater System.**

In the field of wastewater engineering, once flows from various sources are comingled, one cannot differentiate between the wastewaters flowing through sewerage facilities that need to be managed, treated and discharged in a responsible matter. When water becomes contaminated, no matter how, it becomes wastewater, and that wastewater must be collected, treated and managed responsibly by the operator of the wastewater system. PAWC St. No. 6-R, 6:13-21.

The accepted definitions of the term "wastewater" in the field of wastewater engineering and regulation support the view that all fluids flowing in a combined sewer system are "wastewater." The testimony provided by OCA's witness Terry Fought referred to a series of definitions of "wastewater," "stormwater" and related terms contained in the Glossary of water and wastewater terms posted by the Sacramento State Office of Water Programs. OCA Ex. TLF-3. ("Water & Wastewater Glossary"). Mr. Fought describes the Water and Wastewater Glossary as reflecting the accepted meaning of the terms as used in the field of wastewater engineering and regulation. (Fought Cross, N.T. 196:4).

A careful reading of the definitions found in excerpts from the Water and Wastewater Glossary set forth in OCA Exhibit TLF-3 shows that where waters from various sources are

comingled in a combined sewer system, all of the resulting fluids are considered “wastewater.” For example, the Water and Wastewater Glossary defines “Combined Wastewater” as being “[a] mixture of stormwater or surface water runoff and other wastewater, such as domestic or industrial wastewater.” OCA Ex. LTF-3. That definition underscores that where such waters mix, all are “wastewater.” The Water and Wastewater Glossary defines “Wastewater” as “[a] community’s used water and water-carried solids (including used water from industrial processes) that flow to a treatment plant. Stormwater, surface water, and groundwater infiltration also may be included in the wastewater that enters a wastewater treatment plant. *The term sewage usually refers to household wastes, but this word is being replaced by the term wastewater.*” OCA Ex. LTF-3 (emphasis added). This same definition is found on the EPA’s glossary of terms. PAWC St. No. 6-R, 7:15-16. Thus, stormwater, when it combines with other wastewater, is wastewater.

Likewise, Scranton Ordinance No. 13-1968 (PAWC Exhibit JCE-1) describes the Combined Wastewater System as being a sewage system. The term “sewage” is defined in that ordinance as follows: “‘Sewage’ shall mean normal water-carried household and toilet wastes from any Improved Property, *including such ground, surface or storm water as may be present.*” PAWC St. No. 6-R, 7:18 - 8:1 (emphasis added). The definition in Scranton Ordinance No. 13-1968 is consistent with industry definitions and properly reflects the fact that the Combined Wastewater System serving the Scranton area is a sewage and wastewater system. PAWC St. No. 6-R, 8:1-3.

**c. The Regulatory Definitions of Sewage and Wastewater Support the Commission’s Jurisdiction over the Combined Wastewater System.**

Section 1 of the Pennsylvania Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §691.1, defines “sewage” very broadly “to include any substances that contain any of the waste products or excrement or other discharge from the bodies of human beings or animals.” Thus, the term “sewage” includes not only the wastes from humans and animals, but

any "substance" (that is, any waters) which contain such material. The Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P.L. (1965) 1535, *as amended*, 35 P.S. §750.1 *et seq.*, contains an even broader definition of sewage:

"Sewage" means any substance that contains any of the waste products or excrement or other discharge from the bodies of human beings or animals and any noxious or deleterious substances being harmful or inimical to the public health, or to animal or aquatic life, or to the use of water for domestic water supply or for recreation, or which constitutes pollution under the act of June 22, 1937 (P.L.1987, No.394), known as "The Clean Streams Law," as amended.

35 P.S. § 750.2; PAWC St. No. 6-R, 5:1-13. Thus, where human and animal wastes are mixed with other waters, whether they come from industrial users, groundwater or stormwater, the resulting flows are all "sewage" under the Pennsylvania Clean Streams Law and Sewage Facilities Act. PAWC St. No. 6-R, 5:14-16.

PADEP regulations governing wasteload management, set forth in 25 Pa. Code Ch. 94, define "sewerage facilities" as "[t]he term used to collectively describe a plant and sewer system owned by or serving a municipality." All wastewater treatment plants and all sewers serving a community are "sewerage facilities." The term "sewerage facilities" includes all types of sewer systems and related wastewater treatment plants, including separate sanitary sewer systems and combined sewer systems. PAWC St. No. 6-R, 5:17-22. As explained by Mr. Elliott, the Combined Wastewater System is a sewerage facility as defined by the 25 Pa. Code Ch. 94 regulations. PAWC St. No. 6-R, 5:22-24.

The NPDES Permit for the Combined Wastewater System contains provisions for meeting effluent limitations. These effluent limitations are specifically developed to protect water quality in the receiving waters and are limitations imposed for pollutants associated with domestic and industrial sources. The issue of clear water dilution by infiltration, inflow or stormwater sources does not determine or modify these effluent limitations. The NPDES Permit is directed to the treatment of wastewater. PAWC St. No. 6-R, 6:7-12. The operator of the Combined Wastewater System and holder of the NPDES Permit are responsible for management of all wastewater flows

within and discharges from the combined sewer System. PAWC St. No. 2, 5:6-9; PAWC St. No. 6-R, 6:7-12, 8:12-14, 10:11-14. The NPDES Permit does not differentiate between wastewater and stormwater – all of the flows within the integrated wastewater system are regulated under a unitary sewage and wastewater regulatory approach.

Similarly, under Section 207 of the Clean Streams Law, 35 P.S. § 691.207, all plans and designs for sewer systems and treatment works must be approved by PADEP. Such approvals are issued in the form of what are known as Water Quality Management Part II Permits. PAWC St. No. 6-R, 5:25 through 6:1. In issuing such Part II Permits, PADEP does not distinguish between sewerage systems handling just human and animal waste and systems that handle such substances in combination with other wastewater, such as groundwater or stormwater that entered combined sewers, with the resulting combination carrying polluting substances – all such flow is regulated as “sewage” and all such facilities are subject to Part II Permits. PAWC St. No. 6-R, 6:1-6.

In sum, under current industry terminology, the fluids that are flowing in a combined sewer system are all wastewater. PAWC St. No. 6-R, 8:14-16; OCA Ex. LTF-3. Likewise, PADEP and EPA regulate the Combined Wastewater System as an integrated whole under the terms of the NPDES Permit and series of Water Quality Management Part II Permits governing that system. PAWC St. No. 6-R, 8:12-14. Under applicable environmental laws, PADEP considers all of the water flowing within the Combined Wastewater System to be “wastewater,” subject to the regulatory provisions governing the construction and operation of sewerage facilities and the discharge of sewage, irrespective of where that water originated. PAWC St. No. 6-R, 8:16-19.

### **3. The Commission Also Has Ancillary Jurisdiction.**

The analysis of express and necessarily implied jurisdiction is dispositive. As described throughout this brief and in the testimony of Mr. Elliot and others,<sup>4</sup> the Combined Wastewater System is an integrated wastewater system. PAWC St. No. 6-R, 8:9. Even OCA’s witness, Mr.

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<sup>4</sup> N.T. 121:24-45; 123:5; 123:13.

Fought, refers to the SSA combined sewer system as an “integrated wastewater system[.]” OCA St. No. 1S, 7:21-22. As explained by Mr. Elliott, the integrated wastewater system is not made up of separate wastewater and stormwater elements, but is one system providing wastewater services. PAWC St. No. 6-R, 8:9-11. If the Transaction is approved, PAWC would become the owner and operator of the Combined Wastewater System. PAWC St. No. 6-R, 8:21 - 9:2. For those reasons, the Commission has express and necessarily implied jurisdiction over these assets.

In addition, each of the components that comprise the Combined Wastewater System being acquired by PAWC in the Transaction have a direct functional nexus to the provision of wastewater services for many of the same reasons that the Commission has either express or necessarily implied authority over facilities that makeup the Combined Wastewater System that are used and useful in providing wastewater services. N.T. 136:6 - 139:22.

The Commission has previously decided that in circumstances where there is a logical and functional nexus between a utility’s core service and an activity that is not strictly speaking public utility service, it may exercise its discretion to assert ancillary jurisdiction over that activity. This “ancillary jurisdiction” is soundly based on several Code provisions which, when taken together, provide a clear legal basis for Commission jurisdiction over service provided by a public utility that it not strictly speaking utility service. Accordingly, even if the Commission properly finds that it has express or implied jurisdiction over all aspects of the Combined Wastewater System for the reasons specified earlier in this brief, it should also exercise as an alternative basis for its jurisdiction, complete regulatory authority over the provision of stormwater service via the Authority’s Combined Wastewater System because of its logical and functional nexus to clearly jurisdictional wastewater service.

In *Re Pittsburgh TeleCommunications, Inc., et al.*, Docket No. R-84277C001 et al., 64 Pa.P.U.C. 257 (Opinion and Order entered November 17, 1987) (“*Pittsburgh Telecom*”),<sup>5</sup> Bell

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<sup>5</sup> See also *Donnelley Directory v. Bell Tele. Co. of Pa.*, Docket No. C-871245, 66 Pa.P.U.C. 376 (Opinion and Order Entered Feb. 19, 1988) (“It is appropriate to note at this point that when a service such as the Yellow Pages operation requires utilization of public utility facilities and is an adjunct to the provision of telephone service, then its operations fall within the context of

Telephone had proposed a tariff and rates for the occupancy of its conduits. The Commission permitted alternative lower rates to go into effect, but set for hearing the issue of proper cost levels and whether it had jurisdiction over rates and service for conduit occupancy. A coalition of cable television companies ("CATVs") argued against the existence of Commission jurisdiction. *Pittsburgh Telecom* at 2-4.

The legal backdrop to this proceeding began with the federal Pole Attachment Act of 1978, 47 U.S.C. §224 ("1978 Act"). The 1978 Act mandated that the Federal Communications Commission ("FCC") ensure that the rates charged by electric and telephone utilities for pole attachments were just and reasonable. The term "pole attachments" includes communications conduits. However, the 1978 Act did not apply if a state asserted its own jurisdiction. In those cases, the state was required to certify to the FCC that it regulated pole attachment/conduit rates, terms and conditions.<sup>6</sup> The Commission asserted such jurisdiction in 1978 based on Code Sections 501 (general enforcement, administrative and compliance powers), 502 (general enforcement proceedings), 1102(a)(3)(certificates of public convenience and transfers of property) as well as its broad general powers as developed in case law. By separate order in 1981, the Commission added Code Section 1501 (adequacy of service) as an additional basis for its jurisdiction. *Pittsburgh Telecom* at 4-9.

Amendments in the Federal Cable Communications Policy Act of 1984 ("FCCPA 1984") provided that a state would not be considered to regulate the rates, terms and conditions of pole

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Commission jurisdiction. Three examples of this sort of *ancillary jurisdiction*, in the field of telecommunications, are: (1) conduit occupancy, see *Pittsburgh Telecommunications*, supra; (2) pole attachments, as noted in *Re Cable Television Pole Attachments*, 52 Pa.P.U.C. 372 (1978) and the cases cited therein; and (3) the billing and collection services provided by Bell to interexchange carriers discussed in *Re Intrastate Access Charges*, 69 PUR4th 69, 127, 128 (Pa.P.U.C. 1985). *These are important cases because, while the Commission may detariff a telecommunications service ancillary to regulated services, it does not render this Commission without jurisdiction to examine expenses and revenues associated with that service when it utilizes ratepayer supported property.*") (emphasis added).

<sup>6</sup> The state also had to certify that it had the authority to consider the interest of cable television subscribers and the interests of consumers of electric and telecommunications utility services.

attachments unless it had promulgated regulations implementing the state's authority.<sup>7</sup> The Commission subsequently proposed regulations, but never formally adopted them and no certification to the FCC of compliance with the requirement of the FCCPA 1984 to issue regulations was made by the Commission. *Pittsburgh Telecom* at 6-7.

The ALJ in *Pittsburgh Telecom* concluded that the Commission had jurisdiction over conduit rates and service, citing the broad definitions of "rates" and "service" in Code Section 102, and the mandate for utilities to provide adequate service under Code Section 1501. He concluded that because the conduit occupancy service provided by a utility utilized its facilities, it was an adjunct to regulated service and therefore a regulated service itself. The CATVs filed exceptions citing a decision by the Superior Court in *Felix v. Pa.P.U.C.* that held a non-tariffed fee charged by Bell Telephone for non-subscriber listings in the classified directory was a private undertaking and beyond the Commission's jurisdiction.<sup>8</sup> The CATVs argued that the ALJ's standard for evaluating Commission jurisdiction blurred the distinction between utility and non-utility service and was in conflict with *Felix*.

In replies to exceptions, Bell Telephone and the OCA argued that various Code provisions supported Commission jurisdiction over the conduits. They further argued that the conduit facilities would not exist "but for Bell Telephone's regulated service and therefore the conduit, as an "adjunct" to regulated service, was jurisdictional to the Commission. *Pittsburgh Telecom* at 9-13. The Commission described the jurisdictional test proposed by the CATVs as a test for whether the service offering in question had a logical, functional nexus between the service offering and the utility's core service. In contrast, the Commission described the Bell Telephone/OCA proposed jurisdictional test as a "but for" link between the facilities used for the service offering under review and the core service of the utility. *Id.* at 13-14.

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<sup>7</sup> 47 U.S.C. § 224(c)(3)(A).

<sup>8</sup> *Felix v. Pa.P.U.C.*, 187 Pa. Super. 578, 146 A.2d 347 (1958) ("*Felix*").



The Commission determined that the CATV proposed jurisdictional test for determining jurisdictional non-utility service was more persuasive than the Bell Telephone/OCA test. Using the hypothetical example of Bell Telephone renting office space in one of its buildings to tenants that had nothing to do with telecommunications, the Commission stated that under the Bell Telephone/OCA "but for" test, the rent of the office space would be jurisdictional because the rental space would not exist "but for" Bell Telephone's provision of regulated service. However, under the CATVs' test, the office space rental would not be jurisdictional because the "service" only bore an arbitrary, physical relationship to regulated telephone service and not a logical, functional nexus to the utility service. *Id.*

The Commission further found that in addition to the Code sections on facilities, service and the requirement of adequate service cited by the ALJ in support of his finding of jurisdiction over conduit service, Code Sections concerning general regulatory powers (§ 501), enforcement (§ 502), certificates of public convenience and transfers of property (§ 1102(a)(3)), justness and reasonableness of rates (§ 1301) and filing of tariffs (§ 1302) provided further statutory bases for Commission jurisdiction over conduit service. *Pittsburgh Telecom* at 14. Most importantly, the Commission explained how a peripheral matter undertaken by a public utility can be jurisdictional even though it was not strictly speaking utility service:

Moreover, the Commission's jurisdiction is not strictly limited to services which are "public utility services" in the narrow sense. The Code gives the Commission jurisdiction over a broad range of utility activities that are not, strictly speaking, "public utility services". For example, the Commission has jurisdiction: over transfers (including leases) of public utility property to others (§1102(a)(3)); (already cited above); over contracts between utilities and affiliated interests (§2101 et seq.); and over safety and cost apportionments at rail-highway crossings, §2701 et seq. An example of this sort of ancillary jurisdiction, in the context of telecommunications, may be found in the Generic Access Charge proceeding, concerning billing and collection services provided by Bell of Pennsylvania to interexchange carriers (Re Intrastate Access Charges, 69 PUR4th 69, 127, 128 (Pa.P.U.C.1985).

Furthermore, the collective scope of all these provisions constitutes a penumbra of jurisdiction which could easily encompass peripheral matters such as conduit occupancy. Thus, in *DiSanto v. Dauphin Consol. Water Supply Co.*, 291

Pa.Super.Ct. 440, 436 A.2d 197(1981), (quoted in the Recommended Decision at p. 6), the Pennsylvania Superior Court rejected a challenge to Commission jurisdiction over a "private contract" between a water utility and a real estate developer, citing virtually all the statutory provisions discussed hereinabove.

Taking account of all the foregoing, we conclude that there is a sufficient statutory foundation for us to assert jurisdiction over conduit occupancy if we so elected, in the exercise of our discretion, but that there is nothing which compels us to do so.

*Pittsburgh Telecom* at 14-16 (emphasis added). Due to its failure to finally promulgate regulations and certify that action to the FCC, the Commission found it would not exercise jurisdiction over pole attachments; however, it reserved its right to issue final regulations in the future and reassert jurisdiction to the extent permitted by then effective law.

In *Pittsburgh Telecom* the Commission accepted the test offered by the CATVs for determining whether the Commission would exercise discretionary "ancillary jurisdiction" over a service provided by a public utility that is not *per se* utility service:

It appears to us that the test proposed by the CATVs, for our jurisdiction over an offering, is based on the presence or absence of a logical, functional nexus between that offering and the utility's core service... we are of the opinion that the CATVs' position is slightly more persuasive [than the tests offered by OCA and Bell].

*Pittsburgh Telecom* at 13-14. Thus, the Commission may in its discretion assert ancillary jurisdiction if the "offering is based on the presence or absence of a logical, functional nexus between that offering and the utility's core service."

Under the ancillary jurisdiction analysis, it is beyond dispute that the Commission may assert jurisdiction over the Combined Wastewater System to the extent it provides wastewater service. And, if the Combined Wastewater System is deemed to also be providing stormwater service, that activity falls within the Commission's ancillary jurisdiction based on its logical and functional nexus to the wastewater service provided by this integrated wastewater system.

For many of the same reasons that the facilities that makeup the Combined Wastewater System are used and useful in providing wastewater services, each of the components that comprise the Combined Wastewater System being acquired by PAWC have a direct functional nexus to the provision of wastewater services. N.T. 136:6 - 139.22. The functions are connected

right from the beginning of the acceptance of these various flows into the system, whether those flows come from a service lateral at the property line of a building, enter sewers through groundwater infiltration, enter through rainfall derived forces, or through catch basins. N.T. 136:22 - 137:6. Once these waters enter the sewers and are in the collection system, they are wastewater. N.T. 137:7-9.

All Combined Wastewater System facilities, from the point of collection and maintenance of the collection system, serve to convey wastewater. N.T. 138:11-14. That wastewater is regulated and has to be diverted to the wastewater treatment plant through regulator structures. N.T. 138:15-16. The maintenance of the Combined Wastewater System is all directed toward minimizing overflows into the receiving waters.<sup>9</sup> N.T. 138:17-19. The treatment plant facilities provide a series of chemical and physical processes to remove solids and to convert organic wastes biologically, such that the discharge will meet the effluent requirements, while a series of parallel facilities process the resulting biosolids from the treatment process. N.T. 137:21-24; 138:2 through 139.1.

Accordingly, all Combined Wastewater System facilities are related to the handling of the wastewater and its inherent pollutants. N.T. 138:2-3. As aptly put by Mr. Elliott, in the case of a combined sewer system, such as the Combined Wastewater System, the stormwater function is basically an ancillary function; it is not the primary function of the Combined Wastewater System. N.T. 145:24 - 146:2.

Thus, the evidentiary record of this proceeding contains not only substantial evidence, but uncontroverted evidence, that each of the components and facilities that comprise the Combined Wastewater System being acquired by PAWC have a direct functional relationship or nexus to the provision of wastewater services. Although OCA witness Rubin testified that his review of Commission statutes and decisions showed no authorization for Commission jurisdiction over a

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<sup>9</sup> Incorrectly transcribed as "receding" in the N.T.

combined wastewater system, he neither reviewed, nor considered, any decisions on ancillary jurisdiction before formulating his policy position. N.T. 211:14-23.

Comparing this factual scenario to the one in *Pittsburgh Telecom*, the components of wastewater (consisting of comingled sewage, industrial wastewater and stormwater), through their common conveyance and treatment within the Scranton WWTP, have much more of a logical, functional nexus to each other than cable television lines and separate telecommunications cables that happened to be placed in the same conduit, but were found to warrant the assertion of ancillary jurisdiction in *Pittsburgh Telecom*.

Even if the Commission finds that the Combined Wastewater System is providing a discrete stormwater service (which the Joint Applicants have demonstrated is not the case) that is strictly speaking not public utility service, the Commission may exercise its ancillary jurisdiction over this service due to the logical nexus between sewage and stormwater service in a combined system. Moreover, the Commission has the ability to thoroughly and completely regulate the entire Combined Wastewater System pursuant to its Code authority over service, rates, tariffs, transfers of property, enforcement and certificates of public convenience. Hence, the Commission should find that it has express and implied jurisdiction over the Combined Wastewater System. In addition, as a further supported alternative basis for jurisdiction, it should also find it has ancillary jurisdiction over the service provided by the Combined Wastewater System.

**4. Determination of Commission Jurisdiction Over Stormwater-Only Service is Not an Issue in this Proceeding.**

Although the instant case presents the issue of whether the Commission has jurisdiction over service rendered by a public utility through a Combined Wastewater system, PAWC is not proposing through this Transaction to acquire what is referred to as the MS4, which will be retained by SSA. PAWC St. No. 2, 6:4-5; APA §2.02(a) and (o), PAWC Ex. BJG-1, Exhibit F (“Excluded Assets” include the Stormwater System Assets and MS4 System Real Property). As such, PAWC is not arguing in this proceeding that the Commission should exercise jurisdiction over stormwater-

only service and facilities. Such issue is not properly before the Commission in this proceeding. To the extent any equipment or facility which is exclusively related to stormwater, PAWC's right to recover for such equipment or facility is properly addressed in a future PAWC base rate case.

**5. The City of Lancaster Decision is Inapplicable.**

To the extent any of the opposing parties invite the Commission to rely on *City of Lancaster v. Pennsylvania Public Utility Commission*, No. 1968 C.D. 2005 (Pa. Cmwlth. 2006), to question the Commission's jurisdiction over Combined Wastewater service, the Commission should decline that invitation.

In *City of Lancaster*, the city provided combined stormwater and wastewater services to customers within its corporate limits and only wastewater services to extra-territorial (and therefore Commission-jurisdictional) customers. The city developed a revenue requirement on a system-wide basis, including both jurisdictional and non-jurisdictional customers, and apportioned the total system's operating and maintenance expenses, depreciation expenses, and rate base to the jurisdictional customers based on a number of factors. The statutory advocates challenged the city's methodology, arguing that the costs of treating the city's stormwater should not be passed on to jurisdictional customers. Stated differently, the public advocates seemed to express their concerns that jurisdictional customers outside the city would be subsidizing the costs of non-jurisdictional service provided to non-jurisdictional customers inside the city. The Commission adopted OCA's methodology, and the City appealed. The Court affirmed in part but remanded to re-allocate costs of service to jurisdictional customers.

*City of Lancaster* is inapplicable for a variety of reasons. First and foremost, the Commonwealth Court's decision is unpublished and non-binding. As a result, it lacks any precedential authority to which the Commission is bound. In the 10 years since the court decided the case, research has not revealed any cases relying on *City of Lancaster* as persuasive authority for the proposition that the Commission lacks jurisdiction over Combined Wastewater service.

Second, *City of Lancaster* is narrow. That decision deals with municipalities offering service to territorial customers (over which the Commission lacks jurisdiction) and service to extraterritorial customers (over which the Commission exercises jurisdiction under Section 1501 of the Code, 66 Pa. C.S. § 1501).

Third, *City of Lancaster* predates Act 11, which specifically authorizes utilities to spread the costs of wastewater services across the entire customer base. Act 11 represented a significant shift in the public policy of the Commonwealth by encouraging the sharing costs among a larger Commission-jurisdictional customer base.

Fourth, as PAWC witness Mr. Nevirauskas explained in his testimony, another distinction is that in *City of Lancaster*, the Commission in that case could not equitably distribute the costs of the combined sewer system among the non-jurisdictional customers – with the result that the jurisdictional customers would bear the burden of subsidizing that service for all of the City’s residents and the non-jurisdictional customers may have never contributed through rates to the costs of serving the jurisdictional customers. That is not the situation here. Under Act 11, PAWC’s combined customer base may share in the costs of the acquisition and operations and maintenance of the Combined Wastewater System and, in the future, customers in the Scranton service territory may contribute to costs of acquiring and operating other municipal systems elsewhere in Pennsylvania. The Commission could not apportion costs in that way under the narrow circumstances in the *City of Lancaster* case. See N.T. 173:3-24.

Accordingly, the Commission should reject any attempt to rely on *City of Lancaster* for the proposition that the Commission lacks jurisdiction over combined wastewater and stormwater systems. *City of Lancaster* involved an issue of ratemaking equity between jurisdictional and non-jurisdictional customers; not an issue of Commission jurisdiction.

6. **Since the Commission has Jurisdiction Over Combined Wastewater Service, Code Section 1311(c) is Applicable.**

Having established that the Commission has jurisdiction over Combined Wastewater service, the Commission should conclude in this proceeding that Act 11 applies for purposes of allowing PAWC the right in future rate cases to request the Commission to allocate all or any portion of the costs of the Combined Wastewater System to all of PAWC's water and wastewater customers. Act 11 provides that "[t]he commission, when setting base rates, after notice and opportunity to be heard, may allocate a portion of the wastewater revenue requirement to the combined water and wastewater customer base if in the public interest." 66 Pa. C.S. § 1311(c). As PAWC witness Rod Nevirauskas explains, Act 11 was intended to encourage acquisitions of wastewater systems and promote regionalization and economies of scale. PAWC St. No. 4-R, 11:14 - 12:11. By permitting a combined water and wastewater revenue requirement, Act 11 facilitates the acquisition of a wastewater system in need of capital improvement (the cost of which if charged directly to the wastewater ratepayers would produce exorbitant rates) by a capable water public utility. PAWC St. No. 4, 7:1-18.

Act 11 is intended to promote acquisitions such as PAWC's acquisition of the Combined Wastewater System. As explained by Mr. Nevirauskas:

Given PAWC's size, the needed improvements to the System will not produce an unreasonable rate impact on any PAWC customer if PAWC is permitted, as allowed by Act 11, to utilize a combined water and wastewater revenue requirement. Rather, as capital improvements are made to the System, they will be reasonably spread across PAWC's large customer base. In future years, when capital improvements are needed for some other portion of PAWC's system not directly related to the System, those costs will again be spread across all of PAWC's customers, including from SSA customers.

*Id.* 7:11-18. Indeed, without Act 11, acquisitions such as the Transaction may in many circumstances not be economically feasible. Limiting the ability of PAWC to use Act 11 prospectively – and in the absence of a specific rate request in this proceeding – is inappropriate and would be contrary to public policy, which promotes acquisitions of wastewater systems in need of capital improvements.

Because – for the reasons explained above – the Commission has jurisdiction over Combined Wastewater service, there is no legitimate basis upon which the opposing parties can argue that PAWC should be preemptively precluded through this proceeding from availing itself of the ratemaking tools of Act 11.<sup>10</sup> PAWC will be acting as a jurisdictional wastewater provider in its ownership and operation of the Combined Wastewater System and, therefore, would be legally entitled to utilize Act 11.<sup>11</sup>

7. **Approval of the Transaction is in the Public Interest Only if the Commission Exercises Jurisdiction Over Combined Wastewater Service and Finds that Code Section 1311(c) is Applicable.**

The Commission must recognize that issues of jurisdiction over Combined Wastewater service and the applicability of Act 11 to Combined Wastewater service are so fundamental to this Transaction that they must be resolved in this proceeding and cannot wait until a future PAWC base rate proceeding. As described below, if the Commission declines to exercise jurisdiction over the entirety of Combined Wastewater service, PAWC runs a significant risk that it will not be able to recover costs associated with the stormwater component of the Combined Wastewater service in future rate proceedings. Likewise, PAWC’s ability to utilize the ratemaking tools available under Act 11 could directly and significantly impact the prospective rates of Scranton-area customers as well as the financial viability of the Transaction for PAWC. Accordingly, answers

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<sup>10</sup> OCA witness Mr. Rubin suggests that, if the Commission permits the Transaction to move forward, PAWC should be prohibited from transferring responsibility for stormwater-related costs in the Combined Wastewater System away from Scranton-area customers. OCA St. No. 2, 27:17 - 28:10. I&E witness Mr. Cline suggests that capital expenses and operating costs for stormwater functions be allocated to Scranton-area customers in a future PAWC base rate case. I&E St. No. 2, 15:15 - 16:2.

<sup>11</sup> It is worth noting in this regard that Act 11 specifically uses the term “wastewater” and, under industry and regulatory standards (as discussed above), a combined sanitary, industrial, and stormwater flow – as is present in the Combined Wastewater System, is properly considered to be “wastewater.” 66 Pa. C.S. § 1311(c).



to these threshold jurisdictional issues are necessary in this proceeding in order for the Commission to make a "public interest" determination under Code Chapter 11.

**a. A Decision by the Commission that Declines to Exercise Full Jurisdiction over Combined Wastewater Service Could Result in Significant Stranded Costs for PAWC.**

As explained by PAWC witness Mr. Nevirauskas,<sup>12</sup> failure of the Commission to exercise its jurisdiction over the stormwater-related component of Combined Wastewater service could result in significant stranded costs for PAWC that would likely not be recoverable.

This Transaction would not be in the public interest and cannot proceed to closing if the Commission is not prepared to indicate in this proceeding that PAWC will be entitled to recover in rates its prudently incurred capital and operating costs associated with the integrated stormwater service provided as part of the Combined System. It would be unreasonable for PAWC to assume the risk and uncertainty of not knowing whether such cost recovery will be permitted. PAWC would run the risk that it could be saddled with significant stranded costs associated with stormwater collection and treatment that are likely to have a significantly adverse effect upon PAWC's financial status.

PAWC St. No. 4-R, 21:4-16. Further, PAWC could not collect stormwater charges from customers on a non-jurisdictional basis. PAWC would have either to enter into contracts with each customer authorizing the non-jurisdictional stormwater service and charges (a near impossibility) or perhaps collect stormwater fees as a billing agent for a yet to be created municipal stormwater authority. PAWC St. No. 4-R, 20:15 - 21:2.

Absent a clear conclusion of law by the Commission that it has jurisdiction over the entirety of Combined Wastewater service, the Transaction would not move forward because of the uncertainty of cost recovery by PAWC. It would be imprudent for PAWC to assume such an

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<sup>12</sup> Mr. Nevirauskas is the Director of Rates and Regulations for the Mid Atlantic Division, which includes PAWC, for American Water Works Service Company. He has approximately 36 years of utility ratemaking experience and, accordingly, this testimony should be afforded substantial deference. PAWC St. No. 4, 1:9 through 2:10.

unreasonable risk and, as a result, the substantial public benefits that would have been realized as a result of the Transaction would be lost.

**b. Scranton-Area Customers Could Experience Significant Rate Increases if Code Section 1311(c) is Found to be Inapplicable.**

If – as suggested by OCA and I&E – costs associated with the stormwater component of the Combined Wastewater System are allocated entirely and directly to Scranton-area customers, such customers run a real risk of experiencing significant rate increases in the first decade following closing of the Transaction. As explained below, PAWC intends to propose – consistent with its obligations under the APA – rate increases for Scranton-area customers that are gradual and otherwise reasonable. Indeed, Section 7.09(a)(x) of the APA envisions PAWC’s use of Act 11 in its first post-closing base rate case in order “to ensure the System’s customers benefit from Act 11 in the same manner as its other customers throughout Pennsylvania and to the extent permitted by the PaPUC and applicable law . . . .” PAWC Ex. BJG-1.

Act 11 treatment (*i.e.*, the legal authorization to ask in future rate proceedings that the Commission exercise its discretion under Act 11 to allocate all or a portion of the revenue requirement of the Authority’s System to all of PAWC’s water and wastewater customers) is an essential component to the gradual increase of rates for Scranton-area customers. The anti-Act 11 positions of OCA and I&E would likely result in immediate rate shock for Scranton-area customers at a time when affordability is a significant issue for such customers.

**c. PAWC Could Have to Pay a Significant Variance Adjustment if Code Section 1311(c) is Found to be Inapplicable.**

The APA provides for an adjustment to the purchase price of the Transaction (a “Variance Adjustment”) “if revenues from wastewater customers in the service area formerly served by the SSA exceed the 1.9% CAGR [compound annual growth rate] after year ten following closing of the Transaction . . . .” PAWC St. No. 4, 6:11-14; *see also* PAWC Ex. BJG-1 (Section 7.07 and

Schedule 7.07(d) of APA). If the Commission fails to allow Act 11 treatment for PAWC's costs associated with the Combined Wastewater service, PAWC could significantly exceed the 1.9% CAGR and have to pay a significant Variance Adjustment. PAWC St. No. 4-R, 21:17-21.

PAWC's ability to ask in future rate proceedings that the Commission exercise its discretion under Act 11 to allocate all or a portion of the revenue requirement of the Authority's System to all of PAWC's water and wastewater customers was an important premise underlying the APA. If the Commission either affirmatively states that PAWC cannot avail itself of Act 11 for the Combined Wastewater System (or even remains silent on the issue), it would be imprudent for PAWC to proceed with closing on this Transaction. A decision by the Commission on this fundamental issue, as reflected in a conclusion of law, is necessary in this proceeding.<sup>13</sup>

***B. The Commission Should Approve the Transaction because PAWC is Fit and the Transaction Provides a Substantial Public Benefit.***

Once the Commission determines that it has jurisdiction and PAWC has the ability to spread Combined Wastewater service costs under Act 11, the Commission should find and approve the Transaction to be in the public interest because (1) PAWC is fit to acquire the Combined Wastewater System and begin rendering service and (2) the Transaction provides a substantial benefit to the public. In addition, the Commission should approve agreements associated with the Transaction and authorize PAWC to file a supplemental tariff consistent with the request for relief described below.

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<sup>13</sup> The Joint Applicants are not suggesting that the Commission make a predetermination as to the outcome of PAWC's use of Act 11 in a future base rate proceeding. They recognize that Act 11 requires a public interest determination for a combined water and wastewater revenue requirement. 66 Pa. C.S. § 1311(c). The Joint Applicants are merely requesting a conclusion by the Commission in this proceeding that the term "wastewater," as used in Act 11, includes Combined Wastewater service and, therefore, PAWC would not be precluded – as a matter of law – from attempting to avail itself of the ratemaking tools of Act 11.

1. **PAWC is Fit to Own and Operate the Combined Wastewater System in the Applied-For Service Territory.**

As noted in the sections on legal standards described earlier in this brief, PAWC's fitness is presumed. *See e.g., South Hills Movers, Inc.* In addition, the Joint Applicants met their burden to demonstrate PAWC's financial, technical, and legal fitness to own and operate the Combined Wastewater System. The parties opposing the Joint Application did not challenge PAWC's financial, technical and legal fitness to own and operate the Combined Wastewater System. Accordingly, the Commission should find that PAWC is fit to own and operate the Combined Wastewater System in the applied-for service territory.

a. **PAWC is Financially Fit.**

PAWC clearly satisfied its burden to show it is financially fit to own and operate the Combined Wastewater System. The parties opposing the Joint Application did not present any evidence to the contrary.

Financial fitness means that the applicant should possess the financial ability to give reliable and respectable service to the public. The applicant should own or should have sufficient financial resources to obtain the equipment needed to perform the proposed service. *Re Perry Hassman*, 55 Pa. P.U.C. 661, 662-63 (1982); *Re: O'Connor*, 54 Pa. P.U.C. 547 (1980); *Merz White Way Tours v. Pa. Pub. Util. Comm'n*, 201 A.2d 446 (Pa. Super. 1964).

Here, PAWC is financially fit to operate the Combined Wastewater System. James Merante, the Director of Financial Strategy, Planning and Decision Support for American Water Works Service Company's Mid-Atlantic Division (which includes PAWC)<sup>14</sup> testified on behalf of the company regarding PAWC's financial fitness.

Mr. Merante first testified that PAWC is well-financed. PAWC is the Commonwealth's largest water and wastewater provider, with total assets of \$3.9 billion and annual revenues of

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<sup>14</sup> PAWC St. No. 5, 1:6-14.

\$613 million for 2015, including operating income of approximately \$307 million and net income of approximately \$143 million. PAWC St. No. 5: 3:2-5. In addition to those positive cash flows, Mr. Merante testified that PAWC (i) has access to a \$220 million line of credit through American Water Capital Corp., a wholly-owned subsidiary of American Water Works Company, which can be increased if needed (*id.* at 3:10-13); (ii) has high credit ratings with both Moody's Investor Services and Standard and Poor's Rating Services (*id.* at 3:15-16); (iii) obtains long-term debt through American Water Capital Corp. at favorable interest rates and payment terms (*id.* at 3:16-17); and, utilizes low-cost long-term financing through the Pennsylvania Infrastructure Investment Authority and the Pennsylvania Economic Development Financing Authority (*id.* at 3:17-20).<sup>15</sup> Addressing equity investments, Mr. Merante also testified that PAWC may obtain additional equity investments through American Water Company, Inc., based upon its strong operating performance. *Id.* at 4:1-3.

In addition, PAWC's credit rating demonstrates its financial fitness to own and operate the Combined Wastewater System. *See* OCA Ex. 1. OCA Exhibit 1 is the most-recent Standard and Poors Rating Services Ratings Direct report on American Water Works Company, Inc., and its subsidiaries including PAWC. In this May 7, 2015 report, Standard and Poors raised the credit rating of American Water Works Company and its subsidiaries, including PAWC, from an "A-" to "A" based upon its excellent business risk profile. OCA Ex. 1, p. 2. The Standard and Poors report also specifically raised the rating on PAWC's senior secured debt issuances from "A" to "A+." *Id.*

Finally, the opposing parties did not challenge or contradict PAWC's financial fitness to own and operate the Combined Wastewater System. I&E witness Lisa Gumby conceded PAWC's financial fitness. I&E St. No. 1, 8:1-5. OSBA's sole witness, Brian Kalcic, did not provide any testimony regarding PAWC's financial fitness. Although OCA witness Scott Rubin surmised that

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<sup>15</sup> It appears typographical errors were made in Mr. Merante's direct testimony, as the word "borough" was improperly used rather than the word "authority" when referring to these government financing agencies.

the Authority's cost of capital may be lower than PAWC's, he did not contend that PAWC is financially unfit to own and operate the Combined Wastewater System.<sup>16</sup>

Accordingly, the Joint Applicants met the burden of proving that PAWC is financially fit to own and operate the Combined Wastewater System. Even though PAWC's fitness is presumed, there is ample record evidence to support this finding.

**b. PAWC is Technically Fit.**

The Joint Applicants have met their burden to show that PAWC is technically fit to own and operate the Combined Wastewater System. Indeed, none of the opposing parties presented evidence challenging PAWC's technical fitness.

Technical fitness means that the applicant has the technical capacity to meet a public need in a satisfactory fashion. It must possess sufficient staff, facilities, and operating skills to make the proposed service feasible, profitable, and a distinct service to the public. *Re Perry Hassman*, 55 Pa. P.U.C. 661, 662-63 (1982); *Re: O'Connor*, 54 Pa. P.U.C. 547 (1980); *Pa. Pub. Util. Comm'n v. Pa. Radio Tele. Corp.*, 342 A.2d 489 (Pa. Cmwlth. 1975); *Merz White Way Tours v. Pa. Pub. Util. Comm'n*, 201 A.2d 446 (Pa. Super. 1964).

Here, PAWC offered testimony of David R. Kaufman, Vice President – Engineering for PAWC, to demonstrate that PAWC is technically fit to own and operate the Combined Wastewater System.<sup>17</sup> Mr. Kaufman testified on a variety of topics regarding PAWC's technical expertise, including the Consent Decree. PAWC St. No. 2, 6:18-22; PAWC Ex. DRK-1.

Mr. Kaufman explained the specifics of the Authority's Combined Wastewater System and PAWC's capability of operating it. PAWC St. No. 2, 3:18 – 5:10. In addition, Mr. Kaufman

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<sup>16</sup> As explained below, the Joint Applicants take exception to Mr. Rubin's testimony comparing the cost of capital between the Authority and PAWC. Mr. Rubin has admitted that he is not qualified to provide expert testimony regarding the cost of capital and the Joint Applicants submit that his testimony regarding the cost of capital should be disregarded. N.T., 98:3-8.

<sup>17</sup> PAWC St. No. 2, 1:1-12.

testified regarding the Consent Decree requirements that PAWC will assume upon acquisition of the Combined Wastewater System, including requirements that SSA implement a series of corrective actions to improve the facilities and operations of the Combined Wastewater System in order to achieve compliance with the Federal Clean Water Act, the Pennsylvania Clean Streams Law, and the NPDES Permit governing discharges from the Combined Wastewater System. PAWC St. No. 2, 6:22 - 7:4; PAWC Ex. DRK-1.

Mr. Kaufman discussed at length and in detail (a) the specific obligations and requirements of the Consent Decree and how PAWC will meet those requirements (PAWC St. No. 2, 6:16 - 7:16, 7:18-10:14); (b) the estimated costs and estimated time to complete the specific obligations and requirements of the Consent Decree (*id.* at 10:16 - 11:16); (c) PAWC's extensive experience operating systems similar to the Authority's (such as the Clarion and Coatesville systems) that are subject to consent decrees and similar environmental obligations (*id.* at 11:18 - 14:11); and (d) the technical expertise of PAWC and PAWC's parent and affiliates (that operate more than 200 wastewater operations) through which PAWC has acquired and may draw from a broad range of engineering and operational experience to address the Consent Decree and associated environmental challenges on a cost-effective basis: (*id.* at 14:13 - 17:6). Moreover, Mr. Kaufman explained that PAWC has extensive experience delivering large, complex water and wastewater capital improvement projects, such as the Long Term Control Plan ("LTCP") projects associated with the Authority's Combined Wastewater System. *Id.* at 16:15-17.

In addition to Mr. Kaufman's testimony, James Sheridan, PAWC's Vice President-Operations, testified on behalf of the Company regarding PAWC's technical expertise in operating other wastewater systems. PAWC St. No. 3, 1:1-7. Mr. Sheridan testified that PAWC currently operates 15 wastewater treatment plants in Pennsylvania and that American Water Works Company, Inc. and its subsidiaries currently own or operate 200 wastewater operations, including 54 wastewater treatment plants utilizing Biological Nutrient Removal ("BNR") technology and processes similar to the Authority's System. *Id.* at 4:10-15. Mr. Sheridan also testified regarding three of the wastewater treatment plants PAWC operates which utilize BNR technologies,

including the Coatesville Wastewater Treatment Plant, the Southern Wastewater Treatment Plant, and the Franklin Township Treatment Plant. *Id.* at 4:16 – 7:21.

In short, the combined testimony of Mr. Kaufman and Mr. Sheridan demonstrates that PAWC has capable staff, facilities, and operational skills to operate the Combined Wastewater System feasibly and profitably and for the benefit of the public, including the technical capabilities to comply with the requirements of the Consent Decree and related improvements and operations, including an established track record with extensive experience delivering large, complex water and wastewater capital improvement projects, such as the LTCP projects associated with the Authority's Combined Wastewater System.

Finally, the opposing parties did not challenge or contradict PAWC's technical fitness to own and operate the Combined Wastewater System. I&E witness Lisa Gumby conceded PAWC's technical fitness. I&E St. No. 1, 8:1-5. As with PAWC's financial fitness, OSBA's sole witness, Brian Kalcic, did not provide any testimony regarding PAWC's technical fitness. Likewise, OCA's engineering witness, Terry Fought, did not provide any substantive testimony regarding PAWC's technical fitness to own and operate the Authority's system.

Accordingly, the Joint Applicants met their burden of proving that PAWC is technically fit to own and operate the Combined Wastewater System. Even though PAWC's fitness is presumed, there is ample record evidence to support this finding.

**c. PAWC is Legally Fit.**

Again, PAWC met its burden to show it is legally fit to own and operate the Combined Wastewater System without contradiction from the opposing parties. Legal fitness means a public utility's propensity to operate safely and legally. *Seaboard Tank Lines, Inc.*, 502 A.2d at 764. The lack of legal fitness is demonstrated by persistent disregard for, flouting, or defiance of the Code and the Commission's orders and regulations. For applicants like PAWC that already possess operating authority, past performance should be analyzed to determine whether the applicant has



obeyed the Code and Commission regulations, particularly those regulations dealing with public safety. *Re Perry Hassman*, 55 Pa. P.U.C. 661, 662-63 (1982); *Re: O'Connor*, 54 Pa. P.U.C. 547 (1980).

Here, PAWC has a good compliance history with respect to the Code and the Commission's rules, orders, and regulations. PAWC St. No. 1, 9:11. PAWC has no pending legal proceedings or otherwise suggesting that it is legally unfit to provide service to the Authority's customers once the Transaction is approved. *Id.* at 9:12-13. Moreover, I&E, OSBA, and OCA have not offered any testimony suggesting that PAWC is legally unfit to own and operate the Combined Wastewater System.

Accordingly, the Joint Applicants met the burden of proving that PAWC is legally fit to own and operate the Authority's Combined Wastewater System. Even though PAWC's fitness is presumed, there is ample record evidence to support this finding.

2. **PAWC Ownership and Operation of the Combined Wastewater System in the Applied-For Service Territory Would Produce an Affirmative Public Benefit of a Substantial Nature.**

Having established that PAWC is fit, there is overwhelming record evidence demonstrating that the Transaction will provide substantial public benefits. As noted, the Joint Applicants must demonstrate by a preponderance of the evidence that the transaction will "affirmatively promote the service, accommodation, convenience, or safety of the public in some substantial way." *City of York v. Pa. Pub. Util. Comm'n*, 449 Pa. 136, 151,295 A.2d 825, 828 (1972); *Popowsky v. Pa. Pub. Util. Comm'n*, 594 Pa. 583, 611, 937 A.2d 1040, 1057 (2007).

The Joint Applicants met their burden of proving that the Transaction will yield a substantial public benefit for, *inter alia*, the following reasons: (1) Scranton-area customers will benefit from PAWC's enhanced customer services; (2) PAWC has better and more varied access to capital than SSA and is well-suited to provide wastewater service in the face of substantial environmental obligations arising from the implementation of the Consent Decree, in addition to

raising capital for normal operation and maintenance of the Combined Wastewater System; (3) Scranton-area customers will benefit from being part of a larger customer base; (4) PAWC is well-suited to fund and manage the environmental needs of the Combined Wastewater System; (5) PAWC has committed to create 100 new jobs in the Scranton area as a result of the Transaction; and (6) proceeds from the Transaction will help ameliorate Scranton's financial situation that has been a major factor limiting economic and other development in the Scranton region for decades.

**a. Scranton-Area Customers Will Benefit from Enhanced Service.**

First, the Transaction will provide a substantial public benefit to the Authority's current customers by giving them access to enhanced services over those offered by the Authority. According to the unrefuted testimony of PAWC witness James Sheridan, the enhancements include, but are not limited to: (1) extended call center hours for customers; (2) additional bill payment options for customers; (3) enhanced customer information and education programs; and, (4) access to PAWC's customer assistance program. PAWC St. No. 3, 25:4-10.

PAWC's customer service call center is open from 7:00 a.m. to 7:00 p.m., Monday through Friday. *Id.* at 25:14-15. Customers can also reach a customer service representative via email at [infopa@amwater.com](mailto:infopa@amwater.com). *Id.* at 25:15-16. In addition, PAWC customers have the ability to manage their account via PAWC's "My H2O" online portal. *Id.* at 25:16-17. Finally, PAWC offers emergency support 24 hours a day, seven days a week. *Id.* at 25:17-18. Once the Transaction is complete, these customer service enhancements will also be available to the Authority's customers who do not currently receive any of these customer benefits. *Id.* at 25:19-20.

PAWC also offers a number of bill payment options that are unavailable to SSA customers at present. *Id.* at 26:1-1. PAWC customers have the option to receive paper bills through the mail or go paperless and receive their bills electronically via the "My H2O" on-line portal. *Id.* at 26:2-3. Either way, customers can pay their bill by mail, online, or over the telephone with a debit or credit card. *Id.* at 26:3-4. Customers can also pay by e-check or an electronic funds transfer (which

can be set up at the “My H2O” online portal) or pay in person at multiple authorized payment locations across the state. *Id.* at 26:4-6.

PAWC provides extensive customer information and education programs unavailable to the Authority’s customers (that will be available once PAWC acquires the Combined Wastewater System) through brochures, bill inserts, and educational videos posted on PAWC’s website. *Id.* at 26:7-10. PAWC customers always have full access to a wide range of topics, including information on preventing sewer overflows, how to prevent frozen pipes, beneficially re-using residuals from water treatment plants for community gardens, detecting and fixing silent toilet leaks, how to properly dispose of unused pharmaceuticals to keep them out of the wastewater system, water conservation techniques, expansion takes, fire department grants, and protecting customers from utility imposters. *Id.* at 26:10-16.

Further, as new PAWC customers, the Authority’s customers will have access to PAWC’s customer assistance program called the “H2O Help to Others Program.” *Id.* at 26:17-19. For wastewater customers, this program offers two main services: (1) grants of up to \$500 per year and (2) a 15% discount on total wastewater charges. *Id.* at 26:19-21. Additionally, customers who qualify for the program may also be eligible to receive a water saving kit which includes, among other things, a low-flow shower head and low-flow faucet aerators. *Id.* at 26:21 - 27:2.

Accordingly, the Joint Applicants have demonstrated that the Scranton-area customers will benefit from enhanced customer services if the Commission approves the Transaction. The testimony of PAWC with respect to enhanced customer services was unrefuted by the opposing parties.

**b. PAWC Has Better Access to Diverse Capital Sources than SSA.**

Second, because PAWC has access to the equity markets, in addition to its strong balance sheet and credit ratings, it is better positioned than the Authority to address the myriad of costs and obligations associated with present and future improvements and operation of the Authority’s

Combined Wastewater System. As a threshold matter, the Commission should reject the OCA's testimony regarding the financial strength of PAWC versus the Authority. The OCA did not present any expert financial testimony regarding the comparative financial strengths of the Authority versus PAWC. Indeed, OCA's sole witness discussing any financial aspect of the Authority versus PAWC, Scott Rubin, is not a CPA (PAWC St. No. 5-R, 3:15-16), does not have an accounting or finance degree (*id.* at 3:18-19), was never employed in an accounting or financial capacity for a large corporation (*id.* at 3:21-23), and admitted he was not an expert on cost of capital, municipal bonds, or financing issues (N.T. 98:3-8, 200:5-7). In addition, Mr. Rubin's testimony does not account for the fact that the City, which is inextricably tied to the SSA, is a financially distressed municipality enrolled in Pennsylvania's Act 47 program and under the supervision of a state-appointed financial coordinator.

By contrast, PAWC presented the testimony of James Merante, a CPA serving as the Director of Financial Strategy, Planning, and Decision Support for the Mid-Atlantic Division of American Water Works Service Company, with approximately 20 years of experience in finance and operations. PAWC St. No. 5, 1:1 - 2:10. Mr. Merante testified at length regarding PAWC's financial capabilities as compared to the Authority's. PAWC St. No. 5-R, 4:11 - 8:19. To the extent that the Commission must make a determination regarding the weight to be accorded the testimony of Mr. Merante versus that of Mr. Rubin, the Joint Applicants submit that the Commission should accord no weight to Mr. Rubin's testimony regarding the comparative financial strengths and costs of capital available to the Authority and PAWC.

When the Commission considers the testimony of Mr. Rubin, it should keep in mind that his testimony ignores PAWC's high credit rating, its access to credit, and its future financial strength relative to the Authority's. To illustrate, it is undisputed that PAWC currently has a better credit rating than the Authority. PAWC Ex. JSM-1 (Authority's "A-" rating from Standard and Poors); OCA Ex. 1 (PAWC's "A" rating from Standard and Poors); N.T. 125:20 - 126:15. It is also undisputed that PAWC is the largest water and wastewater provider in the Commonwealth with total assets of \$3.9 billion and annual revenues of \$613 million in 2015. PAWC St. No. 3,

3:2-6. In 2015, for example, PAWC had net income of approximately \$143 million or nearly 75% of the purchase price of the Authority. *See id.*

Further, PAWC has access to a \$220-million line of credit, which is more than the purchase price of the Authority. N.T. 130:17-21; PAWC St. No. 5, 3:10-13. PAWC also has access to equity markets that are unavailable to the Authority. N.T. p. 131:1-3; PAWC St. No. 5, 4:2-3; PAWC St. No. 5-R, 7:15-16.

PAWC has a more positive future financial outlook than the Authority. It is undisputed that the Authority is highly leveraged with a 80.4 percent debt to plant ratio (N.T. 129:3-6); that the Authority will have to consider substantial rate increases (estimated to average 4.57% percent per year over the next thirty (30) years) in order to maintain its current financial profile and pay for the improvements required by the Consent Decree (N.T. 129:15-19; SSA St. No. 1, 4:21-24); and, that any such rate increase will be exacerbated by the fact that Authority already has high rates, consuming 2.3% of its customers median household income (N.T. 129:22 -25).

Studies conducted and submitted as part of the Consent Decree mandated LTCP evaluated the financial condition of the Authority's service area and underscored the financial affordability challenges facing the Authority and its ratepayers. PAWC Ex. JCE-5; PAWC St. No. 6-R, 25:16 through 26:19. That study found that the combined populations of the City and Borough have been steadily dropping with each 10-year census since a peak in the 1930s. This population loss has decreased the Authority's ratepayers' ability to pay in several significant ways: (1) there are fewer ratepayers; (2) there are fewer rate and taxpayers for all social and governmental needs; and, (3) property values decrease further eroding community wealth. According to U.S. Census data, nearly 20% of the City's population is below the poverty level and that percentage has been increasing since 2000.

The LTCP noted that the median household income has been increasing at a rate slower than the consumer price index. Put another way, median household income is not keeping pace with inflation, and people are falling further behind. The LTCP's evaluation noted other factors significantly affecting affordability, including (1) the fact that the City of is a financially distressed

community under Pennsylvania's Municipalities Financial Recovery Act, and (2) the Borough has reached its statutory limits on taxing power under state law.

The LTCP analysis found that, applying the affordability analysis methodology of EPA guidance,<sup>18</sup> the Authority's service area had a financial indicators score (which considers socio-economic, debt and financial indicators) of just 1.3, where any score below 1.5 is classified as "weak." At the same time, the cost of combined sewer wastewater system costs per household as a percentage of the median household income was approximately 2.35%, indicating a weakness in residential ability to pay. This is a high financial burden, given that the limit of affordability under the EPA guidance is in the range of 1.6-2.0%. PAWC St. No. 6-R, 25:16 - 26:19.

These affordability issues coupled with the Authority's rate inflexibility and attendant constraints on its future ability to access capital through credit or otherwise affects the Authority's future ability to raise revenue (N.T. 130:1-16) and, in turn, affects the Authority's financial ability to make improvements to its Combined Wastewater System as required by the Consent Decree. Additionally, it is undisputed that a significant portion of the Authority's net position includes restricted capital that must be held in reserve under its Trust Indentures related to outstanding bond issues. PAWC St. No. 5-R, 7:17-20. By contrast, if the Commission approves the Transaction, the public will benefit from having PAWC's comparatively stronger financial position back the operation of the Combined Wastewater System in the short and long term.

Accordingly, the Joint Applicants have demonstrated that Scranton-area customers will benefit from a financially sound owner and operator of the Combined Wastewater System. It is clear that PAWC is well-suited to meet the financial needs of the Combined Wastewater System and its customers.

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<sup>18</sup> U.S. Environmental Protection Agency, Combined Sewer Overflows - Guidance for Financial Capability Assessment and Schedule Development, February 1997 (EPA 832-B-97-004), <https://www3.epa.gov/npdes/pubs/csofc.pdf>.

**c. Scranton-Area Customers Will Benefit from Being Part of Larger Customer Base.**

Third, the Transaction will provide a public benefit to the Authority's customers because they will join PAWC's large customer base. PAWC is the largest investor-owned water and wastewater provider in the Commonwealth and provides water service to more than 653,000 customers and wastewater service to more than 21,000 customers. PAWC St. No. 3, 3:14-16. These services are provided in approximately 400 communities across the Commonwealth with a combined population of approximately 2.3 million persons. *Id.* at 3:16-17. Because of its size and expertise in wastewater management and the leveraging of economies of scale, PAWC will be able to improve efficiencies and lower the costs to operate the Combined Wastewater System. These efficiencies will help keep rates lower for the Authority's customers than they would be if not allowed to become part of PAWC's customer base. PAWC St. No. 4, 5:15 - 6:2.

PAWC can also provide a substantial public benefit to the Authority's customers through Act 11 of 2012's revenue requirement allowance by spreading the costs of capital improvements required by the Consent Decree across PAWC's combined water and wastewater customer base. PAWC St. No. 4, 7:7-11. By spreading the improvement costs across PAWC's combined customer base, the costs of improvements will be minimized per customer and will thereby prevent an unreasonable rate impact. *Id.* at 7:11-15. In turn, PAWC's other customers will benefit as more customers join PAWC's combined customer base because there will be more customers to help pay for future improvements of PAWC's system-wide facilities. *Id.* at 8:1-8.

**d. PAWC's Commitment to Create 100 New Jobs in the Scranton-Area Will Promote Economic Development.**

Fifth, the Transaction offers a substantial public benefit because PAWC has committed to create 100 new jobs in the Scranton area by the end of calendar year 2020. PAWC St. 3, 20:2-6. The Commission has previously held that the creation of new jobs is a substantial public benefit. *See Joint Application of Peoples Natural Gas Company LLC, Peoples TWP LLC, and Equitable*

*Gas Company, LLC for All of the Authority and the Necessary Certificates of Public Convenience (1) to Transfer All of the Issued and Outstanding Limited Liability Company Membership Interest of Equitable Gas Company, LLC to PNG Companies LLC, (2) to Merge Equitable Gas Company, LLC with Peoples Natural Gas Company LLC, (3) to Transfer Certain Storage and Transmission Assets of Peoples Natural Gas Company LLC to Affiliates of EQT Corporation, (4) to Transfer Certain Assets between Equitable Gas Company, LLC and Affiliates of EQT Corporation, (5) for Approval of Certain Ownership Changes Associated with the Transaction, (6) for Approval of Certain Associated Gas Capacity and Supply Agreements, and (7) for Approval of Certain Changes in the Tariff of Peoples Natural Gas Company LLC, Docket Nos. A-2013-2353647, A-2013-2353649, and A-2013-2353651 (Initial Decision dated November 1, 2013), p. 73 (finding that returning a call center support center to Pennsylvania constituted a public benefit) (adopted by Commission Order entered November 14, 2013); Joint Application for Approval of the Transfer of the Issued and Outstanding Shares of Capital Stock of The Peoples Natural Gas Company, d/b/a Dominion Peoples, currently owned by Dominion Resources, Inc., to Peoples Hope Gas Companies, LLC, and to Approve the Resulting Change in Control of The Peoples Natural Gas Company, d/b/a Dominion Peoples, Docket No. A-2008-2063737 (Order entered Nov. 19, 2009) (finding that creation of 200 call center jobs in Pittsburgh area was a public benefit).*

The testimony of Messrs. Sheridan and Nevirauskas confirm PAWC's commitment in the APA to hire Authority personnel and create an additional 100 jobs once the Transaction is complete. These will be new jobs in addition to the Authority employees that PAWC will engage once the Transaction is approved. PAWC St. 3-R, 2:10-15. PAWC anticipates that the employees will serve PAWC or its parent organization (*i.e.*, American Water Works Company) to accommodate growth of the organizations. *Id.* at 3:7-12. If the employees are hired by American Water Works Company, the employees could perform tasks for several of its operating subsidiaries, and the costs of those employees would be allocated to PAWC and the other operating subsidiaries based upon the tasks performed per affiliate. PAWC St. 4-R, 14:12-16. That is, if



PAWC is not receiving a benefit from those services, costs will not be allocated to PAWC and will not be recovered from PAWC's ratepayers. *Id.* at 14:10-11; N.T., p.p. 117:16-118:13.

Further, PAWC has specifically agreed that the costs of those new jobs would be subject to the standard review for reasonableness in a subsequent rate case to alleviate any concern that the new jobs may be unnecessary or would result in an unfavorable impact on PAWC's rates and/or its customers. PAWC St. 3-R, 4:1-6; PAWC St. 4-R, 14:12-16; N.T. p. 118:14-20. As will be explained later, I&E's concerns regarding rate recovery for these jobs is premature and unfounded.

Accordingly, the Joint Applicants have demonstrated that approval of the Transaction is in the public interest because, among other things, the committed additional jobs will provide increased economic development and employment opportunities for the economically distressed Scranton area. Job creation is an affirmative public benefit.

**e. Transaction Proceeds Will Help Ameliorate the City of Scranton's Financial Situation and Benefit the Authority's Customers.**

The Transaction is a cornerstone of the City's economic recover that has been delayed for almost twenty five years. Scranton, currently the sixth-largest city in the Commonwealth, has a venerable history dating to its incorporation as a borough in February 1856 and as a city on April 23, 1866. With a population of 76,089, it is the largest city in the Scranton-Wilkes-Barre-Hazleton, Pennsylvania Metropolitan Statistical Area, with a total population of about 570,000. Scranton is the geographic and cultural center of the Lackawanna River, and the largest of the former anthracite coal mining communities in a contiguous area that also includes Wilkes-Barre, Pittston and Carbondale. SSA St. No. 2, 2:21 - 3:3.

As was explained by the Mayor of Scranton, William L. Courtright, unfortunately, Scranton has balanced on the edge of a financial precipice since the early 1990s. This situation has been exacerbated by the undeniable fact that the population of the City and the Dunmore has been steadily decreasing since the 1930s. SSA St. No. 2-R, 5:11-13. This demographic was

observed in Section 8.3.1 of Authority's October 23, 2012 LTCP that noted that (i) the population of Scranton and Dunmore peaked in the 1930s and has declined steadily ever since, and (ii) both areas are suffering economically and continue to experience population decreases with each 10-year census. PAWC Ex. JCE-5, 8-13. Indeed, over the last 20-year period, the LTCP noted that "Scranton and Dunmore have experienced approximately a 7% drop in population. If this trend continues throughout LTCP implementation, the burden to an individual homeowner of higher sewer system costs and other municipal service costs will increase as the number of ratepayers diminishes." Id.

On January 10, 1992, the City was first determined by the Department of Community and Economic Development ("DCED") to be in "distressed" condition under the Municipalities Financial Recovery Act, Act of 1987, P.L. 246, No. 47 ("Act 47") and has remained under Act 47 status since that time. SSA St. No. 2, 3:12-13. The Pennsylvania Economy League ("PEL") is the Recovery Plan Coordinator for the City designated by the Commonwealth of Pennsylvania under Act 47. In that capacity, PEL has developed, in concert with the City Administration and City Council, Recovery Plans for the City. SSA St. No. 2, 3:19-22.

Mr. Gerald Cross, the Executive Director of PEL's Central Division and the City's Act 47 Coordinator, testified in detail on the City's current distressed financial status and the potential benefit the transaction is expected to provide to the City and its residents. Once a municipality has been declared financially distressed, the appointed Act 47 Coordinator (*i.e.*, PEL in connection with Scranton) assists the municipality in addressing its financial distress, which generally means a chronic inability to meet its expenditures with sufficient revenues, a structural deficit. SSA St. No. 3-R, 4:15-19. The Act 47 coordinator formulates and proposes a financial recovery plan and thereafter implements it in conjunction with municipal officials. SSA St. No. 3-R, 4:20-23.

The most recently completed Revised and Updated Act 47 Recovery Plan ("2015 Recovery Plan") was prepared by PEL for the City in February 2015 (SSA St. No. 2, 3:22-23) and approved by City Council on March 12, 2015. SSA St. No. 3-R, 6:5-8. The 2015 Recovery Plan projected the City's general fund budget surplus/deficit results from 2015-2020. SSA St. No. 3-R, 6:5-8.

The projections in the 2015 Recovery Plan reflect a “business as usual approach” in order to define a baseline against which the plan initiatives and mandates can be measured. The 2015 Recovery Plan projected a baseline deficit for the City of \$13,725,454 in 2017, which climbs to \$19,395,212 by 2020. SSA St. No. 3-R, 6:12-16.

Mr. Cross explained that – as documented in the 2015 Recovery Plan – the City’s options to eliminate the projected deficits are limited. SSA St. No. 3-R, 6:22. For example, the City has already tripled the Local Services Tax (“LST”) from \$1,659,920 to \$4,979,760 to reduce projected deficits. SSA St. No. 3-R, 6:18-20. Employee-related expenses -- including salary and wages, pension, active and retiree healthcare, and other benefits --account for approximately 74% of the City’s operating expenditures. In addition, most of the major City expenditure increases are the result of collective bargaining agreements in force until 2021, debt service obligations, and actuarially required pension contributions, which cannot be altered in real time. SSA St. No. 3-R, 6:22 to 7:2. The City’s pension costs have grown by 131 percent in the last ten years, from \$5,459,314 in 2005 to \$12,635,490 in 2015 and the 2015 Recovery Plan precludes the City from increasing employee benefits in order to constrain employee-related expenses. SSA St. No. 3-R, 7:2-4; SSA St. No. 3-R, 7:4-5.

The City has significantly reduced its personnel compliment during its tenure in Act 47. Any further material reduction in the City’s personnel compliment, particularly police and fire personnel, would jeopardize the City’s capacity to provide for the health, safety and welfare of its citizens. SSA St. No. 3-R, 7:8-11.

On the revenue side, Scranton is equally constrained in its efforts to close budget deficits and successfully exit from Act 47. The City’s largest revenue source is the real estate property tax. Mr. Cross testified that since 2013, the average residential municipal tax bill has increased by approximately 97 percent, from \$504 to \$993 in 2016, a particularly significant increase when measured against the City’s median household income of \$37,551. SSA St. No. 3-R, 7:17-20. While the City’s second largest source of revenue is the earned income tax, its 2.4% is already substantially higher than the Scranton School District’s 1% earned income tax on its co-terminus

residents for an earned income tax rate on City residents of 3.4%. Since all of the outlying municipalities and school districts are restricted to imposing no more than a 1% combined municipal and school district earned income tax for general purposes, the City is at a huge economic disadvantage for attracting new residents. Thus, any increase in the City's earned income tax rate will reduce its residents' income and may convince many residents that an exodus from the City is in their long-term interest. SSA St. No. 3-R, 8:1-9.

The City would need to increase its real property tax millage by approximately 32 percent in 2017 to eliminate the projected 2017 operating deficit. For the average homeowner, this would translate into an approximately 160 percent increase in real estate taxes since 2013. For that same average homeowner, municipal real estate taxes comprised 1.3 percent of median household income in 2013; with an additional 32 percent increase in 2017 it would reach 3.5 percent. SSA St. No. 3-R, 8:16-22.

In the face of the clear and unequivocal financial problems confronting Scranton, the 2015 Recovery Plan documented and confirmed previous discussions about a possible monetization of the Authority as one of the 2015-2016 mandates necessary to continue to put the City on the path of reducing the otherwise projected operating budget deficits through 2020. SSA St. No. 2, 5:10-13. Mayor Courtright testified that the decision to sell or monetize the Authority's assets was the result of deliberate and sustained consideration by many stakeholders, of which the City was only one party. SSA St. No. 2, 5:8-9.

Given the City's longstanding financial woes, the Transaction closing on or before October 31, 2016 may result in the City's long-awaited exit from Act 47 status which the City has endured for over two decades. SSA St. No. 2, 5:19-21. This departure from Act 47 would be an affirmative public benefit.

The residents and taxpayers of the City have experienced and continue to experience the impacts of several major financial crises over the last 25 years which the net Transaction proceeds are expected to alleviate and address. Among other things:

- The City faces a \$10 million budget shortfall out of an approximate \$90 million budget if the Transaction is not finalized by October 31, 2016. SSA St. No. 2, 5:21-25.
- For budgeting purposes, the City cannot take advantage of *anticipated revenues* from the completion of the Transaction. It can only rely on actual net proceeds *in hand* from the Transaction as of the time it must propose the 2017 budget by mid-November 2016. SSA St. No. 2, 6:1-4.
- The City has substantially increased property taxes over the last three years and reduced City services to the absolute minimum, and raising property taxes again to increase City revenues to support the 2017 budget is not sustainable or something that will be authorized by City Council. SSA St. No. 2, 6:4-7.
- The City has the most distressed major pension fund in the Commonwealth of Pennsylvania by a significant margin, being declared “Severely Distressed” by the Auditor General and the City’s actuary since at least 1993. The Fire, Non-Uniformed, and Police pension funds have funded ratios of 17%, 27%, and 31% respectively, meaning that in each case assets are significantly less than liabilities. SSA St. No. 2, 6:9-13.
- In order for the City to realize the *budgetary* benefit of an investment into the pension fund, it is necessary that the Transaction be completed by October 31, 2016. Each year, the City’s actuary follows Act 205 to provide a Minimum Municipal Obligation (“MMO”) that the City must pay into the pension fund. Should a payment not be made, the City is charged substantial interest that it cannot pay. SSA St. No. 2, 6:17-21
- If the City were not able to make a complete cash deposit into the pension fund prior to January 1, 2017, *no benefit to the City’s 2017 budget would inure from the Transaction possibly until 2020*, making the increase that occurs in the City’s MMO payment nearly impossible to meet. SSA St. No. 2, 7:11-15
- Under prior City Administrations, debt was issued with exorbitant interest rates for municipal bonds, *i.e.*, 7.25% and 8.50%, that has placed an undue burden on the City’s budget and will continue to do so until final repayment in 2023. Each year, the City must pay nearly \$4 million to meet these debt service requirements. SSA St. No. 2, 7:17-22.

If the Transaction is not finalized by October 31, 2016, the City will face an untenable 2017 budget which may result in the Commonwealth of Pennsylvania recommending the installation of a Receiver in the City. Without meeting this time frame, the City’s approximately \$90 million budget will, at minimum, have to address a \$10 million budget shortfall. SSA St. No. 2, 5:21-25.

Eugene Barrett, the Authority's Executive Director and Gerald Cross, the Executive Director of the Pennsylvania Economy League Central Division, noted the economic hardships that have been endured by the Authority's customers for decades and the synergies between the City's financial problems and those of the Authority. SSA St. No. 2-R; SSA St. No. 3-R. Any financial conditions causing customers to not be able to pay for wastewater service and their current taxes are likely to lead to a higher delinquency rate for the Authority, a situation that would inevitably be noticed by the Authority's bond rating agencies. This could lead to a higher cost of debt for the Authority, in turn leading to higher rates for customers. This cycle of spiraling costs with reduced ability to pay for wastewater service could lead, in Mr. Barrett's view, to future Authority rate increases well in excess of the 4.57% annual rate increases projected in the LTCP. SSA St. No. 2-R, 7:10-16.

While the Authority has been able to maintain a relatively strong financial position in spite of the City's financial distress, Mr. Cross observed that this position would become severely challenged by the extent of the necessary tax increases and the corresponding inability of residents and businesses to keep up with them. SSA St. No. 3-R, 8:12-15. As Mr. Cross testified, most the Authority's customers are residents and businesses located in the City. Rising property tax bills will put pressure on an increasing number of City property owners to meet their utility expenses, including sewer. This will lead to City residents having to balance between paying their property tax bill or their sewer bill. Increased sewer delinquencies will negatively impact the Authority's cash flow and its ability to satisfy its operating financial obligations. This may lead to an increase in sewer rates as more ratepayers fall delinquent or simply leave the City for economic reasons, creating a downward spiral of rising rates on an impoverished sewer rate base. SSA St. No. 3-R, 10:6-14.

A careful monetization of certain infrastructure assets as recommended in the 2015 Recovery Plan is an integral part of the City's financial recovery and will benefit the City's future financial sustainability. SSA St. No. 3-R, 10:16-18. Approving the Transaction in the manner and time requested by the Joint Applicants will bestow a substantial public benefit on the City,

Borough, thousands of taxpayers and residents, and existing Authority customers in the form of an opportunity for financial and economic development that they have been deprived of for the last twenty-five years.

3. **The Commission Should Approve the Municipal Agreements and Authorize PAWC to File a Tariff Supplement.**

In conjunction with the Commission's approval of the Transaction as in the public interest, the Commission should approve the APA as well as the municipal agreements to be assumed by PAWC. Likewise, the Commission should authorize PAWC to file a compliance tariff supplement consistent with the *pro forma* tariff supplement attached to this brief as **Appendix D**.

a. **The APA and the Municipal Agreements to be Assumed by PAWC are Reasonable, Legal, and Otherwise Valid.**

PAWC seeks a Certificate of Filing for the APA under Code Section 507, 66 Pa. C.S. § 507 (regarding public utility contracts with a municipal corporation). Because the Transaction is in the public interest (as explained in detail in this Main Brief), the APA is reasonable, legal and otherwise valid and the Commission should issue a Certificate of Filing for the APA.

PAWC also seeks additional Certificates of Filing through this proceeding. The Authority currently has seven agreements with three municipal corporations – the Boroughs of Taylor, Dickson City, and Moosic – which will be assumed by PAWC upon the closing of the Transaction. PAWC St. No. 1-Supp, 1:9-19. The agreements are:

1. Interjurisdictional Agreement Between The Sewer Authority of The City of Scranton and The Borough of Dickson City, Pennsylvania, dated April 14, 2003;
2. Interjurisdictional Agreement Between The Sewer Authority of The City of Scranton and The Borough of Taylor, Pennsylvania, dated April 9, 2003;
3. Interjurisdictional Agreement Between The Sewer Authority of The City of Scranton and The Borough of Moosic, Pennsylvania, dated May 13, 2003;

4. Agreement for the Acceptance, Conveyance, Treatment, and Disposal of Wastewater Received from the Siniawa Enterprises Wastewater Collection System at the Scranton Wastewater Collection System and Wastewater Treatment Plant, as of June 14, 1989;

5. Agreement for the Acceptance, Conveyance, Treatment, and Disposal of Wastewater Received from the Montage, Inc. Wastewater Collection System at the Scranton Wastewater Collection System and Wastewater Treatment Plant, as of July 24, 2003;

6. Agreement Providing for Uniformity of Charges Applicable to Residents of Taylor Borough and Residents of the City of Scranton, as of January 12, 1976; and,

7. Agreement for the Transfer, Conveyance, and Acceptance of the Davis Street, Greenwood Avenue, and Corey Street Sanitary Sewer Conveyance Line from Moosic Borough to the Sewer Authority of the City of Scranton, as of April 16, 2008.

Pursuant to Code Section 507, the Joint Applicants filed these seven agreements, along with pro forma assignment and assumption agreements (“A&A agreements”), with the Commission on July 1, 2016. The agreements were served on the parties to this proceeding and no party filed a response.

PAWC witness Bernard Grundusky’s supplemental direct testimony explains the benefits of PAWC’s assumption of such agreements – including maintaining existing relationships with neighboring municipalities, recognition of geographic limitations on service, and efficiencies. PAWC St. No. 1-Supp., 2:10-15:21. No party has challenged the reasonableness, legality, or validity of the municipal agreements or associated pro forma A&A agreements.

Accordingly, the Commission should issue Certificates of Filing for the agreements upon PAWC’s filing of executed versions of the A&A agreements which are substantially-similar in all material respects to the pro forma A&A agreements. PAWC notes that Code Section 507 imposes only a filing requirement upon PAWC with respect to these municipal agreements.



**b. PAWC Should be Permitted to File The Proposed Compliance Tariff Supplement Upon Closing of the Transaction.**

The Joint Applicants attached a *pro forma* tariff supplement as Exhibit L to the Joint Application. The *pro forma* tariff supplement sets forth the proposed rates, rules, and regulations for Scranton-area customers.

The *pro forma* tariff supplement was revised by the written direct testimony of PAWC witness Rod P. Nevirauskas. The revision corrected section 4.11 of the *pro forma* tariff supplement to address a discrepancy between the way the Authority classified certain customers and the way PAWC classifies the same customers. PAWC St. No. 4, 8:11-21. A revised *pro forma* tariff supplement was attached to Mr. Nevirauskas' direct testimony as PAWC Ex. RPN-1.

On May 13, 2016, PAWC and the Authority filed a Joint Motion to Amend the *pro forma* tariff supplement attached as Exhibit L to the Joint Application to include additional tariff pages relating to the IPP-S to be implemented by PAWC for Scranton-area industrial customers upon consummation of the Transaction. The tariff language, if adopted, would incorporate by reference the IPP-S to be approved by PADEP and would set fees for the IPP-S. The motion was served upon all parties to this proceeding, as well as upon all potentially affected industrial customers in the Scranton area. No answers were filed and the motion was granted by order of the ALJs dated June 15, 2016.

The supplemental direct testimony of PAWC witness David R. Kaufman revised the IPP-S provisions of the *pro forma* tariff supplement to remove certain fees. PAWC St. No. 2-Supp, 1:1 through 3:14; PAWC Ex. DRK-5. The changes were made in response to input from industrial customers in the Scranton area. PAWC St. No. 2-Supp., 1:1 through 3:14.

The testimony and exhibits of Messrs. Kaufman and Nevirauskas were received into evidence without objection on July 6, 2016. No party presented evidence directly challenging the language of the *pro forma* tariff supplement as amended. Attached hereto as **Appendix D** is a revised *pro forma* tariff incorporating all of the above-referenced revisions.

Accordingly, PAWC requests that, upon closing of the Transaction, it be permitted to issue, to become effective on the same date as issuance, a compliance tariff supplement consistent with the revised *pro forma* tariff supplement attached hereto as **Appendix D**. The *pro forma* tariff supplement reflects just and reasonable rates and terms and conditions of service.

***C. The Commission Should Reject the Arguments and Policy Positions of the Parties Opposing the Transaction.***

As outlined in detail above, the Commission has jurisdiction over Combined Wastewater service and should approve the Transaction and related agreements and tariff supplements because the Transaction is in the public interest. Notwithstanding the dispositive analysis above, the parties opposing the Transaction have taken a number of positions with respect to jurisdiction and rates. First, the OCA essentially has taken the position that the Commission lacks jurisdiction over Combined Wastewater systems and that no investor-owned utility should ever own Combined Wastewater systems. Second, the statutory advocates both have raised a number of issues regarding rates. For the reasons that follow, the Commission should reject the opposing parties' arguments and positions.

**1. The Commission Should Reject OCA's Position Regarding Jurisdiction.**

The Commission should reject OCA's contention that the Commission lacks jurisdiction over Combined Wastewater systems and that stormwater service is a separate non-jurisdictional service that should be provided by municipal utilities only for a separate stormwater fee. The OCA's arguments miss the mark for both legal and policy reasons.

**a. The OCA's Claim that the Commission Lacks Jurisdiction over Combined Wastewater Service Lacks Merit.**

OCA advocates that an integrated wastewater system must be split into two separate parts (which OCA refers to as "services") for purposes of utility regulation, and that the stormwater aspects should not be owned or operated by a regulated utility. OCA would ostensibly bifurcate management of an integrated wastewater system, such as Scranton's, into pieces, rendering different entities responsible for the different "services" rendered by the single system. While effectively conceding that all of the comingled fluids flowing in the Scranton System are wastewater under applicable environmental regulations, OCA's witness, Scott Rubin, took the position that is "not important." N.T. 96:23 - 97:1.

The OCA is wrong for several reasons. First, its position contradicts the plain language of the Code and the authority of the Commission to regulate Combined Wastewater whether expressly, necessarily implied and/or via the Commission's ancillary jurisdiction. In addition, the OCA's position ignores Act 11 and PAWC's ability to spread the costs of "wastewater" systems across a utility's combined customer base when acquiring distressed (and often "combined") municipal systems. If the Commission lacked jurisdiction over systems that commingled stormwater with sewage as the OCA seems to suggest, there would be a clear gap in regulating wastewater systems acquired by investor-owned utilities. It would also be incongruous to encourage utilities under Act 11 to acquire distressed systems and then prohibit them from making any return on those investments if stormwater enters the system and commingles with sewage.

Second, one can hardly envision an interpretation of state utility law more likely to frustrate the objectives of state environmental law. Where the rules governing wastewater system management administered by PADEP and EPA require *one entity* to take responsibility for and implement all measures and activities required to manage a combined sewer system, the OCA's position would advocate the opposite, with an attendant diffusion of responsibility among multiple entities. Instead of reading statutes together and harmonizing utility and environmental regulation to seek fulfillment of the objectives of both regulatory regimes, the OCA would have this

Commission adopt a framework destined to conflict with federal and state environmental laws governing integrated wastewater systems.

Legal precedent, sound public policy and common sense suggest that the OCA's approach should be rejected. An interpretation that harmonizes environmental and utility regulation should be embraced. An integrated wastewater system is one system, and that one system must be regulated as an integrated whole by the Commission.

**b. The Commission Should Reject the OCA'S Policy Argument that Costs Associated with the Stormwater Aspects of Combined Sewer Systems Should Be Paid for Only Through Separate Stormwater Fees Based on Factors Such as Impervious Surface Area, and That Therefore Operation of Combined Sewer Systems by Public Utilities Should Not Be Allowed.**

The OCA, through its witness, Scott Rubin, submitted testimony positing that costs associated with the stormwater aspects of combined sewer systems should be paid for only through separate stormwater fees based on factors such as the impervious surface area of properties within the service area. OCA St. No. 2, 19:21 - 10:6. From this, Mr. Rubin argues that public utilities do not have the authority to impose and enforce such separate stormwater fees based on property area and stormwater runoff characteristics, because there is no ability to cutoff service to "stormwater customers" and enforcement of such separate stormwater fees would, almost of necessity, require the ability to lien private property, a power which public utilities do not have. OCA St. No. 2, 22:1-7. On this logic, Rubin concludes that all stormwater utilities must be government-owned. OCA St. No. 2, 22:6-7.

**(1) Establishment of Separate Stormwater Fees Is Not Legally Required.**

As a starting point, even OCA's witness Mr. Rubin candidly concedes that he cannot say that separate fee for stormwater service is "required." OCA St. No. 2, 13:9-10. OCA and Mr.

Rubin do not even try to point to any statutory or other legal requirement mandating separate stormwater fees. The reason is fairly clear – there are no such legal requirements. As discussed below, while some statutory authority exists for certain municipalities (*e.g.*, home rule municipalities<sup>19</sup>) and for municipal authorities<sup>20</sup> to establish separate stormwater charging systems based upon property characteristics, such as impervious and pervious surface area, *none* of those laws mandate establishment of such separate stormwater fees or preclude recovery of the costs for combined sewer via other means, such as wastewater charges.

**(2) Separate Stormwater Fees Are Not Common In Pennsylvania.**

OCA's witness, Rubin, claims as part of his public policy argument that separate charges for stormwater service are becoming "more common." OCA St. No. 2, 13:9-10. But Rubin's glittering generalization skews an important fact: separate stormwater fees are not common in Pennsylvania (in part due to limited or questionable legal authority for such fees). Rubin admits that in Pennsylvania, only six or seven municipalities, have established separate stormwater fees. OCA St. No. 2, 14:2-3; N.T. 70. Mr. Elliott confirmed in his testimony that out of the many hundreds of systems that manage stormwater in some fashion, including combined sewer systems and municipal separate storm sewer systems, only seven systems in Pennsylvania currently have separate stormwater service fees. PAWC St. No. 6-R, 29:10-13.

The fact is that the "common" and well-accepted method in Pennsylvania for paying for all combined sewer costs is through charges assessed to wastewater customers. As part of a study Gannett Fleming conducted for SSA on potential rate structures, Gannett Fleming surveyed a representative sample of combined sewer systems across the Commonwealth. PAWC St. No. 6-R, 28:19-21. In all but a very limited number of cases (specifically, the City of Philadelphia),

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<sup>19</sup> *See, e.g.*, City of Philadelphia Home Rule Charter, § 5-801; Philadelphia Code § 13-101.

<sup>20</sup> Municipality Authorities Act, 53 Pa. C.S. § 5607(d)(34), *added by* the Act of July 9, 2014, P.L. 1045, No. 2014-123.

communities across Pennsylvania that have combined sewer systems pay for the capital and operating costs associated with such wastewater systems through sewage fees that are either based on water usage volumes (e.g., \$X per 1000 gallons) or a combination of a flat fee plus a variable fee based on water use. PAWC St. No. 6-R, 28:21 – 29:3. That is how the SSA has charged for such wastewater services: through a sewage rate based on relative water usage. PAWC St. No. 6-R, 29:3-5. At the time of the Gannett Fleming study, only the City of Philadelphia had moved toward adopting a separate stormwater fee based on other factors. PAWC St. No. 6-R, 29:5-6.

**(3) OCA’s Claim That Unless Combined Sewer “Stormwater Services” Are Assessed Via Separate Stormwater Charges, Service Fees May Be Viewed as Taxes, Is Not Well Founded.**

OCA’s witness, Mr. Rubin, attempts to bolster his argument in favor of separate stormwater charges by claiming that “[t]her is a growing body of case law distinguishing between fees for services (particularly utility services) and taxes” and from that insinuating that unless separate stormwater charges are levied, the service fees may be viewed as taxes. OCA St. No. 2, 17:1-9. In alleged support of this proposition, Mr. Rubin’s testimony cites to a publication of the National Association of Clean Water Agencies, *Navigating Litigation Floodwaters: Legal Considerations for Funding Municipal Stormwater Programs* (2014) (the “NACWA Report”). OCA St. No. 2, 17 n.21. In cross-examination, the NACWA Report was admitted as PAWC-Cross-Ex. 1.

A close examination of the NACWA Report upon which Rubin purports to premise his tax vs. fee argument, and the cases cited in that publication, reveals that Rubin’s contentions are without merit:

- Not one of those cases cited in the NACWA Report involved the question of whether costs of stormwater flowing in a combined sewer system could be recovered via charges to wastewater customers based on water use or wastewater generation rather than through a separate stormwater fee.

- Only three of the cases cited even discuss combined sewer systems. *Bolt v. City of Lansing*, 587 N.W.2d 264 (Mich. 1998), *Vandergriff v. City of Chattanooga*, 44 F. Supp. 2d 927 (E.D. Tenn. 1998), and *City of Hallowell v. Greater Augusta Utility District*, Crim. Docket No. AP-11-052, 2013 Me. Super. LEXIS 34 (Me. Super. 2013).
- In *Bolt*, the Court held that the City of Lansing's separate stormwater service charge, based on the impervious and pervious area of each parcel multiplied by a runoff factor, constituted an unconstitutional tax that required authorization by voter approval. 587 A.2d 266-67. The fee was designed to fund half the costs associated with the separation of the City's combined sanitary and storm sewers. *Id.* at 266. Notably, the plaintiffs in the case conceded that charges for stormwater collection, detention and treatment, when assessed together with charges for sanitary sewage disposal, constituted a permissible fee; their argument was that stormwater charges qualified as a tax only when they are assessed separately – the exact inverse of Rubin's position. *Id.* at 268.
- In *Vandergriff*, the court upheld a City of Chattanooga ordinance authorizing the imposition of a separate annual stormwater fee that was used in part to fund improvements to the City's combined sewer system. 44 F. Supp. 2d at 930. The *Vandergriff* court rejected the argument that the stormwater charge, which was implemented based on impervious area, property size, and property use, was actually a tax, but did not address the status of fees collected through more traditional means (such as those based on water usage). *Id.* at 939-41.
- In *City of Hallowell*, the court upheld a decision of the Greater Augusta Utility District increasing sewer rates by 35% and stormwater rates by 45%, over the challenge of some sewer-only customers who believed that the District's rate calculation methodology would cause them to pay an inequitable share of stormwater-related costs. 2013 Me. Super. LEXIS at \*1, \*51.
- In short, these cases provide no support for the position that combined sewer and stormwater charges are more likely to qualify as a tax than a separate stormwater charge; indeed, *Bolt* suggests exactly the opposite.
- A central question in a number of the other cases cited in the NACWA Report was whether a stormwater charge assessed by a municipality based on the total area of properties or the area in impervious surface was a tax or a fee.<sup>21</sup> In other words, it

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<sup>21</sup> See *Zweig v. Metropolitan St. Louis Sewer Dist.*, 412 S.W.3d 223 (Mo. 2013); *DeKalb County v. United States*, 108 Fed. Cl. 681 (2013); *Jackson Cnty. v. City of Jackson*, 836 N.W.2d 903 (Mich. Ct. App. 2013); *Oneida Tribe of Indians of Wis. v. Vill. of Hobart*, 891 F. Supp. 2d 1058 (E.D. Wisc. 2012); *City of Lewiston v. Gladu*, 40 A.3d 964 (Me. 2012); *Lewiston Indep. Sch. Dist. No. 1 v. City of Lewiston*, 264 P.3d 907 (Idaho 2011); *El Paso Apt. Ass'n v. City of El Paso*, 415 Fed. Appx. 574 (5th Cir. 2011); *Storedahl Properties, LLC v. Clark Cnty.*, 178 P.3d 377 (Wash. Ct. App. 2008); *Tukwila Sch. Dist. No. 406 v. City of Tukwila*, 167 P.3d 1167 (Wash. Ct. App. 2007); *McLeod v. Columbia Cnty.*, 599 S.E.2d 152 (Ga. 2004); *City of Gainesville v. Fla.*

was the type of fee that Mr. Rubin advocates (a fee on property area) that was in contention, not a fee based on water or wastewater usage. None of the cases where the tax vs. fee question was posed involved a fee for combined sewer system costs imposed on wastewater users based on wastewater volumes.

- Indeed, in several of those cases, as in *Bolt*, the ruling of the court was that a stormwater charge of the type Mr. Rubin advocates, based on the property area and impervious surface, was ruled to be a tax, not a fee.<sup>22</sup>
- All of the cases cited in the NACWA Report involve the question of whether a charge levied by a **governmental entity** is a tax or a fee. None involve what are allowable fees to be charged by private utility companies.
- Many of the cases referred to in the NACWA Report focus on a different question, that is, whether the governmental entity has the statutory or constitutional authority to adopt a stormwater fee.<sup>23</sup>

In sum, the Commission should reject Mr. Rubin's "tax vs. fee" argument because it is a red herring. It has no relationship to Pennsylvania statutory law which allows PAWC to charge rates for jurisdictional service, to include Combined Wastewater service.

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*Dep't of Transp.*, 778 So.2d 519 (Fla. Dist. Ct. App. 2001); *Long Run Baptist Ass'n v. Louisville and Jefferson Cnty. Metro. Sewer Dist.*, 775 S.W.2d 520 (Ky. Ct. App. 1989); *Zelinger v. City and Cnty. of Denver*, 724 P.2d 1356 (Co. 1986).

<sup>22</sup> *Zweig v. Metropolitan St. Louis Sewer Dist.*, 412 S.W.3d 223 (Mo. 2013); *Jackson Cnty. v. City of Jackson*, 836 N.W.2d 903 (Mich. Ct. App. 2013); *DeKalb County v. United States*, 108 Fed. Cl. 681 (2013); *Oneida Tribe of Indians of Wis. v. Vill. of Hobart*, 891 F. Supp. 2d 1058 (E.D. Wisc. 2012); *Lewiston Indep. Sch. Dist. No. 1 v. City of Lewiston*, 264 P.3d 907 (Idaho 2011).

<sup>23</sup> See *The Wessels Co. v. Sanitation Dist. No. 1 of N. Kentucky*, 238 S.W.3d 673 (Ky. Ct. App. 2007); *McLeod v. Columbia Cnty.*, 599 S.E.2d 152 (Ga. 2004); *City of Gainesville v. Fla. Dep't of Transp.*, 778 So.2d 519 (Fla. Dist. Ct. App. 2001); *Smith Chapel Baptist Church v. City of Durham*, 517 S.E.2d 874 (N.C. 1999); *Long Run Baptist Ass'n v. Louisville and Jefferson Cnty. Metro. Sewer Dist.*, 775 S.W.2d 520 (Ky. Ct. App. 1989).



(4) **OCA's Claim That Absent Adoption of a Separate Stormwater Fee, Federal Agencies Might Not Be Obligated to Pay for Combined Sewer Costs, Misconstrues Applicable Federal Statutes and Is Without Merit.**

Next, Mr. Rubin cites 33 U.S.C. § 1323(c), in support of his contention that wastewater and stormwater services are separate and distinct, and goes so far as to suggest that this federal statute places restrictions on federal agencies' payments for stormwater service, even where there is a combined sewer system. OCA St. No. 2, 16:3-13, 17:19-20, 18:106. Rubin raises the specter that absent adoption of separate stormwater fees of the type he would prefer, federal agencies may not pay for combined sewer system services.

A fair reading of the context and history of 33 U.S.C. § 1323 in general, and § 1323(c) in specific, discloses that Mr. Rubin's reading is incorrect. To start with, 33 U.S.C. § 1323 is part of the Federal Clean Water Act, enacted in 1972, which establishes the national requirements regulating the discharge of pollutants to waters of the United States. In adopting the Clean Water Act, Congress included in 33 U.S.C. §1323(a) a broad mandate that federal agencies comply with state and local water pollution control requirements, and pay state and local water pollution control fees, to the same extent as their private counterparts. Specifically, § 1323(a) declares in pertinent part:

**(a)** Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants, and each officer, agent, or employee thereof in the performance of his official duties, *shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions* respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity *including the payment of reasonable service charges.*

33 U.S.C. §1323(a) (emphasis added).

For many years after adoption of Section 1323(a), Federal agencies complied with that provision, paying for all wastewater and pollution control services received, including services

from combined sewer systems. However, as explained in the legislative record related to the bill (S. 3481) that enacted §1323(c), the situation suddenly changed in 2010.

In April 2010, the Regional Commissioner of the U.S. General Services Administration, GSA, rejected efforts by the District of Columbia Water and Sewer Authority, DCWASA, to collect an assessment under its Impervious Surface Area Billing Program for impervious surfaces under the control of GSA. According to DCWASA, this charge is a “fair way to distribute the cost of maintaining storm sewers and protecting area waterways because it is based on a property’s contribution of rainwater to the District’s sewer system.”

Congressional Record, 111th Congress (2009-2010), <https://www.congress.gov/congressional-record/2010/12/22/house-section/article/H8978-2>. Thus, as explained by Representative Oberstar:

S. 3481 amends section 313 of the Clean Water Act to clarify that “reasonable service charges” for addressing pollution from Federal facilities includes reasonable nondiscriminatory fees, charges, or assessments that are based on the proportion of stormwater emanating from the facility and used to pay (or reimburse) costs associated with any stormwater management program.

This is a simple effort to clarify, again, that the Federal Government bears a proportional responsibility for addressing pollution originating from its facilities, and should remain an active participant in improving the nation’s water quality and the overall environment.

*Id.* What S. 3481 did was to add Section 1323(c), clarifying (should there have been any doubt) the general requirement of Section 1323(a). Section 1323(c) declares:

(c) Reasonable service charges

(1) In general

For the purposes of this chapter, reasonable service charges described in subsection (a) **include** any reasonable nondiscriminatory fee, charge, or assessment that is—

(A) based on some fair approximation of the proportionate contribution of the property or facility to stormwater pollution (in terms of quantities of pollutants, or volume or rate of stormwater discharge or runoff from the property or facility); and

(B) used to pay or reimburse the costs associated with any stormwater management program (whether associated with a separate storm sewer system or a sewer system that manages a combination of stormwater

and sanitary waste), including the full range of programmatic and structural costs attributable to collecting stormwater, reducing pollutants in stormwater, and reducing the volume and rate of stormwater discharge, regardless of whether that reasonable fee, charge, or assessment is denominated a tax.

(emphasis added). Putting Sections 1323(a) and (c) together, Section 1323(a) obligates all federal agencies to pay reasonable service charges “respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity” and Section 1323(c) makes clear that includes (but is not limited to) fees for stormwater. Section 1323(c) uses the word “includes”; it does not restrict federal agencies’ general obligation in Section 1323(a) to pay reasonable charges for pollution abatement.

There can be little doubt that the costs of operating, maintaining, and managing combined sewer systems is directly related to the control and abatement of water pollution. Despite Mr. Rubin’s insinuation to the contrary, there appears to be no question that federal agencies are obligated to pay, and are currently paying, for combined sewer system costs via wastewater fees in Scranton, elsewhere in Pennsylvania, and across the country. Mr. Rubin admits that he is not aware of even a single federal agency having facilities within the SSA service area refusing to pay their sewer bill based on water usage because the costs of combined sewer system operations associated with stormwater are not reasonable service charges. N.T. 207:16. Nor is Mr. Rubin aware of a federal agency anywhere in the country connected to a combined sewer system which, since adoption of 33 U.S.C. §1323(c), has refused to pay a sewer bill based on water or wastewater use claiming that those charges are not reasonable service charges. N.T. 207:23. Before preparing his testimony, Rubin did not consult with any federal agency concerning the meaning and interpretation of 33 U.S.C. §1323(c) in relation to the obligations of federal agencies to pay for what he claims to be stormwater services related to combined sewer systems. N.T. 208:2. Mr. Rubin’s interpretation of 33 U.S.C. § 1323(c) is incorrect.

**c. The Commission Should Reject OCA's Arguments That Costs Associated with the Stormwater Aspects of Combined Sewer Systems Should Be Allocated and Charged to the Municipalities or to Municipal Authorities, Who Could in Turn Impose Separate Stormwater Fees.**

As a fallback to OCA's position that the Transaction should not be approved, OCA's witness, Mr. Fought, suggests that – if the Commission permits a private company to own and operated a combined sewer system – the Commission should require a cost-of-service study to allocate system costs between wastewater and stormwater, and then bill those costs to either (1) the City of Scranton and the Borough of Dunmore based on a stormwater runoff calculation procedure acceptable to both the City and the Borough or (2) a City/Borough Stormwater Authority. OCA St. No. 1, 10:7-10. OCA posits that the municipalities or hypothetical municipal authority could then impose separate stormwater fees of the type advocated by Mr. Rubin.

Contrary to OCA's position and based on substantial real-world experience, Mr. Elliott explained that the administrative and technical undertaking necessary to establish stormwater utilities and fees is beyond the capabilities of many communities in Pennsylvania. PAWC St. No. 6-R, 30:9-11. Separating and allocating the costs inherent in operating combined sewer systems between wastewater and stormwater related aspects is a complicated endeavor. Once flows from various sources are comingled, one cannot differentiate between the wastewaters flowing through sewerage facilities that need to be managed, treated and discharged in a responsible manner. PAWC St. No. 6-R, 6:14-16.

OCA witness Mr. Fought attempted to argue that such an allocation could be simply conducted on the basis of the relative flow volumes of sanitary wastewater and stormwater. OCA St. No. 1, 11:30 - 12:12. As explained by Mr. Elliott, such an approach is a gross oversimplification of the nature of the operational and administrative cost of a wastewater system.

- First, in a cost allocation study there is a determination of customer services, which entails the administrative and billing costs of maintaining customer accounting, educational and other such services. These services are not directly related to flow.

- Secondly, the allocation of operational costs must consider costs that are not variable, such as staffing and certain maintenance services. The staff to run a WWTP is not determined by its variable flow, but by the complexity of its treatment processes and equipment, as well as regulatory obligations.
- Thirdly, there are some significant operating costs at the WWTP that are largely driven by the pollutant loading from sanitary and industrial waste sources. This includes electric power for aeration blowers, sludge pumping, internal recycle and plant water systems, and dewatering of biosolids. Electric power demands for main lift pumps and remote pumping stations are generally related to flow volumes. Chemical costs are mostly dependent on processing of the pollutant load (e.g., pounds of biological oxygen demand (“BOD”) or pounds of nutrients), not the volume of water. Sewer systems with industrial customers typically determine allocations of variable costs per pound of such pollutants as BOD, suspended solids, nitrogen and phosphorus; and industrial customers are surcharged based on the rates per pound in the event they contribute higher strength wastewater.

Thus, under no circumstances would a simple flow based split of system revenue requirements be considered a responsible and defensible basis for equitable ratemaking. PAWC St. No. 6-R, 32:7 through 33:4.

But after allocating costs between wastewater and stormwater, adoption of the type of stormwater fee system advocated by Messrs. Rubin and Fought involves a further, costly and time-consuming step of attempting to allocate such costs among different types of property. That requires the compilation in graphical information systems (“GIS”) of detailed information concerning the surface conditions (e.g., square footage of pervious and impervious surface) on each of thousands of properties.<sup>24</sup>

As warned by Water Environment Federation,<sup>25</sup> one pitfall for stormwater charging regimes is that “[i]naccurate or outdated data leads to a host of problems” and those utilities that

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<sup>24</sup> New England Environmental Finance Center, *Stormwater Utility Fees, Considerations & Options for Interlocal Stormwater Working Group (ISWG)*, (May 2005) at pg. 20 (“NEEFC Report”), <http://efc.muskie.usm.maine.edu/docs/StormwaterUtilityFeeReport.pdf>; Metropolitan Area Planning Council, *Stormwater Financing/Utility Starter Kit*, (Draft March 23, 2014), at pg. 2-4 to 2-10 (“MAPC Report”), [http://www.mapc.org/sites/default/files/SW\\_financing-utility\\_kit\\_mod2\\_finance\\_structure.pdf](http://www.mapc.org/sites/default/files/SW_financing-utility_kit_mod2_finance_structure.pdf).

<sup>25</sup> The Water Environment Federation (WEF) is a not-for-profit technical and educational organization of 33,000 individual members and 75 affiliated Member Associations representing water quality professionals around the world.

“utilize imagery analysis may not analyze and refine the data enough, causing widespread grounds for appeal.”<sup>26</sup> The process of compiling and confirming accurate impervious and pervious surface area involves a data collection and assessment process which is labor intensive and expensive.<sup>27</sup> Beyond this, setting appropriate stormwater fees on a property conditions basis also requires consideration of what each property may have done in terms of controlling and managing its stormwater runoff and what form of credits may be appropriate.<sup>28</sup>

The process of setting up separate stormwater fees of the type advocated by OCA is complicated by Pennsylvania’s local governmental structure. Mr. Elliott aptly observed that Pennsylvania has one of the greatest number of local governments, with more than 2500 municipalities. PAWC St. No. 6-R, 30:11-12, 23:20-22. This myriad of governmental units, and the associated diffusion of core governmental responsibilities, is largely a result of the approach to government embedded in our history and Pennsylvania’s Constitution. As a result, various aspects of streets, wastewater and stormwater management are commonly distributed among separate governmental units in Pennsylvania. This has and will continue to inhibit the development of stormwater utilities in Pennsylvania. PAWC St. No. 6-R, 30:15-22.

With so many governments, the populations served in many jurisdictions are small. In many cases, those municipalities that have the aging combined sewer systems are the least able to step up to the administrative, technical and financial requirements of managing a stormwater utility. PAWC St. No. 6-R, 30:22 – 31:2. There is clearly a need to enable other mechanisms to manage combined sewer systems, which is why using a regulated public utility to supply the managerial, technical and financial wherewithal is in the public’s interest. PAWC St. No. 6-R, 31:2 - 31:5.

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<sup>26</sup> <http://stormwater.wef.org/2015/08/facilitating-fees/>.

<sup>27</sup> NEEFC Report at 20.

<sup>28</sup> NEEFC Report at pg. 32-33; MAPC Report at pg. 2-14; see Black & Veatch, *2014 Stormwater Utility Survey* (2014) at 17-19 (discussing forms of credits provided to stormwater customers), <http://bv.com/docs/default-source/management-consulting-brochures/2014-stormwater-utility-survey>.

Given the difficulties of establishing separate stormwater fees, many (if not most) Combined Wastewater systems continue to utilize wastewater fees based on water usage as the revenue source to pay for their entire combined sewer wastewater system operations. These include, for example, the City of Boston and New York City, and also the Allegheny County Sanitary Authority ("ALCOSAN") system serving the Pittsburgh region (where fees are imposed based on water usage, with a portion being a flat fee). PAWC St. No. 6-R, 31:8-13.

OCA's suggestions fall squarely in the category of "easier said than done." OCA's policy preference for establishing separate stormwater fee systems, based on property characteristics, may in theory have laudable objectives, but public policy must be premised on real world practicality and the challenges facing Pennsylvania's communities today. Advocating, as a policy preference, a regulatory approach that mandates complicated allocations of combined sewer costs, followed by complex new regimes to allocate costs to particular properties, does not promote expeditious progress toward solving Pennsylvania's pressing Combined Wastewater system challenges. The Commission's exercise of jurisdiction over a Combined Wastewater service, however, does.

**d. The OCA's Other Policy Arguments Against Ownership and Operation of Combined Sewer Systems by Investor-Owned Public Utilities Are Ill-Founded.**

Through Mr. Rubin, the OCA offered up other policy arguments against ownership and operation of combined sewer systems by investor-owned public utilities like PAWC. Notably, Mr. Rubin argues that the operation of stormwater related systems and streets should be under the control of a single entity. OCA St. No. 2, 20:7 - 21:7. Mr. Rubin states: "While the storm drains and pipes underneath them theoretically could be separated from the streets in which the drains are located, doing so would be poor public policy. The essential elements of the system should remain under common ownership and control." OCA St. No. 2, 20:15-18. He argues: "If the proposed stormwater utility has no ability to manage the streets (repairing potholes, keeping curbs functional, cleaning streets to keep debris from clogging storm drains, etc.) then the so called utility

is not able to provide the service it purports to provide.” OCA St. No. 2, 20:20-23. For reasons that Joint Applicants’ witnesses explained, Rubin’s contentions concerning the requirement to have streets and stormwater management under the control of a single entity is premised on theories that are not borne out in the practical world. PAWC St. No. 6-R, 21:14-17.

In the Scranton today, ownership and responsibility for the maintenance of streets and ownership and management of wastewater systems involving combined sewer systems are in separate and independent entities. The Combined Wastewater System is currently owned, operated, maintained and controlled by the SSA, which is an independent authority created under the Municipality Authorities Act, 53 Pa. C.S. §§ 5601-5623. Municipal authorities are not “under the control of local government”; they are established under state law as subdivisions of the Commonwealth with their own governing boards, and are deliberately established with significant independence from the municipalities that create the authority. As the Supreme Court held in *Lehigh-Northampton Airport Authority v. Lehigh County Bd. of Assessment Appeals*, 585 Pa. 657, 672, 889 A.2d 1168, 1178 (2005), municipal authorities created under the Municipality Authorities Act are state agencies. Such a municipal authority becomes an independent agency of the Commonwealth that is not subject to control of the incorporating municipality. *Vernon Twp. Water Authority v. Vernon Twp.*, 734 A.2d 935, 938 n. 7 (Pa. Cmwlth. 1999). Within SSA’s current service area, streets are owned and maintained by a series of entities, including the City, the Borough and the Pennsylvania Department of Transportation (“PennDOT”). PAWC St. No. 6-R, 21:18 - 22:8. Thus, in the Scranton area today, Mr. Rubin’s professed preferred institutional arrangement – where all streets and stormwater facilities are under the control of one entity – is simply not the case.

The situation in Scranton is not unusual. As noted in the list of combined sewer systems provided in PAWC Ex. JCE-3, all across Pennsylvania independent wastewater authorities own and manage combined sewer systems, while clearly the roads and streets in the community are owned and managed by the respective cities, boroughs or townships and PennDOT. PAWC St. No. 6-R, 22:9-13.



While Mr. Rubin contends that a wastewater utility operating a Combined Wastewater system which receives stormwater cannot provide the service it is obligated to provide unless it has the ability to manage and repair streets, that contention has no basis. Mr. Rubin points to pothole filling and curb maintenance as examples of services that a "stormwater utility" should perform. OCA St. No. 2, 20:20 - 21:2. However, as explained by Mr. Elliott, such is not the case in any community that has a municipal authority providing wastewater services that involve combined sewers. In such Combined Wastewater system communities, streets are managed by one entity (*i.e.*, the municipality and PennDOT), and the combined wastewater system (managing the combination of sewage, industrial wastewater, I&I and stormwater) by another entity. PAWC St. No. 6-R, 22:14 - 23:2. In those communities, the theoretical concern over "finger-pointing" is not reported to be significant problem. The entities cooperate and coordinate, but there is no legal, engineering, operational, or institutional reason that all functions be performed by one and the same entity. PAWC St. No. 6-R, 22:14 - 23:2. .

Municipal authorities are no more capable of controlling streets and runoff from properties than a regulated privately-owned public utility. PAWC St. No. 6-R, 23:3-4. If a public utility were to own and operate a Combined Wastewater system, it (like any municipal authority) would need to cooperate and coordinate with municipalities in the service area.

It is true that certain aspects of stormwater management lie within province of municipalities, including specifically the exercise of police power regulation over the contribution of stormwater flows from development. But that is also true of other activities that affect wastewater systems, including zoning and building development, and bans on connections of roof gutters to sewers. PAWC St. No. 6-R, 23:4-9.

The Pennsylvania Stormwater Management Act, Act of October 4, 1978, P.L. 864, No. 1978-167, *as amended*, 32 P.S. §§ 680.1-680.17, imposes duties on counties to prepare and adopt watershed stormwater management plans, subject to review and approval by the Pennsylvania Department of Environmental Protection. 32 P.S. §§ 680.5-680.9. In turn, the Stormwater Management Act requires municipalities to control and manage runoff from new developments in

accordance with watershed stormwater management plans prepared and adopted by counties. 32 P.S. §§ 680.11(b). Such regulation of stormwater development must be implemented by cities, boroughs and townships irrespective of whether they own or operate any portion of a combined sewer system or even a municipal separate storm sewer system. *Id.*; PAWC St. No. 6-R, 23:10-16. The Act further imposes duties on land developers to manage stormwater runoff from their lands, implementing such measures consistent with the provisions of the applicable watershed stormwater plan as reasonably necessary to prevent injury to health, safety, or other property. 32 P.S. § 680.13.

Thus, the Stormwater Management Act recognizes that stormwater management activities may be carried out by various governmental and non-governmental entities. Mr. Rubin's theory of one entity must be responsible for all stormwater activities and also for street is not embraced by the Stormwater Management Act or any other state statute.

Moreover, Mr. Rubin's contention that all stormwater and Combined Wastewater system operations must be managed by the same entity that owns streets directly contravenes the long-standing efforts made by PADEP, the Commission, and other state agencies to encourage regionalization of wastewater service. PAWC St. No. 6-R, 23:17-20. Pennsylvania has more than 2,500 local government entities, creating substantial difficulty in implementing statewide policies and practices that ensure future sustainability. PAWC St. No. 6-R, 23:20-22.

Regionalization of wastewater systems has been sought for several reasons, starting with the fact that water flows downhill and does not honor political boundaries. Management of wastewater or stormwater makes more sense on a watershed or regional basis. For this reason, Section 208 of the Federal Clean Water Act, 33 U.S.C. §1288, provides for "area wide planning" to evaluate and address wastewater needs,<sup>29</sup> and Section 203 of the Pennsylvania Clean Streams Law empowers PADEP to order municipalities to undertake studies, prepare plans, undertake projects and "negotiate with other municipalities for combined or join sewer systems or treatment

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<sup>29</sup> See 40 C.F.R. §130.6.

facilities.” 32 P.S. §691.203(b). At the same time, regionalization allows for economies of scale across the spectrum of water, wastewater and stormwater system operations. PAWC St. No. 6-R, 23:22 through 24:4.

Mr. Rubin’s position, by contrast, would advocate for balkanization of those wastewater systems involving combined sewers, with each municipality owning streets having to own and manage its own section of the combined wastewater system. Such an approach would create an institutional and infrastructure nightmare, and would hardly foster the public policy goals of attaining responsible and sustainable management of wastewaters. PAWC St. No. 6-R, 24:4-9.

**e. The OCA’s Claims that Alternative Transaction Structures Are Available and Should Have Been Pursued by SSA Are Unfounded.**

As part of the OCA’s argument against approval of the Transaction, OCA witness Mr. Rubin argues that SSA, the City of Scranton and Borough of Dunmore, could have pursued alternative transaction structures. Mr. Rubin’s testimony mentions the theoretical potential for some form of public-private partnership, such as a lease-concession deal, or an arrangement such as recently entered into by the City of Allentown, which leased its wastewater system to the neighboring Lehigh County Authority. N.T. 95:5-18.

Other than offering theoretical concepts, neither Mr. Rubin nor any other OCA witness offered any testimony indicating that such alternative transaction structures were, in fact, available and feasible in the specific situation confronting SSA, Scranton and Dunmore, nor did they explain why such alternatives would be superior to the transaction selected by SSA and its member municipalities. No evidence was presented suggesting that a hypothetical lease-concession deal or a transaction with some other unidentified municipal authority would provide greater public benefits than the Transaction under review in this proceeding.

It is not the OCA’s role to determine for the SSA, Scranton and Dunmore what form of transaction best serves the interests of their communities, citizens and ratepayers. Moreover, the

OCA's theoretical argument about alternative transaction structures disregards and skews important facts.

Eugene Barrett, SSA's Executive Director, explained that the SSA had engaged in a lengthy competitive proposal process under which it solicited proposals for alternative forms of potential transactions, including the alternative concepts of an operation and management contract or a lease-concession. N.T. 149:10 - 151:8. As explained by Mr. Barrett, the situation in Scranton was very different than in Allentown; in Scranton, there is no other public authority available to purchase or lease the SSA system. N.T. 150:15 - 151:8. Mr. Barrett explained that after broadly soliciting competitive alternative proposals, the SSA received only four proposals. N.T. 150:1-2. After examining initial proposals for alternative forms of transaction, including a lease-concession of the type suggested by Mr. Rubin, the outright sale structure was selected as the approach most beneficial to the SSA's customers and the communities it serves.

No evidence was offered by anyone contradicting Mr. Barrett's testimony that explained why a sale transaction was determined the preferable alternative to serve the interests of the taxpayers and ratepayers of Scranton, Dunmore and SSA. While OCA and its witness, Mr. Rubin, may have a philosophical preference for public, rather than private, ownership and operation of Combined Wastewater systems, their preferences do not form a basis for rejecting the transaction structure selected by SSA, Scranton and Dunmore at after an open and competitive procurement process and arms-length negotiation.

As explained earlier in this brief, the Commission has, under the Code, jurisdiction over Combined Wastewater systems, there is no basis in law or regulatory policy to conclude that the Commission lacks jurisdiction over Combined Wastewater systems, and the notion that any system with a stormwater component must be government-owned and funded by a separate stormwater fee contradicts law and policy. The Commission should reject the OCA's arguments as being founded neither in law nor reality.

**2. The Commission should Reject the OCA's and I&E's Attempt to Interject Ratemaking Issues into these Proceedings.**

In addition to jurisdictional arguments, the opposing parties have raised certain ratemaking issues in this proceeding that are properly reserved for a future PAWC base rate proceeding. Commission determinations on such issues in this application proceeding are inappropriate for many reasons.

**a. Aside from the Threshold Act 11 Issues, Rate Issues Should be Reserved for a Future PAWC Base Rate Proceeding.**

First, as explained above, the legal standard under the Code for deciding the Joint Application is whether PAWC is technically, financially, and legally fit and whether the Transaction will produce an affirmative public benefit of a substantial nature. *See City of York, supra; Popowsky, supra; Seaboard Tank Lines, supra.* Under this limited scope of review, Commission determinations on specific ratemaking issues are not properly before the Commission at this time. In fact, one statutory advocate (*i.e.*, I&E) has expressly recognized that rate issues are properly reserved for rate proceedings.<sup>30</sup>

Second, as a matter of Commission and public policy, application proceedings should not be bogged down with ratemaking issues unless such issues are so fundamental to the transaction that the public interest would be implicated. By attempting to convert this application proceeding into a mini-rate case, the opposing parties are making the acquisition application process unnecessarily complicated, time-consuming and costly, and are delaying the consummation of a transaction that will clearly be beneficial to the public and, in particular, to the citizens of Scranton.

Third, the Commission has already addressed the structure and timing of rate issues related to acquisitions. The Commission's policy statements on acquisitions of water and wastewater

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<sup>30</sup> *See* I&E St. No. 2, 6:5-13 ("I believe that it is important to put PAWC, the Authority and its customers on notice that I&E will likely recommend higher rate increases than what is contemplated in the agreement."); 16:6-7 ("The ratemaking treatment of storm water costs should be addressed in a base rate case.").

systems provide clear guidance on the timing of submission of depreciated original cost of plant-in-service studies. *See* 52 Pa. Code §§ 69.711 (regarding “Acquisitions of Non-Viable Water and Wastewater Systems”), 69.721 (regarding “Acquisitions of Viable Water and Wastewater Systems”). Such studies, absent good cause shown, are to be submitted at least four months prior to the utility’s base rate proceeding in which it intends to seek rate recovery for the system. Likewise, a distribution system improvement charge (“DSIC”) related to acquired system costs is not available until the acquired system is incorporated into rate base. *See* 66 Pa. C.S. § 1357 (regarding computation of DSIC).

Finally, the resolution of rate case issues in an acquisition application proceeding raises significant due process concerns. For matters coming before an administrative agency such as the Commission, procedural due process requires that interested persons be afforded reasonable notice of the issues raised so that they have an opportunity to present any response or objection. *See generally Bell Atlantic-Pa., Inc., v. Pa. Pub. Utility Comm’n*, 763 A.2d 440 (Pa. Cmwlth. 2000); *Honey Brook Water Co. v. Pa. Pub. Util. Comm’n*, 647 A.2d 653 (Pa. Cmwlth. 1994). Here, interested persons were given notice only of an application proceeding (which included, among other things, a request that the Commission recognize the applicability of Act 11). Notice was not given that significant rate issues would be resolved as part of the application proceeding. Accordingly, it is inappropriate to address such rate issues in the instant application proceeding.

For all of the above reasons, the Commission should refrain from making specific rate decisions in this application proceeding. Because such issues are properly resolved in a future PAWC base rate proceeding, the opposing parties’ arguments on rate issues should be summarily rejected. None of the rate issues rise to the level of affecting a finding that the Transaction is in the public interest.

**b. PAWC is Proposing a Reasonable and Gradual Phase-In of Rate Increases.**

With regard to rates, PAWC has committed in the APA to: (a) maintain the current customer charge and consumption charge of SSA, provided that the customer charge will be billed monthly instead of every other month; (b) no proposed rate increase prior to January 1, 2018 and no DSIC prior to January 1, 2019 for Scranton-area customers; (c) propose a 0% increase for Scranton-area customers in its first base rate filing after closing of the Transaction; and, (d) attempt to bring the rates for Scranton-area customers in line with PAWC's average system rates (*i.e.*, PAWC "Rate Zone 1" rates) in equal increments in years 11 through 13 following closing of the Transaction. PAWC St. No. 4, 3:7 through 5:13; PAWC St. No. 4-R, 2:7-22; PAWC Ex. BJJ-1 (Section 7.07 of APA). These commitments, if approved by the Commission, would ensure a gradual and otherwise reasonable implementation of rates for Scranton-area customers.

The concerns expressed by I&E and OSBA regarding potential "rate shock" to Scranton-area customers in years 11 through 13 following closing of the Transaction are speculative and unfounded. As explained by PAWC witness Mr. Nevirauskas, the Commission could – in its expert discretion – determine that rates for Scranton-area customers should be phased into PAWC's system average rates over a longer period of time. PAWC St. No. 4-R, 3:8 - 5:4. It is premature to speculate as to what rates will be approved by the Commission in the future.

Even when PAWC's rate commitments are viewed in the light most favorable to the opposing parties, the APA commitments are not so unreasonable that the Transaction should be rejected as contrary to the public interest. The rate commitments would provide a reasonable progression of rate increases designed to bring Scranton-area customers in line with system average rates over a 13-year period. Moreover, the Commission would maintain its discretion to set "just and reasonable" rates should the Commission believe that rates should be implemented in a different manner. *Cf.* 66 Pa. C.S. § 1301.

**c. Any Acquisition Adjustment is Properly Determined in a Future Base Rate Proceeding after a Depreciated Original Cost of Plant-in-Service Study has been Performed.**

PAWC has agreed to purchase the Combined Wastewater System for \$195 million, as it may be adjusted. PAWC Ex. BJC-1 (Section 3.01 of APA). The purchase price is subject to adjustment under Section 3.02 of the APA for cash on hand at the time of closing of the Transaction. The cash on hand at closing was estimated at the time of PAWC's best and final offer to be approximately \$38 million. PAWC St. No. 4-R, 6:4-8.

PAWC witness Mr. Nevirauskas explains that “[f]ollowing Transaction closing and prior to PAWC's next base rate filing, PAWC will prepare an original cost of plant-in-service study which will be used to determine whether there will be any recoverable acquisition premium associated with the Transaction. Until that study is complete, it is premature to make any determination about the cost of the SSA system and how such cost should be reflected in future PAWC rates.” *Id.*, 6:9-14. Yet, OCA and I&E have both speculated – using an unaudited balance sheet and a newspaper article – as to the value of the Combined Wastewater System.<sup>31</sup>

Mr. Nevirauskas, a very credible expert witness with approximately 36 years of ratemaking experience, explains that there are numerous factors that go into calculation of the depreciated original cost of an acquired system. PAWC St. No. 4-R, 9:11-23. These factors include, *inter alia*: accounting records and other related documentation and agreements of donations or

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<sup>31</sup> OCA witness Mr. Rubin speculates that, based on SSA's current balance sheet, the value of the Combined Wastewater System is less than \$74 million. OCA St. No. 2, 25:7-13. Mr. Rubin even goes so far as to hypothesize that the “real purchase price” is \$260 million based on speculation regarding the payment of a Variance Adjustment by PAWC. *See id.* 27:3-9. Mr. Nevirauskas credibly refutes Mr. Rubin's speculation by explaining that Mr. Rubin is assuming a worst-case scenario regarding a possible Variance Adjustment and that Mr. Rubin discounts PAWC's ability to utilize the ratemaking tools of Act 11 to spread costs among its water and wastewater customer base. PAWC St. No. 4-R, 10:9 - 11:12. In a different approach from Mr. Rubin, I&E witness Mr. Cline speculates that the value of the Combined Wastewater System is approximately \$106.5 million based on a fair market valuation cited by a newspaper article. I&E St. No. 2, 11:1-9. To Mr. Cline's credit however, he acknowledges that the proper means of valuation is depreciated original cost and not fair market valuation and that an original cost study has not yet been performed. *Id.*, 11:1-18.



contributions, services, or property from states, municipalities or other government agencies, individuals, and others for construction purposes; records of unrefunded balances in in customer advances for construction; records of customer tap-in fees and hook-up fees; prior original cost studies; records of local, State and Federal grants used for construction of utility plant; relevant PennVEST or PADEP records; any Commission records; summary of depreciation schedules from all filed Federal tax returns; and, other accounting records supporting plan in service. *Id.* (citing Commission's Statement of Policy on Acquisitions of Viable Water and Wastewater Systems, 52 Pa. Code § 69.721). The process of determining depreciated original cost is complicated and time consuming and not properly part of the instant application proceeding.

Even if OCA's and I&E's arguments regarding the reasonableness of the purchase price are viewed in a light most favorable to OCA and I&E, they are irrelevant to the instant proceeding and, without question, premature. The Commission will make a determination regarding an acquisition adjustment in a future PAWC base rate proceeding and set rates accordingly. Moreover, PAWC may – in the Commission's discretion – earn a rate of return premium for acquiring the Combined Wastewater System because of the challenges currently and prospectively facing SSA. PAWC St. No. 4-R, 7:9-28; *see also* 52 Pa. C.S. § 523 (relating to performance factor consideration); *id.* § 1327(a) (“Acquisition cost greater than depreciated original cost”); 52 Pa. Code § 69.721(g)(regarding Commission policy on acquisition incentives).

**d. The Issue of Rate Recovery of a Variance Adjustment is Properly Reserved for a Future Base Rate Proceeding.**

Under the APA, the Variance Adjustment is an adjustment to the purchase price. PAWC Ex. BJG-1 (Section 7.07 of the APA). If revenues from customers in the service area formerly served by SSA exceed the 1.9% CAGR after year ten following closing of the Transaction, PAWC will adjust the Transaction price for the Combined Wastewater System to compensate SSA for that excess amount. The detailed calculation methodology for a Variance Adjustment is set forth in Schedule 7.07 of the APA. PAWC St. No. 4-R, 12:21 through 13: 4; PAWC Ex. BJG-1.

As explained by PAWC witness Mr. Nevirauskas:

Because the Variance Adjustment is an adjustment to the purchase price of the SSA assets, its recovery through rates cannot be determined until after PAWC has prepared a depreciated original cost of plant-in-service study of the SSA system and the Commission, in a base rate proceeding, has determined that the Variance Adjustment exceeds depreciated original cost plus any allowed acquisition premium. By way of example, if the Commission determines that the depreciated original cost of the SSA system equals the original \$195 million purchase price and that PAWC is otherwise entitled to an acquisition premium, PAWC could seek to recover the acquisition premium as the result of any Variance Adjustment that is subsequently paid. There is no time limitation on the Commission's ability to award an acquisition premium. After ten years of experience, the Commission could theoretically determine that PAWC's acquisition of SSA promoted a substantial public interest and that PAWC should be rewarded by way of a recovery of an acquisition premium.

PAWC St. No. 4-R, 13:5-17. In short, it is premature to make a determination regarding the recovery of a Variance Adjustment through rates.<sup>32</sup> PAWC is lawfully entitled to the opportunity to seek recovery of a Variance Adjustment in a future base rate proceeding. Interested parties would have an opportunity to contest the claim at that time.

**e. Ratemaking Treatment of 100 New Jobs is Properly Reserved for a Future Base Rate Proceeding.**

Despite any concerns expressed by the opposing parties (particularly I&E), the ratemaking treatment of any new jobs created as a result of the Transaction is properly the subject of a future base rate proceeding, and not this application proceeding. PAWC has specifically agreed that the costs of 100 new jobs would be subject to the standard review for reasonableness in a subsequent

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<sup>32</sup> On cross-examination, I&E witness Ms. Gumby acknowledged that the results of a depreciated original cost of plant-in-service study for the Combined Wastewater System are not yet known. She agreed that the depreciated original cost of the Combined Wastewater System could, in theory, exceed a wide variety of values -- \$74 million (Rubin), \$106.5 (Cline), \$157 million (\$195 million unadjusted purchase price less \$38 million estimated cash on hand), and \$195 million (unadjusted purchase price). N.T. 188:7-21. The uncertainty regarding the depreciated original cost of the Combined Wastewater System dictates that no determination regarding the allowance of recovery of a Variance Adjustment should be made in this application proceeding.

rate case to alleviate any concern that the newly created jobs would result in an unfavorable impact on PAWC's rates or its customers. PAWC St. 3-R, 4:1-6; PAWC St. 4-R, 14:12-16; N.T. 118:14-16.

Moreover, it would be premature to evaluate rate issues associated with the additional employees given that the new jobs do not yet exist (and will not be created until approximately 2020). PAWC has specifically acknowledged that the parties in a future rate case proceeding would have the opportunity to conduct discovery regarding the new jobs to ensure proper cost allocation. N.T. 118:17-20. Nothing in this proceeding would limit the opposing parties from participating in any future rate case where the costs for the new employees would be evaluated, analyzed and allocated. Accordingly, the Commission should find that the potential future rate and other implications of the PAWC committed new employees are premature and should not be addressed in this proceeding.

**f. While Act 11 Would be Legally Available to PAWC, Specific Determinations on the Amount of Scranton-Area Wastewater Costs to be Spread to PAWC's Combined Water and Wastewater Customer Base are Properly Reserved for a Future PAWC Base Rate Proceeding.**

As explained above, the Joint Applicants seek – in this proceeding as a part of the threshold jurisdictional issue related to Combined Wastewater service – a conclusion by the Commission that, as a matter of law, PAWC may request in a future rate proceeding that the combined water and wastewater revenue requirement provision of Act 11 for the costs of Combined Wastewater service (including stormwater components of the costs) be allocated to all of PAWC's water and wastewater customers. Determinations regarding the extent to which PAWC may utilize a combined water and wastewater revenue requirement under Act 11 and revenue allocation will be addressed in future PAWC base rate proceedings based upon record evidence developed in those proceedings. See 66 Pa. C.S. § 1311(c) (“The commission, when setting base rates, after notice

and an opportunity to be heard, may allocate a portion of the wastewater revenue requirement to the combined water and wastewater customer base if in the public interest.”).

**g. Nothing in the Asset Purchase Agreement Binds the Commission or Parties in a Future Base Rate Proceeding.**

Finally, the APA makes abundantly clear that Commission approval of the Transaction would neither bind the parties nor the Commission in future PAWC base rate proceedings. Section 7.07 of the APA explicitly states in multiple locations that PAWC’s rate commitments to SSA are “subject to PaPUC approval and applicable law.” PAWC Ex. BJG-1. As such, any concerns that approval of the Transaction would restrict the Commission’s authority to determine (and the opposing parties’ right to advocate) “just and reasonable rates” for PAWC are unfounded. *Cf.* 66 Pa. C.S. §1301 (“Rate to be just and reasonable”).

## **VI. CONCLUSION**

There are two threshold issues that must be resolved in this proceeding in order for the Commission to make a public interest determination. First, the Commission should affirmatively determine that it has jurisdiction over Combined Wastewater service. Second, the Commission should conclude that PAWC may request the opportunity to recover the costs of providing Commission-jurisdictional Combined Wastewater service across PAWC’s broader customer base under Act 11 in future rate proceedings. If these fundamental jurisdictional issues are not resolved as part of this proceeding, PAWC could be subject to a significant and unacceptable risk of large and unrecoverable stranded costs related to the stormwater component of Combined Wastewater service. If Act 11 treatment of costs related to the stormwater component of Combined Wastewater service is not available, PAWC could be required to pay a potentially significant Variance Adjustment and rates for Scranton-area customers would likely not be implemented in a gradual manner.

The positions of the opposing parties in this proceeding fall into two basic categories. First, OCA has taken the position that the Commission does not have the statutory authority to exercise jurisdiction over the stormwater component of Combined Wastewater service. As explained by the credible and largely unrebutted testimony of PAWC witnesses David R. Kaufman and James C. Elliott, such a position is contrary to commonly-accepted definitions of “sewage” and “wastewater” as well as to the legal, engineering and operational realities of a Combined Wastewater system. Moreover, a finding that the Commission lacks jurisdiction over a Combined Wastewater system would be contrary to good public policy which promotes acquisitions of troubled wastewater systems and regionalization under Commission oversight. There are approximately 130 combined systems in the Commonwealth, 11 of which are associated with municipalities that are known to be financially-distressed under Act 47. In this regard, it is worth noting that – in the evidentiary record – both I&E (which is part of the Commission) and OSBA (which is part of the Pennsylvania Department of Community & Economic Development) have taken no position on the issue of Commission jurisdiction over service rendered through a combined system.

Second, the opposing parties have prematurely raised ratemaking issues in this application proceeding that are properly reserved for a future PAWC base rate proceeding. The issues of an acquisition adjustment, recovery of a Variance Adjustment from ratepayers, recovery of expenses associated with new jobs, and rate gradualism are all properly reserved for a future PAWC base rate proceeding. In accordance with Commission policy, PAWC will prepare a depreciated original cost of plant-in-service study in advance of its base rate filing and that study can then be used to determine the appropriateness of an acquisition adjustment and the recovery of a Variance Adjustment. Moreover, PAWC has committed to the SSA in the APA to propose rate increases for Scranton-area customers that, in the opinion of PAWC and the SSA, would be reasonable and gradual. The APA, however, makes abundantly clear that such rate proposals by PAWC would not be binding upon parties to a rate case or the Commission.

Once the Commission decides that it has jurisdiction over Combined Wastewater service, there is no question that the Joint Applicants have satisfied their burden of proof through substantial record evidence that: (a) PAWC is financially, technically, and legally fit to acquire the Combined Wastewater System and to begin service in the applied-for service territory; and, (b) the Transition will produce affirmative public benefits of a substantial nature. Because the Transaction is in the public interest, the Joint Application, as amended, should be approved without modification and the Commission should promptly issue a Certificate of Public Convenience evidencing PAWC's right to acquire the Combined Wastewater System and begin wastewater service in the applied-for territory. Also, the Commission should issue a Certificate of Filing for the APA and authorize the Commission's Secretary to issue Certificates of Filing for the seven agreements with municipal corporations upon PAWC's filing of executed assumption and assignment agreements. The Joint Applicants have demonstrated that the APA and the municipal agreements are reasonable, legal, and otherwise valid.

In sum, the Commission should conclude that – as a matter of law – it has jurisdiction over Combined Wastewater service; and the substantial evidence of record demonstrates by a preponderance that the Transaction is in the public interest. The Joint Application, as amended, should be approved without modification and a Certificate of Public Convenience and Certificates of Filing should be promptly issued.

## **VII. REQUEST FOR RELIEF**

WHEREFORE, Pennsylvania-American Water Company and The Sewer Authority of the City of Scranton respectfully request that the Honorable Administrative Law Judges David A. Salapa and Steven K. Haas recommend, and the Pennsylvania Public Utility Commission order, that:

- (i) The Joint Application, as amended, be approved without modification;

(ii) The Commission's Secretary issue a Certificate of Public Convenience evidencing Pennsylvania-American Water Company's right under Sections 1102(a)(1) and 1102(a)(3) of the Pennsylvania Public Utility Code, 66 Pa. C.S. §§ 1102(a)(1), (a)(3), to (a) acquire, by sale, substantially all of The Sewer Authority of the City of Scranton's Sewer System and Sewage Treatment Works assets, properties and rights related to its wastewater collection and treatment system to Pennsylvania-American Water Company (the "Transaction"), and (b) begin to offer or furnish wastewater service, which includes Combined Wastewater service, to the public in the City of Scranton and the Borough of Dunmore, Lackawanna County, Pennsylvania;

(iii) The Commission's Secretary issue a Certificate of Filing under Section 507 of the Pennsylvania Public Utility Code, 66 Pa. C.S. § 507, for the Asset Purchase Agreement By and Between The Sewer Authority of the City of Scranton, as Seller, and Pennsylvania-American Water Company, as Buyer, dated March 29, 2015;

(iv) The Commission's Secretary issue Certificates of Filing under Section 507 of the Pennsylvania Public Utility Code, 66 Pa. C.S. § 507, for the following agreements between Pennsylvania-American Water Company and a municipal corporation upon Pennsylvania-American Water Company's filing of executed versions of assignment and assumption agreements which are substantially-similar in all material respects to the *pro forma* assignment and assumption agreements filed with the Commission on July 1, 2016;

a. Interjurisdictional Agreement Between The Sewer Authority of The City of Scranton and The Borough of Dickson City, Pennsylvania, dated April 14, 2003 (as will be assigned and assumed by an assignment and assumption agreement which is substantially-similar in all material respects to the *pro forma* assignment and assumption agreement filed with the Commission on July 1, 2016);

b. Interjurisdictional Agreement Between The Sewer Authority of The City of Scranton and The Borough of Taylor, Pennsylvania, dated April 9, 2003 (as will be assigned and assumed by an assignment and assumption agreement which is substantially-similar

in all material respects to the *pro forma* assignment and assumption agreement filed with the Commission on July 1, 2016);

c. Interjurisdictional Agreement Between The Sewer Authority of The City of Scranton and The Borough of Moosic, Pennsylvania, dated May 13, 2003 (as will be assigned and assumed by an assignment and assumption agreement which is substantially-similar in all material respects to the *pro forma* assignment and assumption agreement filed with the Commission on July 1, 2016);

d. Agreement for the Acceptance, Conveyance, Treatment, and Disposal of Wastewater Received from the Siniawa Enterprises Wastewater Collection System at the Scranton Wastewater Collection System and Wastewater Treatment Plant, as of June 14, 1989 (as will be assigned and assumed by an assignment and assumption agreement which is substantially-similar in all material respects to the *pro forma* assignment and assumption agreement filed with the Commission on July 1, 2016);

e. Agreement for the Acceptance, Conveyance, Treatment, and Disposal of Wastewater Received from the Montage, Inc. Wastewater Collection System at the Scranton Wastewater Collection System and Wastewater Treatment Plant, as of July 24, 2003 (as will be assigned and assumed by an assignment and assumption agreement which is substantially-similar in all material respects to the *pro forma* assignment and assumption agreement filed with the Commission on July 1, 2016);

f. Agreement Providing for Uniformity of Charges Applicable to Residents of Taylor Borough and Residents of the City of Scranton, as of January 12, 1976 (as will be assigned and assumed by an assignment and assumption agreement which is substantially-similar in all material respects to the *pro forma* assignment and assumption agreement filed with the Commission on July 1, 2016); and,

g. Agreement for the Transfer, Conveyance, and Acceptance of the Davis Street, Greenwood Avenue, and Corey Street Sanitary Sewer Conveyance Line from Moosic Borough to the Sewer Authority of the City of Scranton, as of April 16, 2008 (as will be assigned



and assumed by an assignment and assumption agreement which is substantially-similar in all material respects to the *pro forma* assignment and assumption agreement filed with the Commission on July 1, 2016).

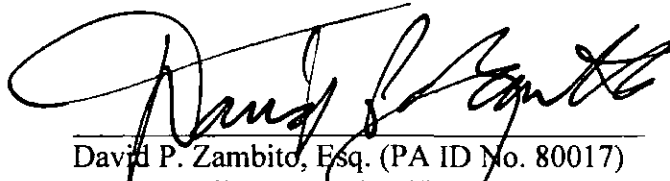
(v) All other approvals required by the Pennsylvania Public Utility Code to carry out the Transaction be granted;

(vi) Upon closing of the Transaction, PAWC issue, to become effective on the same date as issuance, a compliance tariff supplement consistent with the *pro forma* tariff supplement attached hereto as **Appendix D**;

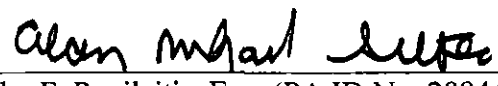
(vii) All protests filed against the Joint Application be dismissed; and,

(viii) This docket be marked closed.

Respectfully submitted,



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Counsel for  
*Pennsylvania-American Water Company*

Counsel for  
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Dated: July 19, 2016

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**CERTIFICATE OF SERVICE**  
**In Re: Joint Application of Pennsylvania-American Water Company and**  
**The Sewer Authority of the City of Scranton**  
**Docket No. A-2016-2537209**

I hereby certify that I have this day served a true copy of the Main Brief of the Joint Applicants, Pennsylvania-American Water Company and The Sewer Authority of the City of Scranton, upon the parties, listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

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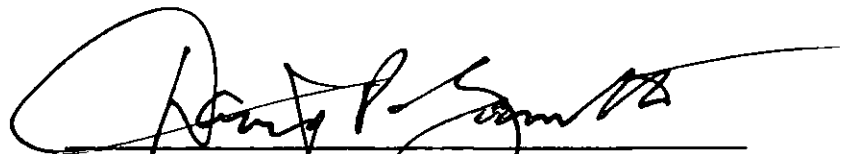
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DATED: July 19, 2016

  
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David P. Zambito, Esquire  
Counsel for Pennsylvania-American Water Company

# **Appendix A**

## APPENDIX A

### JOINT APPLICANTS' PROPOSED FINDINGS OF FACT

#### The Parties

1. Pennsylvania-American Water Company ("PAWC" or the "Company") is a public utility regulated by the Pennsylvania Public Utility Commission ("Commission").

2. PAWC provides water and wastewater service to more than 400 communities in Pennsylvania, including water service to the City of Scranton ("City" or "Scranton") and Borough of Dunmore ("Dunmore" or "Borough"). PAWC St. No. 1, 3:20 – 4:19.

3. The Sewer Authority of the City of Scranton (the "Authority" or "SSA") is a municipal authority organized under the laws of Pennsylvania. SSA St. No. 1, 2:15-16.

4. The Authority is a legal entity separate and fully autonomous from the City. SSA St. No. 2-R, 3:11.

5. The Authority was incorporated on May 18, 1953, by Scranton under the Pennsylvania Municipality Authorities Act of 1949. SSA St. No. 1, 2:15.

6. In 1966, Dunmore became a member of the Authority. SSA St. No. 1, 2:15.

7. The Authority is governed by a Board of Directors, four of whom are appointed by the City's Mayor and the Scranton City Council and one by the Dunmore Mayor and Borough Council. SSA St. No. 1, 2:17-20.

8. The Authority owns and operates a wastewater collection and treatment system providing wastewater service to Scranton and Dunmore (the "Combined Wastewater System" or System). SSA St. No. 1, 3:14.

9. The Authority provides wastewater service to approximately 31,000 customers. SSA St. No. 1, 3:18-20.

### The Asset Purchase Agreement

10. On March 29, 2016, PAWC and the Authority entered into an asset purchase agreement (“APA”) for the sale of substantially all of the Authority’s assets, properties, and rights related to the Combined Wastewater System (the “Transaction”) for \$195 million, subject to certain adjustments. PAWC St. No. 1, 5:8-21; PAWC Ex. BJG-1.

11. The APA represented the culmination of a more-than-15-month-long process in which the Authority issued two requests for proposals for alternative transaction structures: (a) a operation and maintenance services contract for the System, (b) a long-term lease/concession of the Combined Wastewater System, or (c) purchase of the Combined Wastewater System. PAWC St. No. 1, 5:8-15; N.T. 149:10 - 151:8.

12. After competing bidders submitted proposals, the Authority selected PAWC as the winning bidder. PAWC St. No. 1, 5:16-21.

13. PAWC and the Authority executed the APA after conducting arms-length negotiations. PAWC St. No. 1, 5:16-21.

14. Among other things, the APA provides for an adjustment to the purchase price (a “Variance Adjustment”) “if revenues from wastewater customers in the service area formerly served by the SSA exceed a 1.9% CAGR [compound annual growth rate] after year ten following closing of the Transaction . . . .” PAWC St. No. 4, 6:11-14; *see also* PAWC Ex. BJG-1 (Section 7.07 and Schedule 7.07(d) of APA).

15. The APA also provides that PAWC will: (a) maintain the current customer charge and consumption charge of SSA, provided that the customer charge will be billed monthly instead of every other month; (b) not seek no rate increase prior to January 1, 2018 and no distribution system improvement charge (“DSIC”) prior to January 1, 2019 for Scranton-area customers; (c)

propose a 0% increase for Scranton-area customers in its first base rate filing after closing of the Transaction; and, (d) attempt to bring the rates for Scranton-area customers in line with PAWC's average system rates (*i.e.*, PAWC "Rate Zone 1" rates) in equal increments in years 11 through 13 following closing of the Transaction. PAWC St. No. 4, 3:7 - 5:13; PAWC St. No. 4-R, 2:7-22; PAWC Ex. BJG-1 (Section 7.07 of APA).

16. The APA does not contain any provisions that purport to bind any party to this proceeding from actively participating in future rate cases and advocating for the imposition of different rates. Likewise, the APA expressly recognizes that PAWC's rate commitments are subject to Commission approval in future rate proceedings. PAWC St. No. 4, 6:18-20.

### **The Joint Application**

17. On March 30, 2016, PAWC and the Authority (collectively, the "Joint Applicants") filed with the Commission a joint application requesting that the Commission approve PAWC's acquisition of substantially all the assets of the Authority's Combined Wastewater System and authorize PAWC to render wastewater service in the areas served by the Authority pursuant to 66 Pa. C.S. § 1102 ("Joint Application").

18. Notice of the Joint Application was published in the *Pennsylvania Bulletin* on April 9, 2016. *See* 46 Pa.B. 1882.

19. The notice set April 25, 2016, as the deadline for filing protests, petitions to intervene, and answers to the Joint Application.

20. PAWC and the Authority also published notice of the Joint Application in the *Scranton Times* on April 12, 2016, and April 19, 2016, with proof of publication filed with the Commission on April 25, 2016.

21. On April 5, 2016, the Office of Consumer Advocate (“OCA”) filed a protest and public statement.

22. On April 8, 2016, the Commission’s Bureau of Investigation and Enforcement (“I&E”) filed a notice of appearance.

23. On April 25, 2015, the Office of Small Business Advocate (“OSBA”) filed an answer, notice of intervention and public statement.

24. Administrative Law Judges (“ALJs”) David A. Salapa and Steven K. Haas held an in-person prehearing conference in this matter on May 10, 2016, at 10:00 a.m.

25. Counsel for PAWC, the Authority, I&E, OCA and OSBA attended the prehearing conference.

26. As a result of the prehearing conference, ALJs Salapa and Haas issued Prehearing Order No. 2, which established a litigation and briefing schedule for this matter.

27. On May 13, 2016, PAWC and the Authority filed a joint motion to amend the *pro forma* tariff attached as Exhibit L to the Joint Application to include additional tariff supplement pages relating to an industrial pretreatment program (“IPP-S”) to be implemented by PAWC for the Authority’s industrial customers upon consummation of the acquisition.

28. No party filed a response to the motion to amend and it was granted by order dated June 15, 2016. A further revised IPP-S was provided by supplemental direct testimony served on the ALJs and the parties on June 1, 2016.

29. Pursuant to Prehearing Order No. 2, evidentiary hearings in this matter were held on July 6, 7, and 8, 2016, in Hearing Room 2, Commonwealth Keystone Building in Harrisburg, Pennsylvania.



30. During this hearing, the ALJs received testimony and exhibits from PAWC witnesses Bernard J. Grundusky, Jr., David R. Kaufman, James F. Sheridan, Rod P. Nevirauskas, James S. Merante, and James C. Elliott.

31. The Authority presented testimony and exhibits from Eugene Barrett, William Courtright, and Gerald Cross.

32. The Joint Applicants' witnesses testified regarding various aspects of the Transaction, the combined nature of the Combined Wastewater System, PAWC's technical, financial, and legal fitness to own and operate the Combined Wastewater System, and the public benefits of approving the Transaction and authorizing PAWC to own and operate the Combined Wastewater System.

33. OCA presented testimony and exhibits of Terry Fought and Scott Rubin. I&E presented testimony and exhibits of Lisa Gumby and Ethan Cline. OSBA presented testimony of Brian Kalcic.

#### **Witness Qualifications**

34. David R. Kaufman testified on behalf PAWC. Mr. Kaufman serves as PAWC's Vice-President of Engineering and is responsible for the administration of engineering services, including the planning, design and construction of water and wastewater capital investment projects for all of PAWC's systems and facilities. PAWC St. No. 2, 1:5-6. Mr. Kaufman obtained his Bachelor of Science in Engineering from Pennsylvania State University in 1975 and has extensive experience in working in the Scranton area in multiple positions for the former Pennsylvania Gas and Water Company and PAWC. PAWC St. No. 2, 1:16 - 2:11. Mr. Kaufman resided in the Scranton/Wilkes-Barre area for over 29 years and has extensive knowledge of the

water and wastewater systems in the Scranton area. PAWC St. No. 2, 2:16-20. Mr. Kaufman has more than 40 years of engineering experience. PAWC St. No. 2, 1:16-18. Mr. Kaufman was not subjected to any cross-examination, and his credentials and credibility were not challenged by any party. Mr. Kaufman is a credible witness.

35. PAWC also presented the testimony of Rod P. Nevirauskas, the Director of Rates and Regulation for the American Water Works Service Company's Mid-Atlantic Division (which includes PAWC). PAWC St. No. 4, 1:1-7. Mr. Nevirauskas has a Bachelor's Degree in Economics from the University of Massachusetts. *Id.* at 12. Mr. Nevirauskas has more than 35 years of experience in utility ratemaking and finance. *Id.* at 2:13-3:5. Mr. Nevirauskas is a credible witness.

36. James F. Sheridan is PAWC's Vice President-Operations. PAWC St. No. 3, 1:1-7. Mr. Sheridan is an engineer with more than 25 years of operational, engineering and business experience in the water and wastewater industry. Mr. Sheridan was not subjected to cross-examination, and his credentials and credibility were not challenged by any party. Mr. Sheridan is a credible witness.

37. PAWC presented the testimony of James S. Merante, the Director of Financial Strategy, Planning and Decision Support for American Water Works Service Company's Mid-Atlantic Division (which includes PAWC). PAWC St. No. 5, 1:6-14. Mr. Merante is a CPA with approximately 20 years of experience in corporate finance and operations. PAWC St. No. 5, 1:1 – 2:10. Mr. Merante was not subjected to cross-examination, and his credentials and credibility were not challenged by any party. Mr. Merante is a credible witness.

38. PAWC presented the testimony of Bernard J. Grundusky, Jr., PAWC's Director of Business Development, to address PAWC's legal fitness to own and operate the Authority's

system. PAWC St. No. 1, 1:6-7; 9:9-11. Mr. Grundusky has more than 25 years of experience in the waterworks business. PAWC St. No. 1, 2: 1-6. Mr. Grundusky was not subjected to cross-examination, and his credentials and credibility were not challenged by any party. Mr. Grundusky is a credible witness.

39. James C. Elliott testified on behalf of PAWC. Mr. Elliott holds a Masters Degree in Sanitary Engineering from the Pennsylvania State University and has been a Pennsylvania registered professional engineer since 1978. As a Vice President of the global engineering firm Gannett Fleming, Mr. Elliott has more than 40 years of experience in the evaluation, permitting, design, construction, and operation of wastewater collection systems and treatment plants, including municipal and industrial facilities, separate sanitary sewer systems, and combined sewer systems. Mr. Elliott has been involved with engineering, operational, financing, and regulatory issues associated with sewage and waste systems of all types, spanning more than 200 projects across the Commonwealth of Pennsylvania as well as other jurisdictions. PAWC St. No. 6-R, 1:6-14 and Appx. A.

40. Mr. Elliott has direct and substantial experience with respect to the Authority's Combined Wastewater System. Mr. Elliot served as a project manager for many SSA projects (including engineering evaluations, design and operation consultation, regulatory compliance consulting, financial budgeting, rate making analyses, and engineering assistance in financing) and as a Trust Indenture Consulting Engineer to the SSA over a period of several decades. Mr. Elliott has been involved in providing regulatory compliance services for the Scranton system, including environmental permitting and reporting under the National Pollutant Discharge Elimination System ("NPDES") program for the integrated sewerage system.

41. Most recently, Mr. Elliot was involved in providing advice on combined sewer overflow ("CSO") program compliance, development of the Scranton system's Long Term Control Plan ("LTCP") (PAWC Ex. JEC-5), and development of a comprehensive system hydraulic model for the Scranton system along with the associated financial projections and regulatory agency negotiations. PAWC St. No. 6-R, 2:9-21 and Appx. A.

42. Mr. Elliott is credible witness.

43. Terry L. Fought testified on behalf of the Pennsylvania Office of Consumer Advocate ("OCA"). Mr. Fought is a self-employed consulting engineer. Mr. Fought holds a Bachelor's Degree in engineering from Cleveland State University and is a Registered Professional Engineer in Pennsylvania. OCA St. No. 1, Appx. A. Although Mr. Fought has general experience in water and wastewater engineering, he admitted that he has never represented or advised the owner or operator of a combined wastewater system. Likewise, Mr. Fought has never prepared a long-term control plan for a combined sewer system or engaged in negotiations with the U.S. Environmental Protection Agency ("EPA") or Pennsylvania Department of Environmental Protection ("PaDEP") concerning the measures necessary to abate combined sewer overflows. N.T. 192:24 - 193:14. Mr. Fought has no experience in the past ten years representing clients owning or operating wastewater treatment plants in negotiations or interactions with PaDEP with respect to the regulation of wastewater collection systems or treatment plants. N.T. 194:3-8.

44. The testimony of Mr. Elliott was more credible than that of Mr. Fought.

45. Scott J. Rubin, an attorney and independent consultant, testified on behalf of OCA regarding (1) whether it was consistent with public policy for a privately owned utility to own and operate a combined sewer system which, in part, accepts and manages stormwater; (2) how combined sewer systems should be treated as providing separate utility services; (3) the alleged

appropriateness of establishing separate stormwater charge regimes; (4) the alleged need for all services related to streets and stormwater to be under the control of a single entity; (5) comparisons of the cost of capital to SSA and PAWC; and, (6) whether the Transaction is in the public interest. OCA St. No. 2.

46. Mr. Rubin is not an expert with respect to environmental law and regulation in general or specifically with respect to the regulations that govern operation and management of combined sewer wastewater system. N.T. 199:11; 199-17.

47. Mr. Rubin has never represented a municipality in negotiations with EPA or any environmental agency concerning a municipality's responsibilities and obligations with respect to the control and management of combined sewer wastewater systems. N.T. 199:23.

48. Mr. Rubin does not claim to be an expert with respect to municipal or governmental finance or an expert on municipal bonds and bond financing. N.T. 200:4; 200:7.

49. Mr. Rubin has no training or experience in wastewater system engineering. N.T. 200:17.

50. Mr. Rubin has no technical expertise in the design or operation of wastewater systems or stormwater systems. N.T. 200:21.

51. Mr. Rubin is not a CPA, does not have an accounting or finance degree, was never employed in an accounting or financial capacity for a large corporation, and is not an expert on cost of capital, municipal bonds or bond financing issues. PAWC St. No. 5-R, 3:15-23 (N.T. pp. 98:3-8, 200:5-7).

52. Mr. Rubin's testimony is less credible than the testimony of PAWC's witnesses.

53. Eugene P. Barrett is employed by the Authority as its Executive Director. SSA St. No. 1:7-8. Mr. Barrett has a B.A. in Political Science from Kings College and completed post

graduate courses in Urban Affairs and Planning at Boston University. SSA St. No. 1: 12-17. Mr. Barrett was a Senior Executive at Community Central Energy Corporation from 1985 to 2006, and has been the Executive Director for the Authority from 2006 to the present. SSA St. No. 1: 12-17. Mr. Barrett is a credible witness.

54. William L. Courtright is the Mayor of Scranton, having been elected November 7, 2013, and taken office on January 6, 2014. SSA St. No. 2:7-8. Mayor Courtright has been a business owner in Scranton for the past 30 years. SSA St. No. 2:12-17. For 18 years, Mayor Courtright was the Technical Services Manager for TRANE Corp. and was responsible for over a million dollar annual budget. SSA St. No. 2:12-17. Mayor Courtright previously served on Scranton's City Council from 2004-2010, from 2010 to 2014 was Scranton's Tax Collector, previously served as a member of the Civil Service Committee, and served nine years on the Municipal Police Officers Education and Training Commission. SSA St. No. 2:12-17. Mayor Courtright is a credible witness.

55. Gerald E. Cross is employed by the Pennsylvania Economy League ("PEL"), Central PA Division LLC. SSA St. No. 3-R, 15-21. The PEL is a nonpartisan, public policy think tank for local and state government with offices in Wilkes-Barre, Harrisburg, Philadelphia, and Pittsburgh. *Id.* PEL focuses on a unified mission to improve the Commonwealth while tailoring its activities to meet the unique needs of its individual office areas. *Id.* PEL has assisted communities and state and local government leaders for over 75 years with the tools and information they need to ensure the most effective provision of essential public services. *Id.*, 5-12.

56. Mr. Cross has a B.A. in Government and Politics from King's College in Wilkes-Barre, PA (1976) and an M.P.A. from Pennsylvania State University, Capital Campus (1978). Mr.

Cross has worked in municipal government from 1978 through 1984. SSA St. No. 3-R, 15-21. Mr. Cross has worked in municipal authority management and has served as a board member for local and regional sewer authorities, including Plains Township since 1988 and the Wyoming Valley Sanitary Authority since 1996. *Id.* Mr. Cross was employed as a research analyst with the PEL from 1989 through 2004 and was appointed Executive Director of the Central Division of PEL in 2005. SSA Rebuttal St. No. 3-R, 15-21. Mr. Cross is a credible witness.

### **Nature of the Combined Wastewater System**

57. The Authority owns and operates the wastewater collection and treatment system (“Combined Wastewater System”) providing wastewater service to the City and Dunmore (“Service Area”). SSA St. No. 1, 3:14-16.

58. The Authority provides wholesale service to several small adjacent communities, including the Borough of Dickson, Moosic Borough, and the Borough of Taylor. SSA St. No. 1, 3:14-16.

59. The Combined Wastewater System consists of more than 275 miles of sewer mains and large interceptors (of which about 172 miles are combined sewers), 80 combined outflows, 7 pumping stations, and a wastewater treatment plant (“WWTP”). PAWC St. No. 2, 3:19-4:3.

60. The WWTP has an annual average design hydraulic capacity of 20.0 million gallons per day (“mgd”) and an annual average design organic loading capacity of 28,290 lbs. 5-day biochemical oxygen demand (“BOD5”) per day. PAWC St. No. 2, 4:6-11.

61. The Combined Wastewater System provides service to approximately 31,000 customers in a total population estimated at 90,000. SSA St. No. 1, 3:14-20.

62. Approximately 95% of total Authority customers are residential customers who account for around 85% of the Authority's total revenues. SSA St. No. 1, 3:21-22.

63. The Authority has approximately 84 employees, 72 of whom are covered by a union contract. SSA St. No. 1, 4:1-3.

64. The current union contract was signed on April 1, 2013, and will expire on March 31, 2017. SSA St. No. 1, 4:1-3.

65. The Authority operates its own assets and does not lease them. SSA St. No. 1, 2:19-20; PAWC St. No. 2, 5:4-6.

66. Portions of the Combined Wastewater System were constructed as early as the 1870's and many of its pipes were constructed before the establishment of the Authority. SSA St. No. 1, 2:19-20; PAWC St. No. 2, 5:4-6.

67. Under the accepted construction practices of the times, the Combined Wastewater System was originally designed to convey wastewater consisting of comingled sanitary waste, industrial wastewater, and stormwater. SSA St. No. 1, 2:19-20; PAWC St. No. 2, 5:4-6.

68. The Combined Wastewater System collects, treats, and disposes of sewage from homes and businesses, industrial wastewater, and (during wet weather events) stormwater ("Combined Wastewater"). SSA St. No. 1, 2:19-20; PAWC St. No. 2, 5:4-6.

69. The Combined Wastewater System conveys Combined Wastewater through a collection of interconnected piping either to the WWTP or to permitted CSO outfalls under NPDES Permit No. PA0026492 ("NPDES Permit"). PAWC St. No. 2, 5:4-6.

70. The WWTP discharges treated wastewater effluent to the Lackawanna River and its tributaries under the NPDES Permit. PAWC St. No. 2, 4:6-8; PAWC St. No. 6-R, 10:6-14.



71. Under high wet-weather flow conditions that exceed the capacities of downstream facilities, the regulators direct Combined Wastewater to receiving streams. In all other circumstances, wastewater flows to the WWTP. PAWC St. No. 2, 4:3-6.

72. The operator of the Combined Wastewater System and holder of the NPDES Permit are responsible for management of all Combined Wastewater flows within and discharges from the Combined Sewer System. PAWC St. No. 2, 5:6-9; PAWC St. No. 6-R, 6:7-12, 8:12-14, 10:11-14.

73. The Combined Wastewater System serves and inures to the benefit of all customers within the Service Area. PAWC St. No. 2, 5:9-10.

74. Under the proposed Transaction, PAWC will acquire and operate the entire Combined Wastewater System and assume responsibilities for operation and maintenance as the holder of the NPDES Permit. PAWC St. No. 2, 5:11-13.

75. PAWC is not proposing to acquire what is referred to as the municipal separate storm sewer system ("MS4"), which will be retained by SSA. PAWC St. No. 2, 6:4-5; Asset Purchase Agreement §2.02(a) and (o), PAWC Ex. BJG-1, Exhibit F ("Excluded Assets" include the Stormwater System Assets and MS4 System Real Property).

76. The SSA's MS4 differs and is separate from the Combined Wastewater System that PAWC has agreed to acquire in the Transaction. In certain areas within the SSA's existing service area, the MS4 collects and discharges stormwater separately from any wastewater. PAWC St. No. 2, 5:19 through 6:2.

### The Consent Decree

77. In acquiring the Combined Wastewater System, PAWC will be undertaking a series of regulatory obligations associated with its operation and management, including obligations under the NPDES Permit, a “Consent Decree” dated January 31, 2013, in the United States District Court for the Middle District of Pennsylvania with the U.S. Department of Justice (“DOJ”), U.S. Environmental Protection Agency (“EPA”), and Pennsylvania Department of Environmental Protection (“PADEP”), and related obligations pursuant to a Nine Minimum Controls Plan (“NMCP”) and the LTCP. PAWC St. No. 2, 6:18 – 22; PAWC Ex. DRK-1.

78. The Consent Decree requires, among other things, that the SSA implement a series of corrective actions to improve the facilities and operations of the Combined Wastewater System in order to achieve compliance with requirements of the Federal Clean Water Act, the Pennsylvania Clean Streams Law, and the NPDES Permit governing discharges from the Combined Wastewater System. PAWC St. No. 2, 6:22 - 7:4; PAWC Ex. DRK-1.

79. Among other obligations, the Consent Decree required the design, construction, and operation of certain improvements to the SSA’s existing wastewater treatment plant. PAWC St. No. 2, 7:4-7; PAWC Ex. DRK-1.

80. With respect to the Combined Wastewater System, the Consent Decree requires (i) adoption and implementation of an approved LTCP providing for a series of projects, to be constructed in phases, to reduce the potential for CSOs; and (ii) implementation of an NMCP, which sets forth measures, such as pollution prevention, to reduce the impacts of CSOs. PAWC St. No. 2, 7:7-12; PAWC Ex. DRK-1.

81. The Consent Decree and the related plans are designed to address CSOs and other operational issues in the Combined Wastewater System to limit wastewater discharges into natural tributary streams. PAWC St. No. 2, 7:12-14; PAWC Ex. DRK-1.

82. PAWC is in the process of negotiating with EPA, PADEP, and DOJ an Amended Consent Decree and a revised and updated NMCP. PAWC anticipates that the LTCP will remain unchanged. The Amended Consent Decree would be lodged with and approved by the U.S. District Court for the Middle District of Pennsylvania to become effective on closing of the Transaction. PAWC St. No. 2, 8:14-18.

83. Under the contemplated Amended Consent Decree, PAWC will have four basic obligations. PAWC St. No. 2, 9:1-2.

84. First, PAWC will be obligated to implement the NMCP, which outlines measures to reduce the impacts of CSOs on receiving waters. The elements of that NMCP include: (1) a proper operation and regular maintenance program; (2) maximum use of the collection system for storage; (3) implementation of an industrial pretreatment program ("IPP"); (4) maximization of flow to the WWTP for treatment; (5) elimination of CSO discharges during dry weather; (6) control of the discharge of solids and floatables to combined sewers; (7) pollution prevention programs; (8) public notifications and public participation programs; and, (9) monitoring to characterize CSO impacts and the efficacy of CSO controls. PAWC would be required, on at least an annual basis, to evaluate the efficacy of the measures implemented under the NMCP, and submit to DOJ, EPA, and PADEP for review and approval additional proposed changes to the NMCP to the extent any are necessary. PAWC St. No. 2, 9:3-14.

85. Second, PAWC will be required to implement the already approved LTCP, providing for the phased design, construction, and operation of projects involving improvements

to the Combined Wastewater System, to meet the requirements of the EPA Combined Sewer Overflow Policy. As set forth in the Consent Decree, the objective of the LTCP is to cause no more than 4 overflows in a typical year to any non-channelized tributary of the Lackawanna River and no more than 9 overflows in a typical year to the Lackawanna River and its channelized tributaries. The LTCP is required to be implemented as soon as practicable, but no later than December 1, 2037. The Consent Decree specifies the schedules for what are referred to as the Phase A and B projects. PAWC St. No. 2, 9:15-23.

86. Third, by December 1, 2017, PAWC would be required to conduct a study to evaluate the feasibility of implementing Green Infrastructure Measures (as defined in the Consent Decree) as part of the long term controls for reducing CSOs, and to evaluate such potential measures against a series of criteria, including evaluation of potential institutional issues and obstacles. Such Green Infrastructure Measures have the potential to address CSO issues in a more cost-effective manner than typical structural controls and facilities. The Consent Decree provides that PAWC "may submit" (that is, it has the option to submit) to EPA and PADEP a proposal to incorporate Green Infrastructure Measures into the LTCP. PAWC St. No. 2, 10:1-9.

87. Fourth, the Consent Decree imposes a series of general compliance obligations, including the mandate to comply with all final effluent limitations set forth in the NPDES Permit governing the Combined Wastewater System, the prohibition on dry weather overflows and sanitary sewer overflows, compliance with operating protocols designed to maximize flows to the WWTP, and various record-keeping and reporting requirements. PAWC St. No. 2, 10:10-14.

#### **Nature and Regulatory Treatment of Combined Wastewater**

88. Any water mixed with sewage is sewage. PAWC St. No. 6-R, 5: 14-16.

89. Any mixture of sewage, industrial wastewater, infiltration/inflow of stormwater and groundwater into a sewer line, and stormwater flowing into such lines, constitutes wastewater. PAWC St. No. 6-R, 5: 14-16.

90. Wastewater is regulated under the provisions of the Pennsylvania Clean Streams Law, the Sewage Facilities Act, and PADEP regulations relating to sewage. PAWC St. No. 6-R, 4:11-20. PAWC St. No. 6-R, 5: 14-16.

91. Stormwater is wastewater when it combines with other wastewater. PAWC St. No. 6-R, 5: 14-16.

92. Where human and animal wastes are mixed with other waters, whether they come from industrial users, groundwater or stormwater, the resulting flows are all "sewage" under the Pennsylvania Clean Streams Law and Sewage Facilities Act. PAWC St. No. 6-R, 5: 14-16.

93. PADEP regulations governing wasteload management, set forth in 25 Pa. Code Ch. 94, define "sewerage facilities" as "[t]he term used to collectively describe a plant and sewer system owned by or serving a municipality." All wastewater treatment plants and all sewers serving a community are "sewerage facilities." The term "sewerage facilities" includes all types of sewer systems and related wastewater treatment plants, including separate sanitary sewer systems and combined sewer systems. PAWC St. No. 6-R, 5:17-22.

94. The Combined Wastewater System serving the Scranton area is regulated as a sewerage facility under 25 Pa. Code Ch. 94 regulations. PAWC St. No. 6-R, 5:22-24.

95. Under Section 207 of the Clean Streams Law, 35 P.S. § 691.207, all plans and designs for sewer systems and treatment works must be approved by PADEP. Such approvals are issued in the form of what are known as Water Quality Management Part II Permits. PAWC St. No. 6-R, 5:25 - 6:1.

96. In issuing Part II Permits, PADEP does not distinguish between sewerage systems handling just human and animal waste and systems that handle such substances in combination with other wastewater, such as groundwater or stormwater that entered combined sewers, with the resulting combination carrying polluting substances – all such flow is regulated as sewage and all such facilities are subject to Part II Permits. PAWC St. No. 6-R, 6:1-6.

97. Once flows from various sources are comingled, there is no differentiation between the wastewaters flowing through sewerage facilities that need to be managed, treated and discharged in a responsible manner. When water becomes contaminated, no matter how, it becomes wastewater, and that wastewater must be collected, treated and managed responsibly by the operator of the wastewater system. PAWC St. No. 6-R, 6:13-21.

98. The Glossary of water and wastewater terms posted by the Sacramento State Office of Water Programs states that where waters from various sources are comingled in a combined sewer system, all of the resulting fluids are considered “wastewater.” PAWC St. No. 6-R, 7:4-6; OCA Ex. TLF-3 (“Water & Wastewater Glossary”).

99. The Water and Wastewater Glossary defines “Combined Wastewater” as being “[a] mixture of stormwater or surface water runoff and other wastewater, such as domestic or industrial wastewater.” PAWC St. No. 6-R, 7:7-9; OCA Ex. TLF-3; PAWC St. No. 6-R, 7:9-10.

100. The Water and Wastewater Glossary defines “Wastewater” as “[a] community’s used water and water-carried solids (including used water from industrial processes) that flow to a treatment plant. Stormwater, surface water, and groundwater infiltration also may be included in the wastewater that enters a wastewater treatment plant. The term sewage usually refers to household wastes, but this word is being replaced by the term wastewater.” PAWC St. No. 6-R, 7:10-14; PAWC St. No. 6-R, 7:14-22; OCA Ex. TLF-3.

101. The EPA's glossary of terms includes the same definition as the Water and Wastewater Glossary. PAWC St. No. 6-R, 7:15-17.

102. Scranton Ordinance No. 13-1968 (PAWC Exhibit JCE-1) defines "sewage" as "normal water-carried household and toilet wastes from any Improved Property, including such ground, surface or storm water as may be present." PAWC St. No. 6-R, 7:18 - 8:1.

### **The Combined Wastewater System Facilities**

103. The Authority's Combined Wastewater System is an integrated wastewater system. PAWC St. No. 6-R, 8:9; OCA St. No. 1S, 7:21-22.

104. The Combined Wastewater System is not made up of separate wastewater and stormwater facilities. The facilities are integrated to form one cohesive system. PAWC St. No. 6-R, 8:9-11.

105. In a Combined Wastewater system, the sources of water, whether it be domestic or commercial or industrial wastewater, infiltration from groundwater, rainfall derived inflow or storm water, are all combined into one system. N.T. 136:2-5. By industry definition, it is wastewater, with all of these components. N.T. 136:7-9.

106. The processes of the Combined Wastewater System that are used to process the wastewater flows are one process, and the outcome is based on one set of permits. N.T. 136:15-17.

107. PADEP and EPA regulate the Authority's Combined Wastewater System as an integrated whole under the terms of the NPDES Permit and series of Water Quality Management Part II Permits governing the system. PAWC St. No. 6-R, 8:12-14.

108. Under current industry terminology, the fluids that are flowing in a combined sewer system are "combined wastewater." PAWC St. No. 6-R, 8:14-16; Ex. TLF-3.

109. PADEP considers all of the water flowing within the combined sewer system to be "wastewater," subject to the regulatory provisions governing the construction and operation of sewerage facilities and the discharge of sewage, irrespective of where that water originated. PAWC St. No. 6-R, 8:16-19.

110. There is no separate stormwater service being provided in the case of an integrated system. PAWC St. No. 6-R, 8:19-21.

111. Under the APA (PAWC Ex. BJG-1, Exhibit F), PAWC is acquiring nearly all of the assets related to the Authority's wastewater system, which includes (1) the WWTP; (2) all collection systems facilities in the City and Dunmore, including catch basins, regulator chambers, collection sewer mains, interceptor sewers, control facilities and combined sewer overflow structures; and (3) assets currently owned by the Authority that are used in maintaining and managing these facilities and implementing obligations imposed under the NPDES Permit, Water Quality Management Part II Permits, Consent Decree, NMCP and LTCP applicable to this wastewater system. PAWC St. No. 6-R, 9:11 through 10:2.

112. Additional equipment and facilities including vacuum trucks that are used to cleanout catch basins and street sweepers which intercept grit and materials that would otherwise threaten the conveyance capacity of the sewage system or potentially inhibit the WWTP's capacity are required by the NPDES Permit and the Consent Decree. PAWC St. No. 6-R, 13:19-22; PAWC St. No. 6-R, 14:5-14.

113. All of the equipment and facilities that comprise the Authority's Combined Wastewater System are used in providing wastewater services. PAWC St. No. 6-R, 12:1-13:18.



114. Each of the components and facilities that comprise the Combined Wastewater System being acquired by PAWC have a direct functional relationship or nexus to the provision of wastewater services. N.T. 136:6 through 139:22.

a. The functions are connected right from the beginning of the acceptance of these various flows into the system, whether those flows come from a service lateral at the property line of a building, enters sewers through groundwater infiltration, enters through rainfall derived forces, or through catch basins. N.T. 136:22 - 137:6.

b. Once these waters enter the sewers and are in the collection system, they are wastewater. N.T. 137:7-9.

c. From the point of the upper reaches of the collection system, some of the functions include removal of grit and floatable materials, inspection of the pipes, making sure that the pipes flow smoothly and not cause an overflow of wastewater, inspection and maintenance and regulator structures, which divert the flow to the treatment plant, and managing the interceptors or the interceptor's pump stations. N.T. 137:13-20.

d. The facilities, from the point of collection and maintenance of the collection system, serve to convey wastewater. N.T. 138:11-14.

e. That wastewater is regulated and has to be diverted to the wastewater treatment plan through regulator structures. N.T. 138:15-16.

f. The maintenance of the system is all directed toward minimizing overflows into the receiving waters. N.T. 138:17-19.

g. At the WWTP, a series of chemical and physical processes remove solids and convert organic wastes biologically, such that the discharge will meet the effluent

requirements, while a series of parallel facilities process the resulting biosolids from the treatment process. N.T. 137:21-24; 138:2 through 139.1.

h. All of the above facilities are related to the handling of the wastewater and its inherent pollutants. N.T. 138:2-3.

115. In the case of a Combined Wastewater system, such as the Scranton System, the stormwater function is an ancillary function; it is not the primary function of the wastewater system. N.T. 145:24 through 146:2.

116. All gravity sewage systems, even those that are classified as "sanitary only" receive, convey and treat some component of stormwater. PAWC St. No. 6-R, 14:15-18.

117. Infiltration and inflow ("I&I") are terms used to describe the several forms of extraneous clear water that enters wastewater collection systems. Infiltration refers to groundwater that enters the collection pipes primarily through cracks in aging or defective pipes. Inflow traditionally has meant clear water that is directly connected to the sewer system, such as from area drains or roof drains. Collectively, such sources are referenced to as "I&I". PAWC St. No. 6-R, 14:18 through 15:6. However, these simple definitions of I&I have been found inadequate to describe and/or analyze the sources and rehabilitation solutions for adversely affected sewer systems. The industry standard is now "dry weather groundwater infiltration" and "rainfall derived infiltration/inflow". PAWC St. No. 6-R, 15:7-10.

118. I&I is inherent in any gravity wastewater system, and often the volume of I&I is quite significant. PAWC St. No. 6-R, 15:14-15.

119. The amount of I&I can vary greatly between systems. Individual sewer sheds with peak-to-average flow ratios of 100:1 were discovered in research conducted by Mr. Elliott's firm,

Gannett Flemming, and reported among professional colleagues in other portion of the nation. PAWC St. No. 6-R, 16:11-13.

120. OCA witness Scott Rubin concedes that the Commission has jurisdiction over wastewater systems that have I&I, even though that I&I includes stormwater. N.T. 202:15 through 203:3.

121. The flows, challenges and operational issues associated with I&I and combined sewer systems are quite similar. PAWC St. No. 6-R, 17:4-5.

a. Both sanitary sewer systems and combined sewer systems experience extraneous flows of groundwater and stormwater. PAWC St. No. 6-R, 17:14-15.

b. Both require advanced methods of analysis and hydraulic modeling. PAWC St. No. 6-R, 17:15-16.

c. The nature and range of the peak flow ratios experienced in both types of sewer systems are similar. The range of experienced peak to average flow ratios for a sanitary sewer system can overlap the lower end of such ratios for combined sewer systems. PAWC St. No. 6-R, 17:16-19.

d. Operation, management and capital costs associated with these extraneous flows necessitate the system owners to apply prudent judgment in programming cost-effective solutions. PAWC St. No. 6-R, 17:19-21.

### **Combined Wastewater Systems**

122. Currently Pennsylvania has approximately 129 combined sewer wastewater systems. PAWC St. No. 6-R, 18:5-6. Of those, PADEP classifies some 75 wastewater systems as "major" combined sewer wastewater systems. PAWC St. No. 6-R, 18:6-7.

123. Pennsylvania has the largest number of Combined Sewer systems of any state in the nation, posing a major environmental and infrastructure challenge for the Commonwealth and its communities. PAWC St. No. 6-R, 18:9-11. Nationwide there are over 850 combined sewer systems; Pennsylvania has 15% of the total in the U.S. PAWC St. No. 6-R, 18:11-12.

124. Many of these Combined Wastewater systems serve relatively small communities, such as the towns of the anthracite region in Schuylkill, Carbon, Luzerne and Lackawanna Counties, and likewise a myriad of small communities in western Pennsylvania. These are typically located in older Pennsylvania municipalities that have more limited financial capabilities. These communities generally experience difficulty in increasing user fees, often have limited staffing for complex programs, and have significant other municipal infrastructure demands upon available funding. PAWC St. No. 6-R, 18:13-20.

125. Like the City of Scranton, a number of communities that have been identified as financially distressed and enrolled in the Commonwealth's Act 47 program are served by Combined Wastewater systems. Of the 18 municipalities enrolled in Act 47, at least 11 are Combined Wastewater system communities. A number of these communities have limited technical and financial capabilities, and their distressed status presents even greater challenges in terms of being able to address federal and state mandates for managing their Combined Wastewater systems and reducing overflows while meeting a myriad of other financial demands, including structural budget deficits, unfunded pension obligations and the like. PAWC St. No. 6-R, 19:4-12.

126. If the Commission finds that it does not have jurisdiction to allow public utilities to acquire Combined Wastewater systems, then communities faced with Combined Wastewater systems will not have the option to transfer those assets to a more sophisticated and capable public

utility company, with a greater range of technical competence and better access to capital to provide a reliable solution to their wastewater challenges. PAWC St. No. 6-R, 20:6-13.

### **PAWC Financial Fitness**

127. PAWC is the Commonwealth's largest water and wastewater provider, with total assets of \$3.9 billion and annual revenues of \$613 million for 2015, including operating income of approximately \$307 million and net income of approximately \$143 million. PAWC St. No. 5: 3:2-5.

128. PAWC: (i) has access to a \$220 million line of credit through American Water Capital Corp., a wholly-owned subsidiary of American Water Works Company, which can be increased if needed (PAWC St. No. 5, 3:10-13); (ii) has high credit ratings with both Moody's Investor Services and Standard and Poor's Rating Services (*id.* at 3:15-16); (iii) obtains long-term debt through American Water Capital Corp. at favorable interest rates and payment terms (*id.* at 3:16-17); (iv) utilizes low-cost long-term financing through the Pennsylvania Infrastructure Investment Authority and the Pennsylvania Economic Development Financing Authority (*id.* at 3:17-20); and, (v) may obtain additional equity investments through American Water Company, Inc., based upon its strong operating performance (*id.* at 4:1-3).

129. The most-recent Standard and Poors Rating Services Ratings Direct report on American Water Works Company, Inc., and its subsidiaries including PAWC, raised the credit rating of American Water Works Company and its subsidiaries including PAWC from "A-" to "A" based upon its excellent business risk profile. OCA Ex. 1, p. 2. The Standard and Poors

report also specifically raised the rating on PAWC's senior secured debt issuances from "A" to "A+." *Id.*

130. I&E witness Lisa Gumby conceded PAWC's financial fitness to own and operate the Authority's system. I&E St. No. 1, 8:1-5.

131. The other parties to the instant matter did not challenge PAWC's financial fitness to own the Authority's system.

### **PAWC Technical Fitness**

132. PAWC possesses the technical expertise necessary to own and operate the Authority's system, including compliance with the Consent Decree dated January 31, 2013, before the United States District Court for the Middle District of Pennsylvania, entered into by the Authority, the United States (represented by the EPA and the United States Department of Justice), and the Pennsylvania Department of Environmental Protection). PAWC St. No. 2, 6:18-22; PAWC Ex. DRK-1.

133. PAWC possesses the technical expertise to comply with the specific obligations and requirements of the Consent Decree. PAWC St. No. 2, 6:16 - 7:16, 7:18 - 10:14.

134. PAWC has the ability to complete the specific obligations and requirements of the Consent Decree in a timely manner. PAWC St. No. 2, 10:16 - 11:16).

135. PAWC has extensive experience operating systems similar to the Authority's (such as the Clarion and Coatesville systems) that are subject to consent decrees and similar environmental obligations. PAWC St. No. 2, 11:18 - 14:11.

136. PAWC has at its disposal the technical expertise of itself and American Water Works Company, Inc. (PAWC's corporate parent which operates more than 200 wastewater

operations through its subsidiaries) through which may draw from a broad range of engineering and operational experience to address the Consent Decree and associated environmental challenges on a cost-effective basis. PAWC St. No. 2, 14:13 – 17:6.

137. PAWC has extensive experience delivering large, complex water and wastewater capital improvement projects, such as the Long Term Control Plan (“LTCP”) projects associated with the Authority’s system. PAWC St. No. 2, 16:15-17.

138. PAWC currently operates 15 wastewater treatment plants in Pennsylvania. PAWC St. No. 3, 4:10-15.

139. American Water Works Company, Inc. and its subsidiaries currently own or operate 200 wastewater operations, including 54 wastewater treatment plants utilizing Biological Nutrient Removal (“BNR”) technology and processes similar to the Authority’s System. PAWC St. No. 3, 4:10-15.

140. PAWC currently operates three wastewater treatment plants which, like the Combined Wastewater System, utilize BNR technologies, including the Coatesville Wastewater Treatment Plant, the Southern Wastewater Treatment Plant, and the Franklin Township Treatment Plant. PAWC St. No. 3, 4:16 – 7:21.

141. I&E witness Lisa Gumby conceded PAWC’s technical fitness to own and operate the Combined Wastewater System. I&E St. No. 1, 8:1-5.

142. OSBA’s sole witness, Brian Kalcic, did not provide any testimony regarding PAWC’s technical fitness to own and operate the Combined Wastewater System.

143. OCA’s engineering witness, Terry Fought, did not provide any substantive testimony regarding PAWC’s technical fitness to own and operate the Combined Wastewater System.

**PAWC Legal Fitness**

144. PAWC has a good compliance history with respect to the Pennsylvania Public Utility Code and the Commission's rules, orders, and regulations. PAWC St. No. 1, 9:11

145. PAWC has no pending legal proceedings or other actions suggesting that it is legally unfit to provide service to the Authority's customers once the Transaction is approved. *Id.* at 9:12-13.

146. There is no evidence suggesting that PAWC has a propensity to operate unsafely or illegally.

147. There is no evidence suggesting that PAWC has failed to obey the Pennsylvania Public Utility Code or Commission regulations, particularly those regulations dealing with public safety.

**Affirmative Public Benefits of a Substantial Nature**

148. Under PAWC ownership and operation of the Combined Wastewater System, Scranton-area customers would have access to enhanced services over those offered by the Authority. The enhancements would include, but are not limited to: (1) extended call center hours for customers; (2) additional bill payment options for customers; (3) enhanced customer information and education programs; and, (4) access to PAWC's customer assistance program. PAWC St. No. 3, 25:4-10.

149. PAWC's customer service call center is open from 7:00 a.m. to 7:00 p.m., Monday through Friday. PAWC St. No. 3, 25:14-15.



150. PAWC customers can reach a customer service representative via email at [infopa@amwater.com](mailto:infopa@amwater.com). PAWC St. No. 3, 25:15-16.

151. PAWC customers have the ability to manage their account via PAWC's "My H2O" online portal. PAWC St. No. 3, 25:16-17.

152. PAWC offers emergency support 24 hours a day, seven days a week. PAWC St. No. 3, 25:17-18.

153. PAWC offers a number of bill payment options that are unavailable to SSA customers at present. PAWC St. No. 3, 26:1-1.

154. PAWC customers have the option to receive paper bills through the mail or go paperless and receive their bills electronically via the "My H2O" on-line portal. PAWC St. No. 3, 26:2-3.

155. PAWC customers can pay their bill by mail, online, or over the phone with a debit or credit card. PAWC St. No. 3, 26:3-4.

156. PAWC customers can pay by e-check or an electronic funds transfer (which can be set up at the "My H2O" online portal) or pay in person at multiple authorized payment locations across the state. PAWC St. No. 3, 26:4-6.

157. PAWC provides extensive customer information and education programs unavailable to the Authority's customers (that will be available once PAWC acquires the Combined Wastewater System) through brochures, bill inserts, and educational videos posted on PAWC's website. PAWC St. No. 3, 26:7-10.

158. PAWC customers always have full access to a wide range of topics, including information on preventing sewer overflows, how to prevent frozen pipes, beneficially re-using residuals from water treatment plants for community gardens, detecting and fixing silent toilet

leaks, how to properly dispose of unused pharmaceuticals to keep them out of the wastewater system, water conservation techniques, expansion takes, fire department grants, and protecting customers from utility imposters. PAWC St. No. 3, 26:10-16.

159. As new PAWC customers, the Authority's customers will have access to PAWC's customer assistance program called the "H2O Help to Others Program." PAWC St. No. 3, 26:17-19.

160. For PAWC wastewater customers, the H2O program offers two main services: (1) grants of up to \$500 per year; and, (2) a 15% discount on total wastewater charges. PAWC St. No. 3, 26:19-21.

161. PAWC customers who qualify for the H2O program may also qualify to receive a water saving kit which includes, among other things, a low-flow shower head and low-flow faucet aerators. PAWC St. No. 3, 26:21 – 27:2.

162. PAWC is financially stronger and has a brighter financial future than the Authority at present and can better afford the future expenses associated with the future improvements and operation of the Authority's system.

163. PAWC has a better credit rating than the Authority. PAWC Ex. JSM-1 (the Authority's "A-" rating from Standard and Poors); OCA Ex. 1 (PAWC's "A" rating from Standard and Poors); N.T. 125:20 - 126:15.

164. As to future financial health: the Authority is highly leveraged with a 80.4 percent debt to plant ratio (N.T. 129:3-6); the Authority will have to consider substantial rate increases (estimated to average 4.57% percent per year over the next thirty (30) years) in order to maintain its current financial profile and pay for the improvements required by the Consent Decree (N.T. 129:15-19; SSA St No. 1, 4:21-24); and, any such rate increase will be exacerbated by the fact that

Authority already has high rates consuming 2.3% of its customers median household income (N.T. 129:22 -25).

165. Studies conducted and submitted as part of the Consent Decree mandated LTCP evaluated the financial condition of the Authority's service area, and reported on the financial challenges facing the Authority and its ratepayers. PAWC Ex. JCE-5; PAWC St. No. 6-R, 25:16 through 26:19.

166. The LTCP reports that combined populations of the City and Borough have been steadily dropping with each 10-year census since a peak in the 1930s. PAWC Ex. JCE-5, 8-13. Further, this population loss has decreased the Authority's ratepayers' ability to pay in several significant ways: (1) there are fewer ratepayers; (2) there are fewer rate and taxpayers for all social and governmental needs; and, (3) property values decrease further eroding community wealth. PAWC Ex. JCE-5, pp. 8-13 – 8-14.

167. According to U.S. Census data, nearly 20% of the City's population is below the poverty level, and that percentage has been increasing since 2000. PAWC Ex. JCE-5, p. 8-14.

168. The proposed transaction will provide a public benefit to the Authority's customers because they will join PAWC's large customer base.

169. PAWC is the largest investor-owned water and wastewater provider in the Commonwealth and provides water service to more than 653,000 customers and wastewater service to more than 21,000 customers. PAWC St. No. 3, 3:14-16.

170. PAWC's services are provided in approximately 400 communities across the Commonwealth with a combined population of approximately 2.3 million persons. PAWC St. No. 3, 3:16-17.

171. Because of its size and expertise in wastewater management and the leveraging of economies of scale, PAWC will, over time, be able to improve efficiencies and lower the costs to operate the Combined Wastewater System. These efficiencies will help keep the rates lower for the Authority's customers than they would be if not allowed to become part of PAWC's customer base. PAWC St. No. 4, 5:15-6:2.

172. PAWC's can also provide a substantial public benefit to the Authority's customers through Act 11 of 2012's revenue requirement allowance by spreading the costs of capital improvements required by the Consent Decree across PAWC's combined water and wastewater customer base. PAWC St. No. 4, 7:7-11.

173. By spreading the improvement costs across PAWC's combined customer base, the costs of improvements will be minimized per customer and will thereby prevent an unreasonable rate impact. PAWC St. No. 4, 7:11-15.

174. As part of the proposed Transaction, PAWC has committed to create 100 new jobs in the Scranton area by the end of calendar year 2020. PAWC St. 3, 20:2-6.

175. These jobs will be new jobs in addition to the Authority employees that PAWC will engage once the Transaction is approved. PAWC St. 3-R, 2:10-15.

176. PAWC anticipates that the employees will serve PAWC or its parent organization (American Water Works Company) to accommodate growth of the organizations. PAWC St. 3-R, 3:7-12.

177. If the employees are hired by American Water Works Company, the employees could perform tasks for several of its operating subsidiaries, and the costs of those employees would be allocated to PAWC and the other operating subsidiaries based upon the tasks performed per affiliate. PAWC St. 4-R, 14:12-16.

178. PAWC has specifically agreed that the costs of those new jobs would be subject to the standard review for reasonableness in a subsequent rate case to alleviate any concern that the new jobs may be unnecessary or would result in an unfavorable impact on PAWC's rates. PAWC St. 3-R, 4:1-6; PAWC St. 4-R, 14:12-16; N.T. p. 118:14-20.

179. Scranton is the sixth-largest city in Pennsylvania. It is the county seat of Lackawanna County in the state's northeastern region. With a population of 76,089, it is the largest city in the Scranton-Wilkes-Barre-Hazleton, Pennsylvania Metropolitan Statistical Area, with a total population of about 570,000. Scranton is the geographic and cultural center of the Lackawanna River, and the largest of the former anthracite coal mining communities in a contiguous area that also includes Wilkes-Barre, Pittston and Carbondale. Scranton was incorporated as a borough on February 14, 1856 and as a city on April 23, 1866. SSA St. No. 2, 2:21 to 3:3

180. On January 10, 1992, the City was first determined by the Department of Community and Economic Development ("DCED") to be in "distressed" condition under the Municipalities Financial Recovery Act, Act of 1987, P.L. 246, No. 47 ("Act 47") and has remained under Act 47 status since that time. SSA St. No. 2, 3:12-13.

181. The Pennsylvania Economy League ("PEL") is the Recovery Plan Coordinator for the City designated by the Commonwealth of Pennsylvania under Act 47. In that capacity, PEL has developed, in concert with the City Administration and City Council, Recovery Plans for the City. SSA St. No. 2, 3:19-22.

182. Once a municipality has been declared financially distressed, the appointed Act 47 Coordinator (*i.e.*, PEL in connection with Scranton) assists the municipality in addressing its financial distress, which generally means a chronic inability to meet its expenditures with

sufficient revenues, a structural deficit. SSA St. No. 3-R, 4:15-19. The Act 47 coordinator formulates and proposes a financial recovery plan and thereafter implements it in conjunction with municipal officials. SSA St. No. 3-R, 4:20-23.

183. The most-recently completed Revised and Updated Act 47 Recovery Plan (“2015 Recovery Plan”) was prepared by PEL for the City in February 2015 (SSA St. No. 2, 3:22-23) and approved by City Council on March 12, 2015. SSA St. No. 3-R, 6:5-8.

184. The 2015 Recovery Plan projected the City’s general fund budget surplus/deficit results from 2015-2020. SSA St. No. 3-R, 6:5-8. The projections in the 2015 Recovery Plan reflect a “business as usual approach” in order to define a baseline against which the plan initiatives and mandates can be measured. The 2015 Recovery Plan projected a baseline deficit for the City of \$13,725,454 in 2017, which climbs to \$19,395,212 by 2020. SSA St. No. 3-R, 6:12-16.

185. The City would need to increase its real property tax millage by approximately 32 percent in 2017 to eliminate the projected 2017 operating deficit. For the average homeowner, this would translate into an approximately 160 percent increase in real estate taxes since 2013. For that same average homeowner, municipal real estate taxes comprised 1.3 percent of median household income in 2013; with an additional 32 percent increase in 2017 it would reach 3.5 percent. SSA St. No. 3-R, 8:16-22.

186. The 2015 Recovery Plan documented and confirmed previous discussions about a possible monetization of the Authority as one of the 2015-2016 mandates necessary to continue to put the City on the path of reducing the otherwise projected operating budget deficits through 2020. SSA St. No. 2, 5:10-13. The decision to sell or monetize the Authority’s assets was the result of deliberate and sustained consideration by many stakeholders, of which the City was only one party. SSA St. No. 2, 5:8-9.

187. One of the considerations included the Consent Decree obligation, together with ongoing maintenance and capital requirements. SSA St. No. 1, 4:18-21. In analyzing future wastewater rates as a stand-alone entity, the Authority estimated that the requirements of the Consent Decree, the LTCP, as well as ongoing investments needs and expense requirements, could result in the need for average annual rate increases of 4.57% for the foreseeable future. SSA St. No. 1, 8:13-18.

188. The City has the most distressed major pension fund in the Commonwealth of Pennsylvania by a significant margin, being declared "Severely Distressed" by the Auditor General and the City's actuary since at least 1993. The Fire, Non-Uniformed, and Police pension funds have funded ratios of 17%, 27%, and 31% respectively, meaning that in each case assets are significantly less than liabilities. SSA St. No. 2, 6:9-13.

189. If the City were not able to make a complete cash deposit into the pension fund prior to January 1, 2017, no benefit to the City's 2017 budget would inure from the Transaction possibly until 2020. SSA St. No. 2, 7:11-15.

190. The City is undergoing an in-depth financial analysis to determine how to best and most responsibly utilize the net Transaction proceeds. One of the areas of high priority is to help reduce the unfunded liability of the City's pension funds as well as deploying some of the net Transaction proceeds to (i) defease certain of the City's outstanding high interest debt and (ii) make some long-deferred capital improvements. SSA St. No. 2, 11:8-16.

### Municipal Agreements

191. The Authority currently has seven agreements with three municipal corporations, the Boroughs of Taylor, Dickson City, and Moosic, which will be assumed by PAWC upon the closing of the Transaction. PAWC St. No. 1-Supp, 1:9-19.

192. The municipal agreements to be assumed by PAWC are as follows:

- a. Interjurisdictional Agreement Between The Sewer Authority of The City of Scranton and The Borough of Dickson City, Pennsylvania, dated April 14, 2003;
- b. Interjurisdictional Agreement Between The Sewer Authority of The City of Scranton and The Borough of Taylor, Pennsylvania, dated April 9, 2003;
- c. Interjurisdictional Agreement Between The Sewer Authority of The City of Scranton and The Borough of Moosic, Pennsylvania, dated May 13, 2003;
- d. Agreement for the Acceptance, Conveyance, Treatment, and Disposal of Wastewater Received from the Siniawa Enterprises Wastewater Collection System at the Scranton Wastewater Collection System and Wastewater Treatment Plant, as of June 14, 1989;
- e. Agreement for the Acceptance, Conveyance, Treatment, and Disposal of Wastewater Received from the Montage, Inc. Wastewater Collection System at the Scranton Wastewater Collection System and Wastewater Treatment Plant, as of July 24, 2003;
- f. Agreement Providing for Uniformity of Charges Applicable to Residents of Taylor Borough and Residents of the City of Scranton, as of January 12, 1976; and,
- g. Agreement for the Transfer, Conveyance, and Acceptance of the Davis Street, Greenwood Avenue, and Corey Street Sanitary Sewer Conveyance Line from Moosic Borough to the Sewer Authority of the City of Scranton, as of April 16, 2008.

PAWC St. No. 1-Supp.



193. The Joint Applicants filed these seven agreements, along with *pro forma* assignment and assumption agreements (“A&A agreements”), with the Commission on July 1, 2016. The agreements were served on the parties to this proceeding and no party filed a response to the filings.

194. PAWC’s assumption of such municipal agreements will maintain existing relationships with neighboring municipalities, recognize geographic limitations on service, and result in efficiencies. PAWC St. No. 1-Supp., 2:10-15:21.

195. No party has challenged the reasonableness, legality, or validity of the municipal agreements or associated *pro forma* A&A agreements.

#### **Combined Wastewater Services in Pennsylvania**

196. In the City of Scranton today, ownership and responsibility for the maintenance of streets and ownership and management of wastewater systems involving combined sewer systems are in separate and independent entities. The Combined Wastewater System, including the entire combined sewer system from catch basins to the wastewater treatment plant, are currently owned, operated, maintained and controlled by the SSA, which is an independent authority created under the Municipality Authorities Act. Municipal authorities are not “under the control of local government”; they are established under state law as subdivisions of the Commonwealth with their own governing boards, and are deliberately established with significant independence from the municipalities that create the authority. Within SSA’s current service area, streets are owned and maintained by a series of entities, including the City of Scranton, the Borough of Dunmore and the Pennsylvania Department of Transportation (“PennDOT”). PAWC St. No. 6-R, 21:15 - 22:5.

197. The situation in Scranton is not unusual. Throughout Pennsylvania, there are independent wastewater authorities owning and managing combined sewer systems, while the roads and streets in the community are owned and managed by the respective cities, boroughs or townships and PennDOT. PAWC St. No. 6-R, 22:6-10; PAWC Ex. JCE-3.

198. In Combined Wastewater systems, streets are often managed by one entity (the municipality and PennDOT) and the wastewater (*i.e.*, the combination of sewage, industrial wastewater, and stormwater in combined piping systems) by another entity. PAWC St. No. 6-R, 22:11-22. The entities cooperate and coordinate, but there is no legal, engineering, operational, or institutional reason that all functions be performed by one and the same entity. PAWC St. No. 6-R, 22:11-22.

199. Municipal authorities are no more capable of controlling streets and runoff from properties than a regulated privately-owned public utility. PAWC St. No. 6-R, 23:1-2.

200. Certain aspects of stormwater management are within the province of municipalities -- including specifically the exercise of police power regulation over the contribution of stormwater flows from development. But that is also true of other activities that affect wastewater systems, including zoning and building development, and bans on connections of roof gutters to sewers. PAWC St. No. 6-R, 23:2-7.

201. The Pennsylvania Stormwater Management Act imposes duties on municipalities to control and manage runoff from new developments in accordance with watershed stormwater management plans prepared and adopted by counties. Such regulation of stormwater development must be implemented by cities, boroughs and townships irrespective of whether they own or operate any portion of a combined sewer system or even a municipal separate storm sewer system. PAWC St. No. 6-R, 23:8-14.

202. As part of a study Gannett Fleming conducted for SSA on potential rate structures, Gannett Fleming surveyed a representative sample of Combined Wastewater systems across the Commonwealth. PAWC St. No. 6-R, 28:16-21. In all but a very limited number of cases (specifically, the City of Philadelphia), communities across Pennsylvania that have Combined Wastewater systems pay for the capital and operating costs associated with such wastewater systems through sewage fees that are either based on water usage volumes (e.g., \$X per 1000 gallons) or a combination of a flat fee plus a variable fee based on water use. This is how SSA has charged for such wastewater services, though a sewage rate based on relative water usage. At the time of the Gannett Fleming study, only the City of Philadelphia had moved to adoption of a separate stormwater fee based on other factors. PAWC St. No. 6-R, 28:19 through 29:6.

203. Separate fees for stormwater service are not required in Pennsylvania. OCA St. No. 2, 13: 9-10.

204. Only six or seven out of hundreds of stormwater systems across the Commonwealth have separate stormwater fees. OCA St. No. 2, 14:2-3; N.T. 204:23; PAWC St. No. 6-R, 29:7-10.

205. The administrative and technical undertaking necessary to establish stormwater utilities and fees is beyond the capabilities of many communities in Pennsylvania. PAWC St. No. 6-R, 30:9-11.

206. Given the difficulties of establishing separate stormwater fees, many (if not most) combined sewer systems continue to utilize wastewater fees based on water usage as the revenue source to pay for their entire combined sewer wastewater system operations. These include, for example, the City of Boston and New York City, and also the Allegheny County Sanitary Authority ("ALCOSAN") system serving the Pittsburgh region (where fees are imposed based on water usage, with a portion being a flat fee). PAWC St. No. 6-R, 21:3-10.

### **Regionalization of Wastewater Services**

207. Pennsylvania has more than 2,500 local government entities, creating substantial difficulty in implementing statewide policies and practices that ensure future sustainability. PAWC St. No. 6-R, 23:18-20.

208. Regionalization of wastewater systems has been sought in the Commonwealth for several reasons; starting with the fact that water flows downhill and does not honor political boundaries, such that management of wastewater or stormwater makes more sense on a watershed or regional basis. At the same time, regionalization allows for economies of scale across the spectrum of water, wastewater and Combined Wastewater system operations. PAWC St. No. 6-R, 23:20 through 24:2.

# **Appendix B**

## APPENDIX B

### Proposed Conclusions of Law

#### Burden of Proof

1. The Joint Applicants have the burden of proof in this application proceeding. In order to satisfy their burden, they must present evidence found to be of greater weight than the other parties. *Burleson v. Pa. Pub. Util. Comm'n*, 443 A.2d 1373 (Pa. Cmwlth. 1982), *aff'd*, 501 Pa. 433, 461 A.2d 1234 (1983).

2. The Joint Applicants' evidence must be more convincing, by even the smallest amount, than that presented by the other parties. *Se-Ling Hosiery, Inc. v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950).

3. Although the burden of going forward with the evidence may shift back and forth during a proceeding, the burden of proof always remains on the party seeking affirmative relief from the Commission. *Milkie v. Pa. Pub. Util. Comm'n*, 768 A.2d 1217 (Pa. Cmwlth. 2001).

4. The "burden of proof" is composed of two distinct burdens: the burden of production and the burden of persuasion. *Hurley v. Hurley*, 2000 Pa. Super. 178, 754 A.2d 1283 (2000).

5. The burden of production, also called the burden of producing evidence or the burden of coming forward with evidence, determines which party must come forward with evidence to support a particular proposition. This burden may shift between the parties during the course of a hearing. Once the party with the initial burden of production introduces sufficient evidence to make out a *prima facie* case, the burden of production shifts to the opposing party. If the opposing party introduces evidence sufficient to balance the evidence introduced by the party having the initial burden of production, the burden then shifts back to the party who had the initial burden to introduce more evidence favorable to his position. The burden of production goes to the

legal sufficiency of a party's case. *Joint Petition of Metropolitan Edison and Pennsylvania Power Co. for Approval of Smart Meter Technology Procurement and Installation Plan*, Docket No. M-2009-2123950 (Initial Decision of ALJ Colwell, issued Jan. 28, 2010) (subsequent case history omitted).

6. Once the applicant establishes a *prima facie* case by presenting substantial record evidence in support of the proposed action, the burden of production shifts to the opponent. If the opponent presents evidence of co-equal value or weight, the burden of going forward with some additional evidence to rebut the opposing party's evidence then would shift back to the applicant. *Joint Petition of Metropolitan Edison, supra; Burleson, supra; Milkie, supra.*

7. Once the applicant establishes a *prima facie* case and, if contrary evidence is not presented by the opposing party, there is no requirement that the applicant produce additional evidence in order to sustain its burden of proof. *See, e.g., Application of Pa. Power & Light Co.*, Docket Nos. A-110500F0196, *et al.*; 1994 Pa.PUC LEXIS 65 (Oct. 21 1994).

8. A final order of the Commission must be supported by substantial evidence of record. Substantial evidence is that quantum of evidence that a reasonable mind might accept as sufficient to support a conclusion. *See Petition of UGI Penn Natural Gas Inc. for a Finding that Structures to Shelter Pipeline Facilities in the Borough of (Vest Wyoming, Luzerne County, To the Extent Considered To be Buildings under Local Zoning Rules, are Reasonably Necessary for the Convenience or Welfare of the Public*, Docket No. P-2013-2347105 (Opinion and Order entered Dec. 19, 2013), p. 21; *O'Connor v. Pa. Pub. Util. Comm'n*, 582 A.2d 427, 433 (Pa. Cmwlth. 1990).

9. Substantial evidence is more than a mere trace of evidence or a suspicion of the existence of a fact that a party seeks to establish. *Norfolk & Western Ry. Co. v. Pa. Pub. Util. Comm'n*, 489 Pa. 109, 413 A.2d 1037 (1980).

### **Scope and Standard of Review**

10. The Commission may issue a certificate of public convenience upon a finding that “the granting of such certificate is necessary or proper for the service, accommodation, convenience, or safety of the public.” 66 Pa. C.S. § 1103(a) (“Procedure to obtain certificates of public convenience”).

11. A certificate of public convenience is required for “any public utility to begin to offer, render, furnish or supply within this Commonwealth service of a different nature or to a different territory than that authorized . . . .” 66 Pa. C.S. § 1102(a)(1).

12. A certificate of public convenience is required for “any public utility . . . to acquire from . . . any person or corporation, including a municipal corporation, by any method or device whatsoever . . . the title to, or possession or use of, any tangible or intangible property used or useful in the public service.” 66 Pa. C.S. § 1102(a)(3).

13. An applicant for a certificate of public convenience must demonstrate that the transaction will “affirmatively promote the service, accommodation, convenience, or safety of the public in some substantial way.” *City of York v. Pa. Pub. Util. Comm’n*, 449 Pa. 136, 151, 295 A.2d 825, 828 (1972). The “substantial public interest” standard is satisfied by a preponderance of the evidence. *Popowsky v. Pa. Pub. Util. Comm’n*, 594 Pa. 583, 611, 937 A.2d 1040, 1057 (2007).

14. The creation of jobs in the Commonwealth is an affirmative public benefit. *See Joint Application of Peoples Natural Gas Company LLC, Peoples TWP LLC, and Equitable Gas Company, LLC for All of the Authority and the Necessary Certificates of Public Convenience (1) to Transfer All of the Issued and Outstanding Limited Liability Company Membership Interest of*



*Equitable Gas Company, LLC to PNG Companies LLC, (2) to Merge Equitable Gas Company, LLC with Peoples Natural Gas Company LLC, (3) to Transfer Certain Storage and Transmission Assets of Peoples Natural Gas Company LLC to Affiliates of EQT Corporation, (4) to Transfer Certain Assets between Equitable Gas Company, LLC and Affiliates of EQT Corporation, (5) for Approval of Certain Ownership Changes Associated with the Transaction, (6) for Approval of Certain Associated Gas Capacity and Supply Agreements, and (7) for Approval of Certain Changes in the Tariff of Peoples Natural Gas Company LLC, Docket Nos. A-2013-2353647, A-2013-2353649, and A-2013-2353651 (Initial Decision dated November 1, 2013), p. 73 (finding that returning a call center support center to Pennsylvania constituted a public benefit); (adopted by Commission Order entered November 14, 2013); Joint Application for Approval of the Transfer of the Issued and Outstanding Shares of Capital Stock of The Peoples Natural Gas Company, d/b/a Dominion Peoples, currently owned by Dominion Resources, Inc., to Peoples Hope Gas Companies, LLC, and to Approve the Resulting Change in Control of The Peoples Natural Gas Company, d/b/a Dominion Peoples, Docket No. A-2008-2063737 (Order entered Nov. 19, 2009) (finding that creation of 200 call center jobs in Pittsburgh area was a public benefit).*

15. Enhancements to customer service are affirmative public benefits.

16. Regionalization of wastewater systems is an affirmative public benefit.

17. Amelioration of the distressed financial condition of a Pennsylvania municipality is an affirmative public benefit.

18. An applicant for a certificate of public convenience public must demonstrate that it is technically, financially, and legally fit to own and operate the acquired public utility assets. *Seaboard Tank Lines v. Pa. Pub. Util. Comm'n*, 502 A.2d 762, 764 (Pa. Cmwlth. 1985); *Warminster Township Mun. Auth. v. Pa. Pub. Util. Comm'n*, 138 A.2d. 240, 243 (Pa. Super. 1958).

19. The fitness of a currently certificated public utility is presumed. *See e.g., South Hills Movers, Inc. v. Pa. Pub. Util. Comm'n*, 601 A.2d 1308, 1310 (Pa. Cmwlth. 1992).

20. Financial fitness means that the applicant should possess the financial ability to give reliable and respectable service to the public. The applicant should own or should have sufficient financial resources to obtain the equipment needed to perform the proposed service. *Re Perry Hassman*, 55 Pa. P.U.C. 661, 662-63 (1982); *Re: O'Connor*, 54 Pa. P.U.C. 547 (1980); *Merz White Way Tours v. Pa. Pub. Util. Comm'n*, 201 A.2d 446 (Pa. Super. 1964).

21. Technical fitness means that the applicant has the technical capacity to meet a public need in a satisfactory fashion. It must possess sufficient staff, facilities, and operating skills to make the proposed service feasible, profitable, and a distinct service to the public. *Re Perry Hassman*, 55 Pa. P.U.C. 661, 662-63 (1982); *Re: O'Connor*, 54 Pa. P.U.C. 547 (1980); *Pa. Pub. Util. Comm'n v. Pa. Radio Tele. Corp.*, 342 A.2d 489 (Pa. Cmwlth. 1975); *Merz White Way Tours v. Pa. Pub. Util. Comm'n*, 201 A.2d 446 (Pa. Super. 1964).

22. Legal fitness means a public utility's propensity to operate safely and legally. *Seaboard Tank Lines, Inc.*, 502 A.2d at 764. The lack of legal fitness is demonstrated by persistent disregard for, flouting, or defiance of the Code and the Commission's orders and regulations. For applicants that already possess operating authority, past performance should be analyzed to determine whether the applicant has obeyed the Pennsylvania Public Utility Code and Commission regulations, particularly those regulations dealing with public safety. *Re Perry Hassman*, 55 Pa. P.U.C. 661, 662-63 (1982); *Re: O'Connor*, 54 Pa. P.U.C. 547 (1980).

23. A contract between a public utility and a municipal corporation must be filed with the Commission at least 30 days prior to its effective date. 66 Pa. C.S. § 507 ("Contracts between public utilities and municipalities).

24. The Commission will initiate proceedings regarding a contract between a public utility and a municipal corporation only if the Commission has a concern regarding the reasonableness, legality or any other matter affecting the validity thereof. 66 Pa. C.S. § 507.

#### **Commission Jurisdiction Over Combined Wastewater Service**

25. The Pennsylvania Public Utility Code defines “public utility” to include “[a]ny person or corporation now or hereafter owning or operating in this Commonwealth equipment or facilities for . . . Sewage collection, treatment, or disposal for the public for compensation.” 66 Pa.C.S. § 102 (regarding definitions).

26. The Pennsylvania Public Utility Code defines “facilities” as “[a]ll the plant and equipment a public utility, including all tangible and intangible real and personal property without limitation, and any and all means and instrumentalities in any manner owned, operated, leased, licensed, used, controlled, furnished, or supplied for, by, or in connection with, the business of any public utility.” 66 Pa. C.S. § 102 (regarding definitions).

27. The Commission uses the terms “sewage” and “wastewater” interchangeably for purposes of regulation of public utilities. *See* 66 Pa. C.S. § 102 (using term “sewage” in definition of “public utility”); *cf. id.* § 1311(c)(using term “wastewater” in context of combined water and wastewater revenue requirement); *see also* 28 Pa. Bulletin 801 (regarding Commission final rulemaking to change its regulations from use of term “sewer” and “sewage” to use of term “wastewater” in order to make its regulations consistent with current industry standards and establish consistency with other states that currently use term “wastewater”).

28. “Since the Commission is a creature of statute, it has only those powers which are expressly conferred upon it by the Legislature and those powers which arise by necessary

implication.” *Feingold v. Bell*, 383 A.2d 791, 795 (Pa. 1977); *Small v. Horn*, 554 Pa. 600, 772 A.2d 664 (1998); *see also City of Phila. v. Phila. Elec. Co.* 473 A.2d 997 (Pa. 1984); *Grimaud v. Pa. Ins. Dep’t*, 995 A.2d 391 (Pa. Cmwlth. 2010); *Cmwlth., Dep’t of Env’tl. Res. v. Butler County Mushroom Farm*, 499 Pa. 509, 454 A.2d 1 (1982); *Green v. Milk Control Comm’n*, 340 Pa. 1, 16 A.2d 9 (1940).

29. When the language of a statute is free from ambiguity, any further deliberation as to its meaning is unwarranted. *See* Section 1921(b) of the Statutory Construction Act, 1 Pa. C.S. § 1921(b); *Meier v. Maleski*, 670 A.2d 755 (Pa. Cmwlth. 1996), *aff’d*, 549 Pa. 171, 700 A.2d 1262 (1997).

30. When the words of a statute are not explicit, a court attempting to ascertain legislative intent may consider such matters as the occasion and necessity for the statute, the object to be obtained, the consequence of a particular interpretation, and administrative interpretations of the statute. 1 Pa. C.S. § 1921(c); *Meier, supra*.

31. In Pennsylvania, courts have adopted a “strong deference” standard for reviewing agency interpretations of statutes, which they are charge to enforce. *See Scanlon v. Pa. Dep’t of Pub. Welfare*, 739 A.2d 635 (Pa. Cmwlth. 1999).

32. An agency’s interpretation of a statute for which it has enforcement authority will not be reversed unless it is clearly erroneous. *See Armstrong Communications, Inc. v. Pa. Pub. Util. Comm’n*, 768 A.2d 1230 (Pa. Cmwlth. 2001).

33. The Commission is the expert agency charged with enforcing the Pennsylvania Public Utility Code. 66 Pa. C.S. § 501 (“General powers”).

34. Combined Wastewater is “sewage” as such term is used in the Pennsylvania Public Utility Code and, as such, the Commission has jurisdiction over Combined Wastewater service

(including any stormwater component of such combined service). 66 Pa. C.S. §§ 102 (“Definitions”), 501 (“General powers”).

35. Even if the express language of the Pennsylvania Public Utility Code is not deemed to confer jurisdiction upon the Commission over the Combined Wastewater System, the Commission has jurisdiction by necessary implication because of the following factors, *inter alia*: (a) the Legislature’s and the Commission’s interchangeable use of the terms “sewage” and “wastewater”; (b) administrative interpretations (including those of the Pennsylvania Department of Environmental Protection) which define “wastewater” or “sewage” to include Combined Sewer; (c) the need for expert regulatory oversight of Combined Wastewater service; (d) the consequences if the Commission does not exercise jurisdiction over Combined Sewer service (including lack of expert regulatory oversight of such service, discouragement of acquisitions of troubled Combined Wastewater systems in the Commonwealth, limiting the ability public utilities to regionalize wastewater systems, and limiting the ability of public utilities to spread costs over a larger customer base). *See* 66 Pa. C.S. §§ 102, 1311(c); *see also* 28 Pa. Bulletin 801; Pennsylvania Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §691.1 (defining “sewage” very broadly to include any “substance” which contains wastes); The Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P.L. (1965) 1535, *as amended*, 35 P.S. §750.1 *et seq.* (defining “sewage” to include mixed waters that include human and animal wastes); 25 Pa. Code Chapter 94 (defining “sewerage facilities” to include combined sewer systems).

36. The Combined Wastewater System facilities will be used and useful in the provision of public utility service. *See* 66 Pa. C.S. § 102 (defining “facilities” to include all plant and equipment of a public utility used in connection with the business of the public utility)(defining “rate base” to include any property of a public utility used and useful in the public service).

37. Because Combined Wastewater service is a regulated public utility service, PAWC may charge rates for Combined Wastewater service (including the stormwater component of such service). *See* 66 Pa. C.S. §§ 1101 (“Organization of public utilities and beginning of service”), 1301 (“Rates to be just and reasonable”).

38. Because Combined Wastewater service is a regulated public utility service, PAWC is lawfully entitled to make claims in future base rate proceedings to allocate a portion of the revenue requirement for Combined Wastewater service (including any revenue requirement related to the stormwater component of such service) to PAWC’s combined water and wastewater customer base. 66 Pa. C.S. § 1311(c).

**Approval of Certificate of Public Convenience and Pro Forma Tariff Supplement**

39. PAWC’s financial, technical, and legal fitness to own and operate the Combined Wastewater System in the public interest is presumed. *See e.g., South Hills Movers, Inc. v. Pa. Pub. Util. Comm’n*, 601 A.2d 1308, 1310 (Pa. Cmwlth. 1992).

40. The Joint Applicants have nevertheless demonstrated by a preponderance of substantial record evidence that PAWC is financially, technically, and legally fit to own and operate the Combined Wastewater System.

41. The Joint Applicants have demonstrated that the Transaction will produce affirmative public benefits of a substantial nature and is, therefore, in the public interest.

42. The Joint Applicants have satisfied their burden of proof that the Joint Application, as amended, should be approved without modification.

43. The Joint Applicants have satisfied their burden of proof with respect to the requirements for the issuance of a certificate of public convenience evidencing PAWC’s right to

acquire the Combined Wastewater System and to begin service in the applied-for service territory.  
66 Pa. C.S. § 1102(a)(1), 1102(a)(3), 1103.

44. Issues relating to rates are properly reserved for a PAWC base rate proceeding. These issues include, but are not limited to: the phase in of rate increases; an acquisition adjustment; submission of a depreciated original cost of plant-in-service study; a claim for recovery through rates of a Variance Adjustment (as defined in Section 7.07 and Schedule 7.07(d) of the APA); the merits of a claim for recovery of expenses associated with newly-created jobs; and, the merits of a claim for a combined wastewater and water revenue requirement. *Cf.* 52 Pa. Code §§ 69.711, 69.721 (regarding Commission statements of policies of acquisitions of water and wastewater companies) (discussion timing of submission of depreciated original cost of plant-in-service studies in relation to base rate filings).

45. Approval of the Joint Application would not restrict the advocacy of interested parties to, or the determinations of the Commission in, future PAWC base rate proceedings. PAWC Exh. BJK-1 (Section 7.07 of the APA).

46. Commission resolution of rate-related issues in this application proceeding would exceed the scope and standard of review for an application for a certificate of public convenience. 66 Pa. C.S. §§ 1102(a), 1103.

47. Commission resolution of rate-related issues in this application proceeding would potentially violate the due process rights of persons who may have an interest in the rate-related issues by denying notice and an opportunity to be heard to such persons. *See generally Bell Atlantic-Pa., Inc., v. Pa. Pub. Utility Comm'n*, 763 A.2d 440 (Pa. Cmwlth. 2000); *Honey Brook Water Co. v. Pa. Pub. Util. Comm'n*, 647 A.2d 653 (Pa. Cmwlth. 1994).

48. The Joint Applicants have satisfied their burden of proof in demonstrating that the *pro forma* tariff supplement attached to the Joint Applicants' Main Brief as **Appendix D** is supported by substantial record evidence, is just and reasonable, and should be permitted to become effective immediately upon closing of the Transaction. 66 Pa. C.S. §§ 1301 ("Rates to be just and reasonable), 1302 ("Tariffs; filing and inspection").

**Issuance of Certificates of Filing for APA and Other Municipal Agreements**

49. The Joint Applicants have filed the APA and the following agreements with municipal corporations in accordance with Section 507 of the Pennsylvania Public Utility Code, 66 Pa. C.S. § 507:

a. Interjurisdictional Agreement Between The Sewer Authority of The City of Scranton and The Borough of Dickson City, Pennsylvania, dated April 14, 2003 (as will be assigned and assumed by an assignment and assumption agreement which is substantially-similar in all material respects to the *pro forma* assignment and assumption agreement filed with the Commission on July 1, 2016);

b. Interjurisdictional Agreement Between The Sewer Authority of The City of Scranton and The Borough of Taylor, Pennsylvania, dated April 9, 2003 (as will be assigned and assumed by an assignment and assumption agreement which is substantially-similar in all material respects to the *pro forma* assignment and assumption agreement filed with the Commission on July 1, 2016);

c. Interjurisdictional Agreement Between The Sewer Authority of The City of Scranton and The Borough of Moosic, Pennsylvania, dated May 13, 2003 (as will be assigned and assumed by an assignment and assumption agreement which is substantially-similar in all material



respects to the *pro forma* assignment and assumption agreement filed with the Commission on July 1, 2016);

d. Agreement for the Acceptance, Conveyance, Treatment, and Disposal of Wastewater Received from the Siniawa Enterprises Wastewater Collection System at the Scranton Wastewater Collection System and Wastewater Treatment Plant, as of June 14, 1989 (as will be assigned and assumed by an assignment and assumption agreement which is substantially-similar in all material respects to the *pro forma* assignment and assumption agreement filed with the Commission on July 1, 2016);

e. Agreement for the Acceptance, Conveyance, Treatment, and Disposal of Wastewater Received from the Montage, Inc. Wastewater Collection System at the Scranton Wastewater Collection System and Wastewater Treatment Plant, as of July 24, 2003 (as will be assigned and assumed by an assignment and assumption agreement which is substantially-similar in all material respects to the *pro forma* assignment and assumption agreement filed with the Commission on July 1, 2016);

f. Agreement Providing for Uniformity of Charges Applicable to Residents of Taylor Borough and Residents of the City of Scranton, as of January 12, 1976 (as will be assigned and assumed by an assignment and assumption agreement which is substantially-similar in all material respects to the *pro forma* assignment and assumption agreement filed with the Commission on July 1, 2016); and,

g. Agreement for the Transfer, Conveyance, and Acceptance of the Davis Street, Greenwood Avenue, and Corey Street Sanitary Sewer Conveyance Line from Moosic Borough to the Sewer Authority of the City of Scranton, as of April 16, 2008 (as will be assigned and assumed by an assignment and assumption agreement which is substantially-similar in all

material respects to the *pro forma* assignment and assumption agreement filed with the Commission on July 1, 2016).

50. While not required under the filing requirement of Section 507 of the Pennsylvania Public Utility Code, PAWC has demonstrated by substantial record evidence that the APA and other municipal agreements are reasonable, legal, and otherwise valid and that further Commission investigation is not warranted at this time. 66 Pa. C.S. § 507.

51. A certificate of filing should be issued for the APA under 66 Pa. C.S. § 507.

52. Upon PAWC's filing of the executed versions of assignment and assumption agreement which are substantially similar in all material respects to the *pro forma* assignment and assumption agreements associated with the aforementioned municipal agreements, certificates of filing should be issued for such agreements, including the assignment and assumption agreements, under 66 Pa. C.S. § 507.

# **Appendix C**

## APPENDIX C

### JOINT APPLICANTS' PROPOSED ORDERING PARAGRAPHS

#### IT IS ORDERED THAT:

1. The Joint Application, as amended, is approved without modification;
2. The Commission's Secretary shall issue a Certificate of Public Convenience evidencing Pennsylvania-American Water Company's right under Sections 1102(a)(1) and 1102(a)(3), 66 Pa. C.S. §§ 1102(a)(1), (a)(3), to (a) acquire, by sale, substantially all of The Sewer Authority of the City of Scranton's Sewer System and Sewage Treatment Works assets, properties and rights related to its wastewater collection and treatment system to Pennsylvania-American Water Company (the "Transaction"), and (b) begin to offer or furnish wastewater service, which includes Combined Wastewater service, to the public in the City of Scranton and the Borough of Dunmore, Lackawanna County, Pennsylvania;
3. The Commission's Secretary shall issue a Certificate of Filing under Section 507 of the Pennsylvania Public Utility Code, 66 Pa. C.S. § 507, for the Asset Purchase Agreement By and Between The Sewer Authority of the City of Scranton, as Seller, and Pennsylvania-American Water Company, as Buyer, dated March 29, 2015;
4. The Commission's Secretary shall issue Certificates of Filing under Section 507 of the Pennsylvania Public Utility Code, 66 Pa. C.S. § 507, for the following agreements between Pennsylvania-American Water Company and a municipal corporation upon Pennsylvania-American Water Company's filing of executed versions of assignment and assumption agreements which are substantially-similar in all material respects to the *pro forma* assignment and assumption agreements filed with the Commission on July 1, 2016;

a. Interjurisdictional Agreement Between The Sewer Authority of The City of Scranton and The Borough of Dickson City, Pennsylvania, dated April 14, 2003 (as will be assigned and assumed by an assignment and assumption agreement which is substantially-similar in all material respects to the *pro forma* assignment and assumption agreement filed with the Commission on July 1, 2016);

b. Interjurisdictional Agreement Between The Sewer Authority of The City of Scranton and The Borough of Taylor, Pennsylvania, dated April 9, 2003 (as will be assigned and assumed by an assignment and assumption agreement which is substantially-similar in all material respects to the *pro forma* assignment and assumption agreement filed with the Commission on July 1, 2016);

c. Interjurisdictional Agreement Between The Sewer Authority of The City of Scranton and The Borough of Moosic, Pennsylvania, dated May 13, 2003 (as will be assigned and assumed by an assignment and assumption agreement which is substantially-similar in all material respects to the *pro forma* assignment and assumption agreement filed with the Commission on July 1, 2016);

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e. Agreement for the Acceptance, Conveyance, Treatment, and Disposal of Wastewater Received from the Montage, Inc. Wastewater Collection System at the Scranton

Wastewater Collection System and Wastewater Treatment Plant, as of July 24, 2003 (as will be assigned and assumed by an assignment and assumption agreement which is substantially-similar in all material respects to the *pro forma* assignment and assumption agreement filed with the Commission on July 1, 2016);

f. Agreement Providing for Uniformity of Charges Applicable to Residents of Taylor Borough and Residents of the City of Scranton, as of January 12, 1976 (as will be assigned and assumed by an assignment and assumption agreement which is substantially-similar in all material respects to the *pro forma* assignment and assumption agreement filed with the Commission on July 1, 2016); and,

g. Agreement for the Transfer, Conveyance, and Acceptance of the Davis Street, Greenwood Avenue, and Corey Street Sanitary Sewer Conveyance Line from Moosic Borough to the Sewer Authority of the City of Scranton, as of April 16, 2008 (as will be assigned and assumed by an assignment and assumption agreement which is substantially-similar in all material respects to the *pro forma* assignment and assumption agreement filed with the Commission on July 1, 2016).

5. All other approvals required by the Pennsylvania Public Utility Code to carry out the Transaction are granted;

6. Upon closing of the Transaction, PAWC shall issue, to become effective on the same date as issuance, a compliance tariff supplement consistent with the *pro forma* tariff supplement attached hereto as **Appendix D**;

7. All protests filed against the Joint Application are dismissed; and,

8. This docket is marked closed.

# **Appendix D**

Pennsylvania-American Water Company

**RATES FOR RATE ZONE 11** - The rates as set forth below will be in effect for all Scranton Sewer wastewater customers. (C)

**Metered Charges** (Based on Water Usage or Sewage Flows, determined at PAWC's discretion)

All metered customers shall be subject to a monthly service charge per equivalent dwelling unit (EDU).

**A. Residential**

Service charge per month:	\$19.50
Usage charge per 100 gallons:	\$.50
Flat Rate	\$21.53

**B. Commercial - Apartments and Non Residential Customers billed under the residential rate by Scranton Sew Authority**

Service charge per month:	\$19.50
Usage charge per 100 gallons:	\$.50

**C. Commercial Other than Apartments, Industrial and Municipal**

Service charge per month:	\$19.50
Usage charge per 100 gallons	
First 5,000 gallons per month	\$.50
All Over 5,000 gallons per month	\$.775

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Issued:

Effective:



RULES AND REGULATIONS

**PART II: DEFINITIONS**

The following words and phrases, when used in this tariff, shall have the meanings assigned below unless the context clearly indicates otherwise:

1. **Applicant:** A person, association, partnership, corporation, municipality, authority, state or federal governmental agency or other entity who applies to become a customer of the Company in accordance with Part III, Section A, of this tariff.
2. **B.O.D. (Biochemical Oxygen Demand):** The quantity of oxygen, expressed in milligrams per liter, utilized in the biochemical oxidation of organic matter under the standard laboratory procedure for five (5) days at twenty (20) degrees Centigrade. The standard laboratory procedure shall be that found in the latest approved edition of "Standard Methods for the Examination of Water and Sewage" published by the American Public Health Association, the American Water Works Association, and/or the Water Pollution Control Federation. **(C)**
3. **Capacity Reservation fee:** A fee charged by the Company for the allocation of capacity on a per EDU basis.
- 3a. **Combined Sewer:** A sewage collection system which conveys both sanitary sewage and storm water flow. **(C)**
4. **Commission:** The Pennsylvania Public Utility Commission.
5. **Company:** Pennsylvania-American Water Company and its duly authorized officers, agents and employees, each acting within the scope of his authority and employment.
6. **Company Service Line:** Company owned wastewater service line from the sewer main of the Company which connects to the Customer Service Line at the edge of the right-of-way or actual property line.
7. **Customer:** A person or entity who is an owner, occupant or who contracts with the Company for or who takes or receives wastewater collection, treatment and/or disposal service.
8. **Customer Service Line:** Customer owned wastewater service line extending from the end of the Company Service Line or connection to and within the customer's premise.

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Pennsylvania-American Water Company

9. **Domestic Wastewater:** The liquid waste or liquid borne waste: (1) resulting from the non-commercial preparation, cooking and handling of food; (2) consisting of human excrement; or (3) consisting of wastewater, non-commercial laundering water, domestic housekeeping wastewater, and similar types of wastes from sanitary uses, whether generated in residences or sanitary facilities in commercial or industrial facilities, but does not include any storm water or ground water introduced from facilities such as roof leaders, sump pumps, floor drains or industrial wastewater. (C)
10. **Dwelling Unit:** A structure or dwelling intended to be occupied as a whole by one family.
11. **Equivalent Dwelling Units (EDU):** The EDU is a measure based upon the estimated average daily wastewater flow for the type of business, as calculated by the PaDEP Regulation at 25 Pa Code: 73.17 divided by the typical estimated average daily wastewater flow from a current single-family unit. (C)
12. **Garbage:** The solid wastes from domestic cooking and dispensing of food, and from the handling and storage of produce.
13. **Garbage Properly Shredded:** The term "Properly Shredded Garbage", as used herein, shall mean the wastes from the preparation, cooking, and dispensing of food that have been shredded to such degree that all particles will be carried freely under the flow conditions normally prevailing in public sewers, with no particle greater than one-half inch in dimension.
14. **Grinder pump:** Any mechanical or powered device, owned by the Customer, used to grind, macerate or fluidize garbage so that it can be discharged into the Sanitary Sewer.
15. **Industrial/Commercial Wastes:** Any liquid, gaseous or water borne wastes from industrial processes or commercial establishments, as distinct from domestic wastewater.
16. **Industrial/Commercial Waste Permit:** A wastewater permit issued as required by the Company to an Industrial/Commercial user which discharges Industrial/Commercial Waste.

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Pennsylvania-American Water Company

17. **Industrial/Commercial Waste Pretreatment Program:** A program established by the Company that requires industrial and commercial dischargers to monitor, test, treat and control as necessary pollutants in their wastewater prior to discharge into the Sanitary or Combined Sewer. (C)
18. **Line extension (for line extension purposes):** An addition to the Company's main line which is necessary to serve the premises of a Customer. Refer to Section G.
19. **Main:** The Company's pipe, excluding service connections, located in a public highway, street, alley or private right-of-way which pipe is used in transporting wastewater.
20. **Meter:** Any device supplied by the Company or other for the purpose of measuring water consumption or wastewater discharge.
21. **Nonresidential Service:** Wastewater service supplied to a commercial or industrial building, including a hotel or motel, or to a master-metered trailer park or multi-tenant apartment building, or to any customer who purchases wastewater service from the Company for the purpose of resale.
22. **Pretreatment:** The application of physical, chemical and/or biological processes to reduce the amount of pollutants in, or alter the nature of the polluting properties of, an industrial/commercial process wastewater prior to discharging such wastewater into the Sanitary or Combined Sewer. (C)
23. **Public Utility:** Persons or corporations owning or operating equipment or facilities in this Commonwealth for water, electric or wastewater collection, treatment, or disposal for the public for compensation.
24. **Residential Service:** Wastewater service supplied to an individual single-family residential dwelling unit.
25. **Regulatory Agency:** Agencies, including but not limited to the Commission, the Pennsylvania Department of Environmental Protection (DEP), U.S. Environmental Protection Agency (EPA), which have authority over the operations of and/or discharges into and/or from the Company's treatment facilities.

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Issued:

Effective:

Pennsylvania-American Water Company

26. **Sanitary Sewer:** A sewer which primarily carries sanitary wastewater, together with such storm, surface and ground water as may be present.
27. **Storm Sewer:** A sewer which carries surface, ground water, or storm water from the buildings, ground, streets, or other areas.
28. **Storm Water Flow:** Any flow occurring during or following any form of natural precipitation, and resulting from such precipitation, including snowmelt. (C)
29. **Suspended Solids:** Solids that either float on the surface of, or are in suspension in water, wastewater, or other liquids, and which are largely removable by filtration. (C)
30. **Tariff:** All of the service rates, rules and regulations issued by the Company, together with any supplements or revisions thereto, officially approved by the Commission and contained in this document. (C)
31. **Toxic Substances:** Any substances where gaseous, liquid or solid waste which, when discharged to a public sewer in sufficient quantities, will be detrimental to any biological wastewater treatment process, constitute a hazard to human beings or animals, inhibit aquatic life, or create a hazard to recreation in receiving waters of the effluent from a wastewater treatment plant, or as defined pursuant to PL 92500 (Federal Water Pollution Control Act Amendments of 1972) or its amendments. (C)
32. **Wastes:** Any liquid, gaseous, or solid substances or combination thereof which are discarded, leached, or spilled substances or combination thereof including sanitary wastewater but excluding storm-water. (C)
33. **Wastewater:** The liquid and water-carried wastes from dwellings, commercial facilities, industrial facilities and institutions, together with any groundwater, surface water, and storm water that may be present, whether treated or untreated, in the Company's sewer system. (C)

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Issued:

Effective:

**PART III: RULES AND REGULATIONS**

**Section A - Applications for Service**

1. **Service Application Required:** All applications for service must be in writing on a form provided by the Company and signed by the owner or owners of the property to which wastewater collection service will be provided; except that where a lessee of property occupies or uses the property under a lease having a fixed term of more than six (6) months, the lessee may request service as an applicant. The Company may, at its sole discretion, require that a separate contract for service be signed by the applicant.

Non residential service customers which desire to discharge Industrial/Commercial Wastes into the Sanitary Sewer or existing industrial/commercial users which desire to commence operations of a new facility or a new or different process that will affect the characteristics of the wastewater discharging into the Sanitary Sewer, shall notify the Company prior to the commencement of the new or different operations at the facility and provide such other information regarding the proposed discharge as the Company may request, including an application for an Industrial Waste Discharge Permit when deemed necessary.

2. **Change in Ownership or Tenancy:** A new application must be made to the Company upon any change in ownership where the owner of the property is the Customer, or upon any change in the identity of a lessee where the lessee of the property is the Customer. The Company shall have the right to discontinue or otherwise interrupt wastewater collection service upon three (3) days notice if a new application has not been made and approved for the new customer.
3. **Acceptance of Application:** An application for service shall be considered accepted by the Company only upon written approval by the Company. (C)
4. **Temporary Service:** In the case of temporary service for less than a 12-month period, the Company may require the Customer to pay all costs of making the service connection and for its removal after the service has been discontinued, or to pay a fixed amount in advance to cover such expenses. If the actual costs differ from the estimate, the Applicant will pay to the Company any excess amount due or the Company will refund to the Applicant any excess amount paid.

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**Issued:**

**Effective:**

Pennsylvania-American Water Company

**Section F- Wastewater Control Regulations**

**1. General Prohibitions:**

- (a) No storm water from pavements, area ways, runoff basins, roof runoff water, foundation drains, subsurface drains, water from springs, cooling water, basement sump pumps, unpolluted industrial or commercial process water or other sources shall be admitted to the Company Sanitary Sewer.
- (b) The discharge of garbage to the Sanitary or Combined Sewer is expressly prohibited. Properly shredded biodegradable garbage may be discharged into the Sanitary or Combined Sewer with no particle greater than one-half inch in dimension. **(C)**

**2. Sampling and Analysis:**

- (a) All measurements, tests and analyses of the characteristics of waters and wastes to which reference is made in the Company's rules may be determined in accordance with the latest DEP and EPA approved editions of "Standard Methods for the Examination of Water and Wastewater" under Act 252 as prepared by DEP and approved and published jointly by the American Public Health Association, the American Water Works Association, and/or the Water Pollution Control Federation or other reference sources specified by regulatory agency requirements, such as "Methods for Chemical Analysis of Water and Wastes," U.S.E.P.A. 1974 or its subsequent updated version.
- (b) All measurements, test, inspections and analyses deemed by the Company to be necessary under this Section or any other part of the Rules and Regulations of the Company, shall be done by the Company or its agents, employees or contractors. If the measurements, test, inspections and/or analyses determine that a customer has created a situation which is in violation of any statute, ordinance, rule or regulation then the customer shall be required to pay all costs incurred in order to measure, test, inspect, analyze and remedy the situation. Otherwise, the costs involved are to be borne by the Company. Costs assessed against a Customer pursuant to this Section shall be in addition to any other fees charged by the Company. The costs shall be payable within 30 days of presentation of a bill for such costs by the Company to the Customer(s).

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- (c) Where the Company deems it advisable, it may require any customer discharging wastes to install and maintain, at his or her own expense, in a manner approved by the Company or its representative, a suitable device to continuously measure and record the pH of the wastes so discharged.
- (d) In the event any person, firm or corporation producing any industrial wastes otherwise excluded from the Sanitary or Combined Sewer, desires to discharge the same into any portion of the Company's sanitary or Combined sewer system, the Company may at its option, consent to such discharge at a charge in accordance with the Company's established Schedule of Rates, Surcharges and discounts applicable to such Industrial/Commercial Wastes, as provided in Section K.8 entitled "Surcharge for Industrial Wastes." Such consent may be made contingent upon the applicant providing and maintaining apparatus for regulating the rate of discharge and/or treating the wastes at his or its expense prior to discharge as the Company may deem necessary. Such consent will stipulate the location and type of metering device to be used for measuring the quantity of such wastes discharged to the sewage system, and will also stipulate the method and frequency of sampling such wastes. Each analysis will be made on a composite of twenty-four (24) hourly (or a larger number of more frequent) samples of wastes collected over a singly twenty-four (24) hour day; the volume of each of the samples will be proportional to the rate of Waste flow. The average suspended solid content or acid equivalent of the wastes for the quarter will be calculated in such a manner as to be as truly representative of the entire quarterly flow and composition of the waste as possible. Particular care will be exercised to insure that the difference in character or composition of the wastes during the week ends or nights when industrial operations are at a minimum, are properly considered in arriving at quarterly averages. (C)

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3. **Prohibited Discharges:** The Company reserves the right to refuse connection to its Sanitary or Combined Sewer and/or to compel the discontinuance of the use of any system, or to require pre-treatment of Wastes by any Customer, in order to prevent the discharge of any Wastes to the Sanitary or Combined Sewer system which may be deemed harmful to the Sanitary or Combined Sewer system, or to have an adverse effect on the sewage treatment processes. Except from the written consent of the Company, there shall be excluded from the sewage system but not limited to, any wastes having suspended solids and ammonia concentrations in excess of effluent limits set forth in industrial/commercial waste permits and Wastes having any or all of the following characteristics: (C)
- (a) Wastes containing any gasoline, naphtha, fuel, oil or other liquids, solids or gases which by reason of their nature or quality may cause fire or explosion or be in any other way injurious to persons, the structures of the wastewater system or its operation.
  - (b) Wastes having a temperature in excess of 120 degrees F. or less than 32 degrees F that enters the Sanitary or Combined Sewer or Wastes entering the plant that increase the temperature of the Wastewater at the headworks of the plant to exceed 104 degrees F.  
(C)
  - (c) Wastes having a pH lower than 6.0 or higher than 9.0, or having any corrosive property capable of causing damage or hazards to structures, equipment or personnel of the wastewater system.
  - (d) Wastes containing any noxious or malodorous gas or substance that either singly or by interaction with sewage or other wastes is likely in the opinion of the Company to create a public nuisance or hazard to life or prevent entry to sewers for their maintenance and repair.
  - (e) Wastes containing ashes, cinders, sand, mud, straw, shavings, metal, glass, rags, feathers, tar, plastics, wood, hair, chemical or paint residues, greases, paunch, manure, dairy products, cotton, wool, plastic or other fibers, lime, slurry or any other solid or viscous material of such character or in such quantity as in the opinion of the Company may cause an obstruction to the flow in sewers or otherwise interfere with the proper operation of the sewer system.
  - (f) Wastes containing insoluble, non-flocculent substances having a specific gravity in excess of 2.65.

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- (g) Wastes containing soluble substances in such concentrations as to cause the specific gravity to be greater than 1.1.
- (h) Wastes containing any substances which may affect the effluent and may cause violation of the National Pollutant Discharge Elimination System Permit.
- (i) Wastes containing other matter detrimental to the operation of a sewage treatment plant or Sanitary or Combined Sewers causing erosion, corrosion or deterioration in sewers, equipment and structures of a sanitary or sewage treatment plant. (C)
- (j) Wastes containing fats, wax, tar, grease or oil of petroleum origin, whether emulsified or not, in excess of one hundred mg/L, or petroleum oil, non biodegradable cutting oil or petroleum products of mineral oil origin in amounts that will cause interference or pass through at the wastewater treatment facilities.
- (k) Wastes containing an average concentration of oils and greases, of the Hydrocarbon variety or any Freon extractables which are not biodegradable in excess of 10 mg/L.
- (l) Wastes containing more than 10 mg/L of any of the following gases: hydrogen sulfide; sulfur dioxide; nitrous oxide; or any of the halogens.
- (m) Wastes containing a toxic or poisonous substance, in a sufficient quantity to injure or interfere with any sewage treatment process, constitute a hazard to humans or animals or create any hazard in the sewer system operation or exceed the limitation set forth in a National Categorical Pretreatment Standard. Toxic pollutants or substances shall include but not limited to Wastewater containing cyanide, chromium, cadmium, mercury, copper, nickel, or materials listed as hazardous materials. (C)
- (n) Any waste containing toxic substances in quantities sufficient to interfere with the biochemical/biological processes of the sewage treatment works or that will pass through the sewage treatment works and exceed the state and/or federal requirements in respect thereof.
- (o) Any waste containing radioactive isotopes or other radioactive materials.

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- (p) Sludges resulting from the treatment of concentrated solutions that are not acceptable for discharge to the Sanitary or Combined Sewer.
- (q) Waste introduced into the Sanitary or Combined Sewer with any pollutants which cause pass through or interference; whether or not the customer is subject any other national, state, or local pretreatment standards or requirements. (C)
- (r) Waste containing any color which may not be removed in the wastewater treatment process. (C)

Effluent limitations promulgated as categorical standards, 40 C.F.R. Chapter 1, Subchapter N and 40 C.F.R. 403.6 shall apply in any instance where they are more stringent than those in this section. (C)

The local limits in this section may be supplemented with more stringent limitations if the Company determines that the limitations in subsection (a) through (p) above may not be sufficient to protect the operation of the sewerage system or to enable the water pollution control plant to comply with water quality standards or effluent limitations specified in the Company's NPDES permit. (C)

- 4. **Disposal of Wastes From Septic Tanks and Cesspools:** No person shall dispose of wastes from septic tanks, cesspools, or other such sources of sanitary sewage to the Company's Sanitary or Combined Sewer, except as designated by the Company. (C)
- 5. **Penalties:** The Company reserves the right to terminate water and/or wastewater service for violation of any provision of these regulations, subject to PUC rules and regulations.
- 6. **Damages:** In the event of any damage to the Company's wastewater system caused by a Customer, or a Customer's representative, such damage shall be immediately reported to the Company and said Customer shall reimburse the Company for the costs of such repairs, testing, consulting and all other costs associated with the damage.

Any user violating any of the provisions of these Rules and Regulations shall become liable to the Company for all expenses, losses, or damages occasioned by the Company by reason of such violation, whether incidental or consequential.

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**Section S. Industrial Pretreatment Program (Scranton-Area) Compliance**

This Section applies to Industrial customers served under Rate Zone 11 of this tariff. All such customers shall comply with the "Industrial Pretreatment Program (Scranton-Area)" ("IPP-S") as approved by the Pennsylvania Department of Environmental Protection and as may be amended from time to time. It is the purpose of this Section to provide for the recovery of costs caused by such customers for the implementation, administration, and enforcement of the IPP-S, and for the additional costs for treatment of wastewaters from such customers who have loadings and characteristics that are in excess of Domestic Sewage as defined by the IPP-S. Pursuant to the IPP-S, IPP-S fees are set by this tariff. IPP-S fees are separate from and in addition to all other rates chargeable by the Company under this tariff.

The fees as set forth in Schedule IPP-S-1 below will be in effect for customers subject to the IPP-S. Terms are as defined by IPP-S.

**SCHEDULE IPP-S-1****1.1. General Fees**

- 1.1.1. IWDP Application Fee: \$1,000.00
- 1.1.2. IWDP Transfer/Modification/Renewal Fee: \$250.00
- 1.1.3. Facility Inspection Fee: \$250.00 per inspection
- 1.1.4. Monitoring Report Review Fee: \$250.00 per monitoring report
- 1.1.5. Sampling and Analysis Fee: Actual cost of sampling and laboratory analysis plus 25% to cover administrative costs.
- 1.1.6. Accidental Discharge, Slug Control, and/or Monitoring Fee: Actual cost of response to accidental discharges or discharges of slugs loads, including but not limited to the costs incurred for any additional treatment or other actions required to manage such discharges, monitoring and response to such discharges, correction of any resulting contamination or other impacts to the Treatment Works, including the Collection System and Treatment Plant.

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1.1.7. Compliance and Enforcement Fee - Administrative and Legal: Actual cost incurred by the Company for investigation and actions to address a User's non-compliance with the terms of this IPP or any IWDP.

1.1.8. Damage Repair: Actual cost for cleaning, repair, replacement and/or correction of any damage to the Treatment Works, including the Collection System and the Treatment Plant, caused or contributed to by a User's discharge.

## 1.2. Specific Fees

1.2.1. Industrial Loading Fee - applicable on a quarterly basis to discharges with loadings above typical Domestic Sewage loadings up to but not exceeding any applicable Local Limit or IWDP limit, based on sampling and analysis by the Company and sampling required to be reported by the User under an IWDP:

Quarterly Fee (\$) =  $Q \times \{((\text{BOD5 Actual} - \text{BOD5 Domestic}) \times \text{BOD5 Cost Factor}) + ((\text{NH3-N Actual} - \text{NH3-N Domestic}) \times \text{NH3-N Cost Factor}) + ((\text{TSS Actual} - \text{TSS Domestic}) \times \text{TSS Cost Factor})\}$

Where:

BOD5 Actual = actual concentration of BOD5 in mg/l as measured by the Company or the Industrial User

BOD5 Cost Factor = Treatment cost for BOD5 for the system = 0.0045

BOD5 Domestic = 330 mg/l, the typical concentration in Domestic Sewage

NH3-N Actual = actual concentration of NH3-N in mg/l as measured by the Company or the Industrial User

NH3-N Cost Factor = Treatment cost for NH3-N for the system = 0.0063

NH3-N Domestic = 23 mg/l, the typical concentration in Domestic Sewage

Q = Total flow for the quarter measured in thousand gallons

TSS Actual = actual concentration of TSS in mg/l as measured by the Company or the Industrial User

TSS Cost Factor = treatment cost for TSS for the system = 0.0028

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TSS Domestic = 350 mg/l, the typical concentration in Domestic Sewage

1.2.2. Excess Loading Fee - applicable to discharges with loadings that exceed a Local Limit or IWDP limit:

If in any monthly period, the loading of BOD5, NH3-N, or TSS exceeds a Local Limit or IWDP limit, then for the applicable parameter, in calculating the Industrial Loading Fee under §1.2.1, the BOD5 Cost Factor, NH3-N Cost Factor and/or TSS Cost Factor, applicable to the total loading of that parameter will be 125% of the value set forth in §1.2.1 to compensate for the additional administrative, oversight and management costs associated with managing such excessive loadings.

1.2.3. Special Discharge Fee - applicable to discharges with loadings or concentrations that exceed a Local Limit or IWDP limit and that impact sludge handling or disposal methods and costs, necessitate acquisition of nutrient credits, result in damages to the facility, or require extraordinary measures:

Fee = Actual cost incurred by the Company, including but not limited to:  
(1) additional costs of managing impacted sludge (including costs related to use of alternative disposal facilities, additional monitoring, etc.),  
(2) costs of acquiring nutrient credits to meet NPDES Permit cap limits;  
(3) costs of repairs to and restoration of the Treatment Works, including the Collection System and Treatment Plant; or (4) costs of implementing any other measures required to control, manage and address such excessive loadings or concentrations.

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