

COMMONWEALTH OF PENNSYLVANIA



OFFICE OF CONSUMER ADVOCATE

555 Walnut Street, 5th Floor, Forum Place
Harrisburg, Pennsylvania 17101-1923
(717) 783-5048
800-684-6560

FAX (717) 783-7152
consumer@paoca.org

July 27, 2016

Rosemary Chiavetta, Secretary
PA Public Utility Commission
Commonwealth Keystone Bldg.
400 North Street
Harrisburg, PA 17120

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

Dear Secretary Chiavetta:

Attached for electronic filing please find the Office of Consumer Advocate's Reply Brief in the above-referenced proceeding.

Copies have been served per the attached Certificate of Service.

Respectfully submitted,

/s/ Erin L. Gannon

Erin L. Gannon

Senior Assistant Consumer Advocate

PA Attorney I.D. # 83487

E-Mail: EGannon@paoca.org

Enclosures

cc: Honorable David A. Salapa, ALJ
Honorable Steven K. Haas, ALJ

Certificate of Service

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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 : Docket No. A-2016-2537209
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.

I hereby certify that I have this day served a true copy of the following document, the Office of Consumer Advocate's Reply Brief, upon parties of record in this proceeding in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant), in the manner and upon the persons listed below:

Dated this 27th day of July 2016.

SERVICE BY E-MAIL AND INTER-OFFICE MAIL

Allison C. Kaster, Esquire
Gina L. Lauffer, Esquire
Bureau of Investigation & Enforcement
Pennsylvania Public Utility Commission
400 North Street
Harrisburg, PA 17120

SERVICE BY E-MAIL AND FIRST CLASS MAIL, POSTAGE PREPAID

Sharon Webb, Esquire
Office of Small Business Advocate
Suite 202, Commerce Building
300 N. Second Street
Harrisburg, PA 17101

Alan Michael Seltzer, Esq.
John F. Povilaitis
Buchanan Ingersoll & Rooney PC
409 North Second Street, Suite 500
Harrisburg, PA 17101

David P. Zambito, Esq.
D. Troy Sellars
George A. Bibikos
Cozen O'Connor
17 North Second Street, Suite 1410
Harrisburg, PA 17101

Susan Simms Marsh, Esquire
Pennsylvania American Water
800 West Hersheypark Drive
Hershey, Pennsylvania 17033

SERVICE BY FIRST CLASS MAIL, POSTAGE PREPAID

Jeffrey J. Belardi, Esquire
The Sewer Authority of the
City of Scranton
410 Spruce Street, 4th Floor
Scranton, PA 18503

Paul J. Walker, Esquire
The Sewer Authority of the
City of Scranton
205 North Washington Ave. #1
Scranton, PA 18503

/s/ Erin L. Gannon

Erin L. Gannon
Senior Assistant Consumer Advocate
PA Attorney I.D. # 83487
E-Mail: EGannon@paoca.org

Christine Maloni Hoover
Senior Assistant Consumer Advocate
PA Attorney I.D. # 50026
E-Mail: CHoover@paoca.org

Counsel for
Office of Consumer Advocate
555 Walnut Street
5th Floor, Forum Place
Harrisburg, PA 17101-1923
Phone: (717) 783-5048
Fax: (717) 783-7152
224316

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

REPLY BRIEF OF THE
OFFICE OF CONSUMER ADVOCATE

Christine Maloni Hoover
Senior Assistant Consumer Advocate
PA Attorney I.D. # 50026
E-Mail: CHoover@paoca.org

Erin L. Gannon
Senior Assistant Consumer Advocate
PA Attorney I.D. # 83487
E-Mail: EGannon@paoca.org

Counsel for:
Tanya J. McCloskey
Acting Consumer Advocate

Office of Consumer Advocate
555 Walnut Street
5th Floor, Forum Place
Harrisburg, PA 17101-1923
Phone: (717) 783-5048
Fax: (717) 783-7152
Dated: July 27, 2016

TABLE OF CONTENTS

I. INTRODUCTION.....	1
II. ARGUMENT	3
A. Stormwater Service Cannot Be Shoehorned into Wastewater Service in Order to Avoid the Results of the Transaction Negotiated by the Joint Applicants.....	3
1. The Joint Applicants’ Transaction Depends on the Commission Authorizing a Privately-Owned Utility to Charge Non-Jurisdictional Costs to Jurisdictional Customers.....	3
2. Stormwater Service Is Not Wastewater Service.....	4
3. There Is No Basis to Imply Commission Jurisdiction Over Stormwater Service.	7
4. There Is No Functional Nexus to Support PUC Ancillary Jurisdiction Over Stormwater Service.	8
5. City of Lancaster Supports a Determination in This Case That Stormwater Service Is Distinct from Wastewater Service.....	10
6. Policy Reasons Why Stormwater Service Should Not Be Under PUC Jurisdiction....	12
B. The Commission Cannot Approve an Acquisition That Is Not In the Public Interest.	14
1. There Is No Affirmative Benefit for Existing PAWC Customers, Only Detriments...	15
2. There Is No Evidence That PAWC Will Perform the Improvements at Less Cost or More Quickly; The Mere Assertion That There Will Be “Economies of Scale” or That Service Will Be “Enhanced” Is “Speculative” and Does Not Establish an Affirmative Benefit.	17
3. SSA Rates May Benefit in the Short-Term, But Not In Years 11 to 13or Thereafter..	19
4. Benefits to the City of Scranton Are Not Determinative of the Public Interest.	21
C. If the Commission Disregards the OCA’s Position and Decides that Stormwater Is Jurisdictional, and That There Are Affirmative Benefits, Certain Protections Must Be in Place.	22
1. Stormwater Costs Must Be Separately Allocated.	23

a.	Setting Stormwater Rates and Identifying the Customers.	27
b.	Separate Stormwater Fees Are Not an Anomaly.	29
c.	Implications of a Stormwater Fee versus a Tax.....	30
d.	Charging Municipalities or a Municipal Authority for Stormwater Service Is a Viable Option As Is a Stormwater Authority.	32
2.	PAWC Cannot Ask For Pre-Approval of Certain Rate Matters Raised by the APA and Exclude Others That Have a Bearing on Whether the Transaction Should Proceed.	35
III.	CONCLUSION	38

APPENDIX A:

Excerpt from Recommended Decision

Petition of United Water Resources, Inc., Docket No. P-900453 (Nov. 20, 1990)

TABLE OF AUTHORITIES

	Page(s)
Cases	
<u>City of York v. Pa. P.U.C.</u> , 449 Pa. 136, 295 A.2d 825 (1972)	14
<u>Middletown Twp. v. Pa. P.U.C.</u> , 85 Pa. Commw. 191, 482 A.2d 674 (1984)	15, 21
<u>City of Lancaster v. Pa. P.U.C.</u> , 2006 WL 84181478 (Pa. Commw.).....	10-12
 Administrative Decisions	
<u>Application of CMV Sewage Co., Inc.</u> , 2008 Pa. PUC LEXIS 950	17, 21-22
<u>Application of North Heidelberg Water Co.</u> , 2010 Pa. PUC LEXIS 919	17-18
<u>Pa. P.U.C. v. City of Lancaster Sewer Fund</u> , Docket No. R-2012-2310366, Order (Apr. 18, 2013).....	11
<u>Pa. P.U.C. v. City of Lancaster Sewer Fund</u> , Docket No. R-0004986, Remand Order (Sept. 15, 2008).....	10, 11
<u>Pa. P.U.C. v. Pennsylvania-American Water Co.</u> , 2013 WL 6835107 (PUC).....	24-25
<u>Petition of United Water Resources, Inc. and North East Water, Inc. for Declaratory Order Approving the Following Financial and Ratemaking Request</u> , Docket No. P-900453, Recommended Decision (Nov. 20, 1990).....	26-27
<u>Petition of United Water Resources, Inc. and North East Water, Inc. for Declaratory Order Approving the Following Financial and Ratemaking Request</u> , 1991 Pa. PUC LEXIS 32	27
<u>Re Pittsburgh Telecomm., Inc.</u> , 64 Pa. PUC 257 (1987)	8-9

Statutes

32 P.S. § 680.1, et seq.7
32 P.S. § 680.45
35 P.S. § 691.2017
35 P.S. § 691.2027
35 P.S. § 691.4017
53 Pa. C.S. § 5607(a)(18).....5, 30
53 Pa. C.S. § 5607(d)(34)30
66 Pa. C.S. § 102.....1, 7
66 Pa. C.S. § 1102.....1
66 Pa. C.S. § 1301, et seq.8
66 Pa. C.S. § 1311(c) *passim*
33 U.S.C. §§ 1251-13877

Other

2011 Legislative Journal – House 1956 (Oct 4, 2011)23

I. INTRODUCTION

The Office of Consumer Advocate (OCA) submits this Reply Brief in response to the Brief of Pennsylvania-American Water Company (PAWC) and the Sewer Authority of the City of Scranton (SSA or the Authority) (together Joint Applicants). The OCA's Main Brief (OCA Brief) contained a comprehensive discussion of the evidence and its position on all issues, thus the OCA will respond to those matters raised by the Joint Applicants that were not previously addressed or that require clarification.

The Public Utility Code does not authorize the provision of stormwater service by a regulated public utility. 66 Pa. C.S. §§ 102, 1102. The fact that stormwater service and wastewater service are provided in a combined system does not make them a single service subject to Commission regulation; they are fundamentally and functionally distinct. Stormwater is rain and snow or ice melt that is collected and drained to prevent flooding of streets and property. OCA St. 1 at 5-6; OCA St. 2 at 8-9. Wastewater is "used" water from homes and businesses that is collected so that it can be treated before it is returned to streams and creeks. In Pennsylvania, only municipalities and municipal authorities own and operate stormwater systems and combined stormwater/wastewater systems. This reflects that stormwater management is tied inextricably to land use and other municipal functions like street cleaning, solid waste collection and green infrastructure initiatives. OCA St. 1 at 12-13; OCA Exh. TLF-5; OCA St. 2 at 9-10. For these legal and policy reasons, the Joint Applicants' request that the Commission expand its jurisdiction to include stormwater service must be denied.

In addition, the Joint Applicants have not shown the proposed acquisition of SSA's combined stormwater/wastewater system will provide affirmative public benefits. The Joint Applicants are proposing that PAWC's existing wastewater and water customers subsidize \$400

to \$700 million in costs in order to acquire 31,000 wastewater customers who are already PAWC water customers. SSA customers could face severe increases after the first 10 years post-transaction if they are moved to PAWC system rates because of the rate provision in the Asset Purchase Agreement that shifts costs to existing customers during the first 10 years. The harms of this transaction outweigh any alleged benefit provided by the agreement between PAWC and the Authority. To support this transaction, the Joint Applicants want the Commission to analyze the rate impact of the transaction from a 100-year perspective. An analysis that extends for 100 years for such a transaction is unprecedented and would raise significant intergenerational inequities, particularly given the lives of the acquired facilities and the nature of the transaction's proposed treatment in rates. The OCA submits that the Commission should deny the Joint Application because it is not in the public interest.

If the Commission disagrees and determines that it will regulate stormwater service in combined systems and that the proposed transaction provides substantial affirmative benefits, the OCA submits that it must condition its approval by requiring PAWC to develop separate rates and charges for the stormwater service to responsible parties. In addition, the Commission must condition its approval to prevent PAWC's existing customers from subsidizing the purchase price and mandated stormwater-related capital improvement costs.

II. ARGUMENT

A. Stormwater Service Cannot Be Shoehorned into Wastewater Service in Order to Avoid the Results of the Transaction Negotiated by the Joint Applicants.

1. The Joint Applicants' Transaction Depends on the Commission Authorizing a Privately-Owned Utility to Charge Non-Jurisdictional Costs to Jurisdictional Customers.

The Joint Applicants argue that if the Commission does not expand the definition of wastewater service to include, for the first time, stormwater service, it will produce a series of “bad results.” JA Brief at 35-38. PAWC points out that it could have stranded costs for stormwater service, rates for SSA customers might increase significantly if they have to pay the costs associated with their stormwater service and, if they do pay the full costs of the stormwater system, PAWC or its wastewater customers are at risk to pay an additional purchase price of \$104 million or more. PAWC St. 4-R at 4 at 3-4, 21-22; Tr. 115-16; OCA St. 2 at 28; OCA Brief at 46-47. As such, PAWC concludes that “[t]his transaction would not be in the public interest.”¹ Id.; PAWC St. 4-R at 6, 20-21; PAWC Exh. BJG-1. The OCA agrees. But more to the point, by adhering to the statutory definition of public utility service and denying the Application and transaction as proposed, these potential consequences need not result. See OCA Brief at 29-40; infra Section II.B.

In either case, the Joint Applicants have the discretion to negotiate a different arrangement that is consistent with the Public Utility Code and provides the necessary affirmative benefits. PAWC Exh. BJG-1, Att. F, § 14.01(g). As the Joint Applicants acknowledge, “perhaps [PAWC could] collect stormwater fees as a billing agent for a yet to be created municipal stormwater authority.” JA Brief at 36 (citing PAWC St. 4-R at 20-21). Yet,

¹ Interestingly, while the Joint Applicants seek to use the cost-spreading mechanism of Section 1311(c), they specifically propose not to apply the DSIC mechanism to the SSA customers until 2019. PAWC St. 4-R at 2; see JA Brief at 37 (calling the OCA and I&E’s objection to pre-approval of 1311(c) rate treatment of Scranton’s stormwater costs “anti-Act 11”).

the Joint Applicants did not negotiate that deal but chose to present a transaction to the PUC that contains elements beyond the Commission's jurisdiction and provides no affirmative public benefit.

It is important to recognize that the Joint Applicants put the onus of ensuring affirmative benefits on the Commission, claiming that the Commission's determination that it does not have jurisdiction over stormwater service will remove the benefits from the transaction. JA Brief at 35-38. The Joint Applicants, however, elected to structure the transaction in a way that is inconsistent with the Public Utility Code.² Their actions, rather than the actions of the Commission or the parties pointing out the jurisdictional issues and lack of affirmative benefits, rendered the transaction unworkable.

2. Stormwater Service Is Not Wastewater Service.

It is a fallacy to suggest that SSA's stormwater/wastewater system provides only "wastewater" service because stormwater must be treated after it combines with wastewater. The physical combining of facilities does not make the stormwater service cease to exist – the combined system provides the same stormwater service as the stormwater-only system that serves the MS4 areas of Scranton and Dunmore. OCA St. 1S at 3.

² OCA St. 2 at 35-36. The Authority had options other than the sale of its combined stormwater/wastewater system to PAWC. See PAWC St. 4-R at 20-21; Tr. 95-96.

Q. Mr. Barrett, would you please respond to Mr. Rubin's claims that the Authority had options other than the sale of the Authority's assets as a vehicle to obtain additional funds for the benefit of the City of Scranton, Borough of Dunmore?

A. The Scranton Sewer Authority had multiple options. We went through a request for proposal process that lasted for approximately a year or so. The potential proposers were offered the opportunity to submit a proposal based on an operation and maintenance situation. The second opportunity was a lease/concession alternative. And the third one was an outright purchase of the asset.

Tr. 149 (SSA witness Barrett). SSA received multiple bids for each type of arrangement and received them from four different parties, whom he characterized as "some of the largest companies in the country, and if not the world. I mean they were very top-rated companies." Id. at 150.

The Joint Applicants argue, nonetheless, that the definitions of “wastewater” and “facilities” in the Public Utility Code are broad and, therefore, it is appropriate to interpret wastewater to include stormwater service and for wastewater rates to include costs associated with the facilities that provide stormwater service. JA Brief at 15-16. As discussed in the OCA’s Main Brief, while “sewage” is not defined in the Public Utility Code, the common industry usage of sewage and wastewater do not include stormwater. OCA Brief at 12-13; OCA St. 1 at 6-8; OCA St. 1S at 4. Thus, where the General Assembly has intended to include stormwater in the types of service an entity can provide, it has amended the statute to add “stormwater” where the existing statute already authorized the provision of “sewer” service. See, e.g., 53 Pa. C.S. § 5607(a)(18) (Municipal Authorities Act); 32 P.S. § 680.4 (Pennsylvania Storm Water Management Act).

The Joint Applicants also argue that all of the facilities that comprise the CSS are used in providing wastewater services. JA Brief at 17-18. There is overlap in categories of plant utilized to provide the two services but “the size of a combined sewer usually is only slightly larger than that required for storm flow alone.” OCA St. 1 at 5. SSA’s stormwater/wastewater system has mains that are 78 inches in diameter.³ PAWC St. 6-R at 10. In addition to size, another key differential in the plant used to provide stormwater versus wastewater service is the inlets. The Authority has 10,000 to 14,000 stormwater catch basins and inlets that are intended to capture stormwater and introduce it into the SSA combined system. OCA St. 1 at 9. In wastewater systems regulated by the PUC, stormwater connections are prohibited. OCA St. 1S at 4-5. The fact that the combined system ascribes a second use to the catch basins, *i.e.* attaching a hood to trap gasses emanating from wastewater in the lines, does not change the fact that the catch basins

³ By way of comparison, the trunk collection main in PAWC’s recently expanded Coatesville wastewater (only) system is 42 inches in diameter, or three feet smaller. PAWC St. 3 at 5.

would not be connected to the wastewater lines in the first place, but for the provision of stormwater service. JA Brief at 18; PAWC St. 6-R at 12.

Also exclusive to combined stormwater/wastewater systems are “combined sewer outfalls” or CSOs. PAWC Exh. JCE-4 at 6. These CSOs do not exist in wastewater systems or stormwater systems, only in combined stormwater/wastewater systems. Id. By design, they allow for the discharge of untreated wastewater into receiving waters. The SSA system has eighty permitted CSOs. OCA St. 1 at 3. The projects and investment required by the Nine Minimum Controls Plan (NMCP) and Long Term Control Plan (LTCP) are attributable to the CSOs. PAWC St. 2 at 7; PAWC Exh. DRK-1. As discussed in the Joint Legislative Committee CSO report, the costs of addressing CSOs are substantial. PAWC Exh. JCE-4 at 10 (2001 preliminary estimate of \$4 billion to remedy the CSO problem in Pennsylvania). For the Scranton system alone, the Authority estimated that the NMC and LTCP would cost \$140 million over 25 years. PAWC St. 2 at 7, 10. It bears repeating that the compliance requirements and costs derive from the provision of stormwater service through a combined stormwater/wastewater system.⁴ PAWC St. 2 at 7; OCA St. 1 at 3.

Further, as discussed in the OCA’s Main Brief and the testimony of OCA witnesses Terry Fought and Scott Rubin, the control and management of CSOs is intertwined with other municipal services. Operating the combined stormwater/wastewater system would require PAWC to take responsibility for the majority of street sweeping and catch basin cleaning in the City of Scranton and the Borough of Dunmore. OCA St. 1 at 12-13 (citing OCA Exh. TLF-8 and TLF-9); OCA St. 2 at 10, 20-21. PAWC does not provide street sweeping and catch basin cleaning in any other wastewater or water service areas. OCA St. 1 at 13.

⁴ The Joint Legislative Committee CSO report does not address privately-owned utility ratepayers as a possible funding source and no privately-owned utilities participated in the hearings. PAWC Exh. JCE-4.

Thus, the sizing of the CSS to provide for stormwater service and the costs and management of CSOs distinguish stormwater and wastewater services, despite the physical commingling of stormwater and wastewater within the combined system. These fundamental distinctions explain and support the exclusion of stormwater service from PUC regulation. 66 Pa. C.S. § 102; OCA St. 1 at 5; OCA St. 2 at 19-20. The Joint Applicants efforts to treat the combined stormwater/wastewater system as providing only wastewater service ignores that the CSS provides the same stormwater service as the separate storm sewer system that serves the MS4 areas of Scranton and Dunmore. OCA St. 1 at 2-3.

3. There Is No Basis to Imply Commission Jurisdiction Over Stormwater Service.

The Joint Applicants state correctly that in the OCA's view, stormwater service should not be owned or operated by a regulated utility. JA Brief at 62. The Joint Applicants, however, err in their assertion that the OCA seeks to bifurcate jurisdiction and management of a combined stormwater/wastewater system.⁵ The OCA is not seeking a change; the Joint Applicants are asking the Commission to expand and overlap its jurisdiction with the federal and state entities that already regulate the provision of stormwater service through stand-alone or combined stormwater/wastewater systems – local municipalities, Pennsylvania Department of Environmental Protection (PaDEP), United States Environmental Protection Agency. 32 P.S. § 680.1, et seq.; 35 P.S. §§ 691.201, 691.202, 691.401; 33 U.S.C. § 1251-1387. This complication is avoided if ownership of the CSS remains with the municipality. OCA St. 1 at 5; OCA St. 2 at 19-20.

⁵ The Joint Applicants argue, conversely, that if the PUC does not have jurisdiction over stormwater service, there is a gap in the regulatory system for wastewater systems acquired by privately-owned utilities. JA Brief at 62. There is no gap. Instead there is a legal impediment to PAWC providing stormwater service for compensation that is rooted in the functional, engineering, and economic differences between stormwater service and other services. See OCA Brief at 19-29.

The Joint Applicants also argue that unless privately-owned utilities can acquire combined stormwater/wastewater systems, it will thwart the objectives of state environmental law.⁶ JA Brief at 62-63. Their argument is that management and control of CSOs and discharges from the CSS treatment plant are encompassed in one NPDES permit, which must be held by a single entity. JA Brief at 62; Tr. 204. This does not create a conflict, however. NPDES permits are issued for facilities rather than systems. Tr. 203. The fact that PaDEP's regulates the discharge from CSOs and the treatment plant in one permit, therefore, does not bear on PUC jurisdiction over stormwater service nor does it bear on how the PUC sets rates.

If the Commission determines that PAWC cannot provide stormwater service under the Public Utility Code, sole responsibility for the CSOs and treatment plant discharge will remain with the SSA. If the Commission does determine that PAWC can provide stormwater service under the Public Utility Code, PAWC will have sole responsibility for compliance with the NPDES permit. In the latter case, the OCA's concern is with just and reasonable rates under the Public Utility Code. 66 Pa. C.S. § 1301, et seq.; OCA St. 2 at 19-20. The Company's claims regarding state environmental law are unfounded.

4. There Is No Functional Nexus to Support PUC Ancillary Jurisdiction Over Stormwater Service.

The Joint Applicants argue that the Commission should exercise ancillary jurisdiction over stormwater service based on its jurisdiction over wastewater service. JA Brief at 25-31. The argument fails, however, because there is no logical, functional nexus between stormwater service and wastewater service. Specifically, for the Commission to choose to exercise ancillary jurisdiction over a service that is not clearly a regulated public utility service, there should be a "logical, functional nexus between that offering and the utility's core service." Re Pittsburgh

⁶ The Joint Applicants' argument regarding the purpose of Act 11 is addressed in Section C.1, *infra*.

Telecomm., Inc., 64 Pa. PUC 257, 264 (1987) (Pittsburgh). A functional nexus exists when an offered service is “implied as part of the function of [the company’s] public provision” of adequate service. Id. A mere “factual nexus,” or “but for link,” between the regulated and proposed services is not enough to create Commission jurisdiction. Id. at 264-265. Stormwater and wastewater services provided through a combined system are related only by a physical nexus, however, as opposed to a functional nexus.

In Pittsburgh, the Commission concluded that although conduit occupancy is factually and physically connected to telephone service, the functional nexus between these two services is limited and determined not to exercise jurisdiction. Pittsburgh at 264-65. The provision of stormwater service is not implied by a utility’s provision of adequate wastewater service, even where the services share a physical conduit. Unlike wastewater, stormwater cannot be separated from other municipal functions, such as the maintenance of streets. OCA St. 2 at 19. A significant part of the stormwater removal system in a developed area are the streets, culverts, and drainage ditches that are in the public right of way and that are designed, operated, and maintained by local (or state) government. Id. As OCA witness Fought testified:

The movement of stormwater through a city depends in significant measure on the network of streets, drainage ditches, and culverts that are part of the public right-of-way and that are designed, constructed, and maintained by the government. It is not feasible to separate control of these facilities from control of the remainder of the stormwater management system.

OCA St. 2 at 20-21. In other words, stormwater does not begin at the storm drain; it must get to the storm drain over a properly maintained network of streets. OCA witness Rubin elaborated on the fundamental distinctions between the two types of services. He stated:

Wastewater utility service involves running pipes from each property to a centralized wastewater treatment plant where the wastewater is treated prior to discharge in a receiving water (lake, stream, river, etc.). The customer controls its wastewater production and disposal, collecting the wastewater produced in the

building into a pipe (the wastewater service line) that connects to the wastewater utility's wastewater main. Throughout the process, wastewater is produced and controlled by the customer then transferred to the utility at a specific point.

In contrast, stormwater service is not directly controlled by customers or contained in pipes throughout the process. Stormwater is generated by precipitation -- rainfall and the melting of snow and ice. Some stormwater falls on pervious, unfrozen ground that can absorb some (but not all) of the stormwater. Other stormwater falls on roofs, streets, sidewalks, frozen ground, and other largely impervious surfaces where the stormwater is not absorbed and flows downhill. Thus, most stormwater does not begin as a controlled, piped flow of water. The purpose of a stormwater control system, therefore, is to direct the flow of that runoff so that it does not create flooding on private property or public streets and highways. This occurs by grading properties, parking lots, and driveways to control the flow of stormwater, designing streets to direct the flow of stormwater (which is one reason curbs are so important on urban streets). Maintaining streets to ensure a proper flow of stormwater (for example by cleaning streets, repairing curbs, and cleaning storm drains), and ultimately have stormwater enter storm drains that collect stormwater in a network of pipes.

OCA St. 1 at 9-10. Despite combining within a physical conduit, there are distinct differences in the purpose, function, control and management of stormwater and wastewater systems. In addition, and as discussed in more detail below, there are distinct rate implications for stormwater service that do not exist for wastewater service. OCA St. 2 at 15-20. As a result, in Pennsylvania, no privately-owned utilities provide stormwater service. OCA St. 1 at 5; OCA St. 2 at 19. For the same reasons, there is no ancillary jurisdiction over stormwater service. Stormwater service and all of its attendant, distinct requirements is not peripheral to PAWC's provision of wastewater service.

5. City of Lancaster Supports a Determination in This Case That Stormwater Service Is Distinct from Wastewater Service.

The Joint Applicants argue that City of Lancaster is inapplicable to the determination of the Commission's jurisdiction over stormwater service. JA Brief at 32-34 (citing City of Lancaster, 2006 WL 8411478 (Pa. Commw. 2006)). First and foremost, the City of Lancaster cases are relevant because Lancaster is the only combined stormwater/wastewater system over

which the Commission exercises jurisdiction and, in those cases, the Commission did not treat stormwater service provided through a CSS as being only “wastewater service.”

The Joint Applicants argue, however, that the Court’s decision is unpublished and non-binding. JA Brief at 32. This does not change the facts – the Commission regulates the wastewater rates for jurisdictional customers served by the City of Lancaster and has set rates that exclude the costs of stormwater service. Pa. P.U.C. v. City of Lancaster Sewer Fund, Docket No. R-0004986, Remand Order at 3 (Sept. 15, 2008) (Lancaster 2004); Pa. P.U.C. v. City of Lancaster Sewer Fund, Docket No. R-2012-2310366, Order (Apr. 18, 2013) (Lancaster 2012). The Commission’s own orders in those cases inform the Commission’s decision here.

Next, the Joint Applicants argue that the Court’s 2004 decision in City of Lancaster is not relevant because it turned on the Commission’s inability to allocate costs to the non-jurisdictional customers. JA Brief at 33. This is an incorrect interpretation of the case. Instead, the Commission’s decision depended on two findings that are applicable to the transaction under review: (1) the costs of providing stormwater service are distinct from the costs of providing wastewater service, even where one system is providing two services and (2) PUC-regulated customers should not pay the costs associated with stormwater service when they do not contribute to the stormwater costs. Lancaster 2004; Lancaster 2012; OCA St. 1 at 9; OCA St. 1S at 5-7; OCA St. 2 at 19.

The Joint Applicants also make a disjointed argument that, unlike the situation in Lancaster, where the Commission cannot allocate costs of the CSS to non-jurisdictional customers, Act 11 allows the Commission to allocate costs of the SSA CSS to PAWC’s existing water and wastewater customers. JA Brief at 33. The Joint Applicants’ theory is that applying the cost-spreading provisions of Act 11, Section 1311(c) would be equitable in the current case

because, at some point in the future, the SSA customers will contribute to the costs of acquiring and operating other municipal systems. JA Brief at 33; Tr. 173. First, Section 1311(c) does not expand Commission jurisdiction to include stormwater service nor alter the basis for excluding stormwater costs – stormwater is a distinct service and its costs should be borne only by the customers who contribute to those costs. 66 Pa. C.S. § 1311(c). The Commonwealth Court stated in its review of the Commission’s allocation of stormwater costs:

After a review of the record, we conclude that the Commission did not err in accepting the OCA’s overall cost allocation methodology, which is premised on the theory that the collection of both storm water and sewage in the City’s combined sewer system, increases the cost of sewage treatment and that the costs of treatment of the City’s stormwater should not be passed on to the jurisdictional customers....

2006 WL 8411478 at *7. Second, as discussed below, Section 1311(c) does not mandate cost sharing, it allows cost sharing where the subsidy is “just and reasonable,” and there is no showing in this case that the massive subsidy proposed by the Joint Applicants is just and reasonable.

For all of these reasons, the Commission’s decision should be informed by its recognition in setting rates for jurisdictional customers served by the City of Lancaster that the physical commingling of stormwater and wastewater within the SSA’s combined system does not expand the Commission’s jurisdiction to stormwater service.

6. Policy Reasons Why Stormwater Service Should Not Be Under PUC Jurisdiction

The OCA’s position is that, in addition to the legal discussion, *supra*, it is not consistent with public policy in Pennsylvania for stormwater service to be provided by an investor-owned utility and subject to PUC jurisdiction

The Joint Applicants argue that the OCA’s policy arguments against PAWC’s ownership of a combined system and provision of stormwater service and wastewater service are “ill-

founded.” JA Brief at 74-78. Specifically, the Joint Applicants argument is essentially that the current system separates the ownership of the stormwater from the responsibility for the maintenance of streets and therefore having PAWC work with other governmental entities is no different. However, the current situation is different from what is proposed. First, the Authority’s Board of Directors has four Directors appointed by the City’s Mayor and the Scranton City Council and one by the Dunmore Mayor and Borough Council. SSA St. 1 at 2.

Second, municipal authorities can place liens on properties that have not paid bills. A privately owned stormwater utility lacks any meaningful enforcement method to collect stormwater bills from a property owner. There is no procedure to “shut off” stormwater service as PAWC might do with water service if a water customer or wastewater customer does not pay its bill. OCA St. 2 at 22.

The Joint Applicants also state that municipal authorities are no more capable of controlling streets and runoff from properties than a regulated privately-owned utility. JA Brief at 76. As explained above, the working relationship between a municipal authority and the municipalities that created it is very different than between those municipalities and an investor-owned utility. Moreover, as Mr. Rubin explained, “Some municipalities have found that it is more cost effective to use stormwater management solutions that do not involve new pipes or larger detention basins, particularly when the stormwater and wastewater systems are combined.” OCA St. 2 at 21. Mr. Rubin provided examples that such as increasing vegetation and using porous paving materials, which are being used to reduce the amount of stormwater that flows into the system. Id. Importantly, Mr. Rubin noted that these types of measures must be undertaken and enforced by local government and cannot be mandated by a privately owned utility. Id. According to Mr. Rubin other non-structural measures such as building and land use

codes that encourage or mandate stormwater reduction efforts can be done by local governments who are responsible for the enactment of legislation, inspecting and enforcing those requirements. Once again, those things cannot be done by a privately-owned utility but can be done by a municipal authority and its connections to the municipalities that create it.

The Joint Applicants next argue that the OCA's position contravenes the long-standing efforts to encourage regionalization of wastewater service. JA Brief at 77-78. The OCA's position in this case has nothing to do with wastewater regionalization. Rather, the OCA's position reflects opposition to the unauthorized expansion of PUC jurisdiction into stormwater service. Further, unlike most regionalization efforts, the Joint Applicants have not pointed to any economies of scale to be found with this so called regionalization transaction related to wastewater (there are no new customers because they are already water customers of PAWC).

B. The Commission Cannot Approve an Acquisition That Is Not In the Public Interest.

As explained *supra*, the PUC should not adopt PAWC's proposed expansion of the PUC's jurisdiction. However, if the PUC disagrees with the OCA's legal position on the threshold issue, then it can only approve the transaction if it provides affirmative public benefits.

The standard for reviewing the benefits of an application is whether the transaction will provide substantial, affirmative benefits to the public. City of York, 449 Pa. 136, 141, 295 A.2d 825, 828 (1972). The transaction must affirmatively promote the service, accommodation, convenience or safety of the public in some substantial way; the mere absence of any adverse effect is not sufficient. 449 Pa. at 141, 295 A.2d at 828. When the "public interest" is considered, the benefits and detriments to all affected parties must be considered. Middletown Twp. v. Pa. P.U.C., 85 Pa. Commw. 191, 482 A.2d 674, 682 (Pa. Commw. Ct. 1984).

In this proceeding, it is undisputed that the City of Scranton would benefit from the proposed transaction: Scranton-area customers will benefit from being a part of a larger customer base; PAWC has agreed to create 100 new jobs in the Scranton area, and proceeds from the transaction will help Scranton's financial situation. JA Brief at 45-50. As addressed below, and in the OCA's Main Brief, however, the other "benefits" that the Joint Applicants ascribe to the proposed transaction do not outweigh the harms to existing PAWC customers and the Scranton customers after year 10 when their rates will need to be brought up to cost of service. OCA Brief at 29-41.

1. There Is No Affirmative Benefit for Existing PAWC Customers, Only Detriments.

The Joint Applicants devote almost 14 pages of their brief to their arguments about the benefits of the proposed transaction to the City of Scranton and the SSA customers. JA Brief at 44 to 58. In one sentence within that discussion, they identify the benefits they foresee for PAWC's existing wastewater and water customers. They state:

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.

JA Brief at 44 (citing PAWC St. 4 at 8). First, the PAWC customer base is not expanding. While SSA serves approximately 31,000 customers, essentially all of those customers are already PAWC water customers. OCA St. 2 at 34. PAWC's total customer count would not increase and there would be no meaningful reduction in overhead or back-office costs per customer resulting from the proposed transaction. Id. at 27.

Moreover, it is going to take a very long time for other wastewater service areas to generate hundreds of millions of dollars in capital projects for the SSA customers to subsidize. The total cost of PAWC's compliance with consent decrees for the Clarion and Coatesville

systems totaled only \$82 million, \$24 million and \$58 million respectively. PAWC St. 2 at 12-14. The Joint Applicants propose that, as soon as January 1, 2018, PAWC's existing wastewater and water customers will begin paying higher rates that, over the next 20 years, will reflect between \$146 and \$199 million of the costs of improvements to the SSA system. PAWC St. 4 at 4, 7; OCA St. 1 at 31 (citing PAWC Response to OCA II-6, Att. B, Table 2). These amounts are in addition to the variance adjustment that PAWC proposes to recover from its existing wastewater and water customers, or alternatively the rate subsidy created if SSA customers are not charged cost based rates, which equates to at least \$104 million and up to \$360 million over the next 30 years. OCA St. 2 at 24-26, 33 (citing PAWC Response to OCA II-6, Attachment C); Exh. BJG-1, Att. F, Section 7.09(x). Existing customer rates will also reflect the purchase price of \$195 million, which is more than twice book value for the assets being acquired. Id. at 25.

If PAWC is proposing to acquire other stormwater/wastewater systems (the Joint Applicants mention that there are approximately 130 in Pennsylvania) then it is going to take even longer for the existing customers to see benefits. JA Brief at 10. The benefit is even more speculative and remote if PAWC acquires combined systems in areas where it already provides water service, so there is no expansion of the customer base.

Additionally, every existing PAWC wastewater and water customer already must pay taxes or other fees to control stormwater in his/her community. OCA St. 2 at 34-35. Mr. Rubin provided the following example:

PAWC customers in Mount Lebanon, PA, currently pay PAWC for water, pay the Borough of Mount Lebanon \$4.05 per 1,000 gallons for wastewater disposal and \$8.00 per month for stormwater control. Now PAWC suggests that a Mount Lebanon customer -- who already is paying for her own wastewater disposal and stormwater control -- must provide additional subsidies each year to help pay for wastewater disposal and stormwater control in Scranton and Dunmore.

OCA St. 2 at 34-35.

For all of these reasons, the Joint Applicants have not established that the transaction provides an affirmative benefit to the existing PAWC customers. The record shows conclusively that these customers will suffer considerable harm.

2. There Is No Evidence That PAWC Will Perform the Improvements at Less Cost or More Quickly; The Mere Assertion That There Will Be “Economies of Scale” or That Service Will Be “Enhanced” Is “Speculative” and Does Not Establish an Affirmative Benefit.

The Joint Applicants provided no documentation that PAWC can construct, operate and maintain the existing SSA system and proposed LTCP improvements at a lesser cost than SSA. OCA St. 1 at 4; OCA St. 2 at 32. OCA Brief at 39. Mr. Rubin testified that PAWC’s cost of capital will likely be higher compared to SSA, which does not have to pay income taxes and state and federal taxes on its equity earnings and has the advantage of being able to issue tax exempt debt. Id. at 30-31; Tr. 98. OCA Brief at 40.

In addition, PAWC will not meet the obligations under the Consent Decree on a faster timeframe than that committed to by SSA – PAWC, using the same employees, will follow the same time frame under the Consent Decree as SSA. OCA St. 2 at 29. There is no evidence that the current owner is not technically or managerially fit. Tr. 154; OCA St. 1 at 4; OCA Brief at 38-39. The statements that customer service will be enhanced do not establish an affirmative public benefit. See Application of CMV Sewage Co., Inc., 2008 PaPUC LEXIS 950 (CMV).

In order to determine whether benefits meet this standard, the Commission may consider: “(1) the legal and technical fitness of the purchasing entity to provide service; (2) the public need for service; (3) the inadequacy of the existing service; and (4) any other relevant evidence.” Application of North Heidelberg Water Co., 2010 PaPUC LEXIS 919, *20. As discussed, the legal and technical fitness of PAWC is sufficient, but so is the existing service by SSA. There is no indication on the financial side that SSA cannot meet its obligations under the Consent

Decree so long as it continues to raise rates in accordance with its rate plan. Although PAWC witness Merante claimed that PAWC is in a much stronger financial position than SSA, Mr. Rubin pointed out that Standard & Poor's noted SSA's healthy financial profile, its strong debt service coverage and liquidity. Tr. 98-99; OCA Brief at 39. He also testified that there is no reason to believe that SSA could not finance the capital improvements over the next 20 years that it agreed to implement in its consent decree with the federal and state governments. Tr. 99-100; OCA Brief at 39. Mr. Rubin also observed that Standard & Poor's noted that, assuming SSA can implement reasonable rate increases over time, it will be able to finance the obligations it has agreed to. Id. at 100. Moreover, the cost to the public of having PAWC undertake those projects is likely to be substantially greater than the costs that would be incurred by the Authority. Id. The most recent bond ratings for SSA by Standard & Poor's was an A minus and for PAWC by Moody's was A3. Tr. 99. As Mr. Rubin explained, those ratings are essentially equivalent. Id. In rating SSA, Standard & Poor's highlighted the authority's healthy financial profile, its strong debt service coverage and liquidity. Id. Mr. Rubin concluded that the financial markets are not finding that PAWC is significantly different from SSA. Tr. 99.

There are no advantages to the public (or to the environment) from having PAWC own the Scranton-Dunmore system because PAWC is not committing to undertake any physical construction or studies that the Authority is not already required to undertake. PAWC does not claim that it has significant expertise in the operation of a combined wastewater-stormwater utility and, in fact, it appears that it would rely on existing Authority employees for most of that expertise. OCA St. 2 at 29. In other words, it appears that the level and quality of service will be the same under PAWC ownership as it would be under SSA ownership. Id.

PAWC is unable to “precisely quantify” any efficiencies or decreased operating costs resulting from the proposed transaction or indicate when they might occur. PAWC St. 4 at 5. It relies on the vague supposition that at some unknown time efficiencies “will inevitably be realized because of the size of PAWC’s water and wastewater operations.” PAWC St. 1 at 8; PAWC St. 4 at 5. OCA Brief at 40.

Moreover, there are no economies of scale because PAWC already provides water service to these same customers. Indeed, because of the ratemaking concessions that PAWC is seeking, the existing PAWC customers will be harmed by paying rates above their cost of service so that stormwater improvements can be funded over a greater number of customers and in 10 years, may have to pay up to \$104 million more in rates because of the variance adjustment. All of the risk and all of the costs are being shifted to the existing PAWC water customers.

3. SSA Rates May Benefit in the Short-Term, But Not In Years 11 to 13 or Thereafter.

The record clearly shows that SSA customers will receive a substantial benefit from the proposed transaction during the first ten years post-acquisition, *e.g.*, PAWC will not propose to increase rates for SSA customers by more than 1.9% CAGR over the 10-year period, SSA customers will not pay a DSIC prior to January 1, 2019, the substantial costs of improving the system will be subsidized by PAWC’s existing wastewater customers and, if the Commission allows, by its water customers.⁷ PAWC St. 4-R at 2; PAWC Exh. BJK-1, Att. F (Section

⁷ WHEREAS, pursuant to the terms of the APA, the customers of the System will experience in the first ten years after the transaction a significant reduction in the Authority’s currently planned sewer rates, meaning that, as per the terms of the APA, the sewer rates will not increase to the extent that the Authority, acting on its own, would require; and

WHEREAS, the APA sets forth that during the first ten years of ownership PAWC may not raise the sewer rates more than an average of 1.9% compound annual growth rate (“CAGR”) per year; and

7.09(x)); PAWC Exh. BJK-1, Att. J at 3. PAWC indicates, however, that it intends to move the SSA customers to its system rates in equal increments in years 11 through 13 following closing of the transaction. PAWC St. 4 at 3; PAWC St. 4-R at 2. If approved as proposed, PAWC would charge an SSA customer using 3,000 gallons of water per month \$34.50 compared to charging an existing Rate Zone 1 customer \$46.14 for the same usage.^{8,9} In the 10 years post-acquisition, the rate disparity will grow if PAWC proposes rate increases for Rate Zone 1 that exceed the rate increases proposed for SSA customers due to the CAGR limitation. This means that moving SSA customers to system rates in years 11 through 13 could require severe increases because of the rate provision in the Asset Purchase Agreement that shifts costs to existing customers during the first 10 years.

Section 7.07(d) of the Asset Purchase Agreement provides that, if at the end of 10 years the actual increases exceed a compound average of 1.9% per year, then PAWC must pay an additional “purchase price” equal to the difference. PAWC Exh. BJK-1, Att. F (Section 7.07(d)); OCA St. 2 at 23. The Authority has sole discretion whether PAWC will distribute this amount to its current wastewater customers in the City of Scranton and Borough of Dunmore or pay the adjustment directly to the Authority with no limitation on how the funds are used. PAWC Exh. BJK-1, Att. F (Section 7.07(e)). Even if the adjustment is paid to wastewater customers in the

WHEREAS, the APA will shift to PAWC the obligations of Consent Decree compliance and Long Term Control Plan implementation currently estimated to be at or near \$140,000,000; and

WHEREAS, the purchase price for the sale, transfer, assignment conveyance and delivery of the assets shall be One Hundred Ninety-Five Million Dollars (\$195,000,000.00) subject to the adjustments contemplated in the APA. . .

PAWC Exh. J at 3.

⁸ \$19.50 service charge + (\$0.50 usage charge per 100 gallons x 30) = \$34.50 per month. PAWC Exh. BJK-1, Att. L.

⁹ \$7.50 customer charge + \$1.2880 usage charge per 100 gallons x 30) = \$46.14 per month. See App. B attached to OCA’s main brief (Supp. 2, PAWC Tariff-Wastewater Pa. P.U.C. No. 15 at 4).

Scranton area, it will be partly recovered from the same customers in their water rates. Id., Section 7.09(x). As such, there is no certainty that the adjustment will offset the rate increases for SSA customers in years 11 through 13.

4. Benefits to the City of Scranton Are Not Determinative of the Public Interest.

The Joint Applicants state that the proposed transaction is a cornerstone of the City's economic recovery. JA Brief at 52. In addition, the creation of 100 jobs in the Scranton area by the end of 2020 is another benefit to the City of Scranton. JA Brief at 50. SSA witness Barrett explains that the sale is expected to benefit the City (SSA St. 2-R at 3), the benefit to Scranton¹⁰ does not establish that there are affirmative public benefits from the proposed transaction. See OCA Brief at 36. Although there is no doubt that the City of Scranton will benefit, that is not determinative of whether there are affirmative public benefits.

A determination of the public interest involves examining the impact of the proposed acquisition on all parties that would be affected by the transaction, as opposed to only considering "one particular group or geographic subdivision." Middletown Twp. v. Pa. P.U.C., 85 Pa. Commw. 191, 202; 482 A.2d 674, 682 (1984); Application of CMV Sewage Co., Inc., 2008 Pa. PUC LEXIS 950, *43. Therefore, while the Commission is statutorily charged with the regulation of public utilities and the protection of their customers and must consider the adverse impacts of a proposed transaction on these parties, the Commission has explicitly chosen not to "expand [the] previous definition of the public interest to include the interests of municipal authorities" CMV at *43-44; Tr. 94-96. Therefore, while all parties acknowledge that the City of

¹⁰ As Mr. Rubin explained, whenever there is a voluntary sale of assets, such as this transaction, there's a benefit to the seller or it would not be proceeding with the transaction. Tr. 94.

Scranton will benefit, that is not determinative of a finding that there are affirmative public benefits.

C. If the Commission Disregards the OCA's Position and Decides that Stormwater Is Jurisdictional, and That There Are Affirmative Benefits, Certain Protections Must Be in Place.

If the Commission disagrees with the OCA's position and finds that it does have jurisdiction over stormwater service, and it finds that there are affirmative public benefits, then it must put in place certain protections and conditions. Specifically, stormwater costs will need to be separated for ratemaking purposes. OCA St. 2 at 36-38. In addition, the Commission should make clear that Section 1311(c) cannot be used to shift stormwater costs to water and wastewater customers. Finally, the variance adjustment should not be collected from existing customers.

In their Main Brief, the Joint Applicants argue that they are entitled to use Section 1311(c) to shift stormwater costs to existing wastewater and water customers in order to ensure that the transaction is economically feasible and in the public interest. JA Brief at 35-36. As noted above, if the Commission does not provide such authorization, PAWC alleges that it will have significant stranded costs. JA Brief at 36-37. The Joint Applicants also argue that the Scranton area customers could experience significant rate increases if Section 1311(c) is not applicable. JA Brief at 37-38. PAWC states that without preapproval of subsidies, the transaction "would not be in the Public Interest and cannot proceed to closing." PAWC St. 4R at 21.

As discussed below, Section 1311(c) is not meant to apply to stormwater costs. Moreover, any stranded costs that might result would be the responsibility of PAWC alone as its shareholders determined to acquire a system where the majority of costs and improvements are stormwater related. Finally, the Commission should not predetermine any resulting rates. To the extent the Scranton area customers wastewater related costs are proposed to be shared with water

customers, under Section 1311(c) in the future, that determination will be made in future cases based on the facts at the time.

1. Stormwater Costs Must Be Separately Allocated.

PAWC claims that it has a legal right to make a claim in a future base rate proceeding to shift stormwater costs to water customers under Section 1311(c) of the Public Utility Code. JA Brief at 63. As discussed below, not only does PAWC want the right to make that claim, it also wants to have the Commission determine that such a shift in costs will be permitted in the future as part of this proceeding. The Joint Applicants' proposed expansion of the intent and plain language of Section 1311(c) should not be adopted.

The amendment to Section 1311(c), as part of Act 11 of 2012, was not intended to shift costs of the magnitude proposed by the Joint Applicants. Specifically, the intent was to address the acquisition of **small** failing wastewater systems by larger water utilities and to address the impact that the necessary improvements would have on the small system with few customers. Representative Godshall, the chair of the House Consumer Affairs Committee, stated that the portion of the bill addressing the proposed amendment to Section 1311(c) was "necessary to balance the 'economies of scale' that have come about due to some of our larger water utilities taking over ... failing wastewater systems." 2011 Legisl. Journal – House 1956 (Oct. 4, 2011). Chairman Godshall went on to say that the "Utility wastewater systems (as opposed to a municipal system or authority) generally serve small communities and are made up of fewer customers than utility water systems." *Id.* The focus was on larger water utilities taking over small utility wastewater systems. Further, the discussion did not include applying this amendment to stormwater costs or encouraging acquisitions of stormwater systems. In this case, PAWC would more than double its wastewater customers as a result of this acquisition, and the large system to be acquired has a large 25 year capital improvement program related primarily to

stormwater service. This scenario is not at all within the stated intent of the amendment to Section 1311(c). Moreover, it is clear that the discussions held on this amendment were not contemplating costs related to stormwater but were focused on the plight of small failing wastewater systems.

Furthermore, fundamental issues of fairness are presented by PAWC's proposal in this proceeding to use Section 1311(c).¹¹ As already discussed in the OCA's Main Brief, not only are there PAWC water customers who are not wastewater customers (and thus either have another wastewater provider or have invested in an individual septic system), under PAWC's arguments regarding jurisdiction and the use of Section 1311(c), the significant majority of water customers are not PAWC stormwater customers and they are already paying for stormwater handling in their communities. Yet these customers will see their rates raised because of the shift of stormwater and wastewater revenue requirement from Scranton. PAWC St. 2 at 34-35. Second, the amount of stormwater and wastewater revenue requirement that PAWC would propose to shift from wastewater customers in Scranton to water customers will have a large impact on the PAWC water rates. PAWC water rates will be above costs, which is a concern under the fairness and efficiency principles that guide ratemaking.

In PAWC's 2013 rate case, Pa. P.U.C. v. Pennsylvania-American Water Co., 2013 WL 6835107, which was resolved by a Joint Petition for Settlement, \$5.4 million of wastewater revenue requirement was shifted to water customers. The overall impact on rates for Zone 1 water customers related to that shift was less than 1% (2013 WL n.12; Settlement at ¶ 10(d)) while the overall revenue requirement increase as a result of the settlement was \$26 million, or

¹¹ Although the specific determination of what costs if any should be shifted from the wastewater and stormwater revenue requirement must wait for specific claims in future cases, it is clear that PAWC's intent in this proceeding is to shift a very large portion of the revenue requirement as well as the shortfall in revenue requirement that it agreed it would not propose to be placed on the Scranton sewer customers.

approximately 4.5% in lieu of the \$58.6 million, or approximately 10.1% increase originally requested. 2013 WL *17; Settlement at ¶ 10(a). The \$5.4 million was approximately 25% of the total wastewater revenue requirement (Settlement Appendix G). PAWC has not provided any support for its position that capital improvements and a purchase price that would likely result in a wastewater revenue requirement well above what was included in PAWC's 2013 case is within the boundaries of reasonableness, fairness or efficiency. Section 1311(c) was not intended to address the ratemaking impacts of a transaction where a utility has paid up to 3x book value for a system that requires almost the same amount of capital improvement after acquisition.

Moreover, Section 1311(c) is discretionary. Even if PAWC's position is correct on jurisdiction, there is no basis to provide any assurance of what shift of revenue requirement, if any, would be permitted in future rate cases. If the use of Section 1311(c) is so fundamental to the transaction (JA Brief at 35), there still is no guarantee that the shifts that it will propose in future rate cases to deal with the nearly \$200 million of capital improvements to the Scranton stormwater system will in fact be approved in those future rate cases as just and reasonable.

The Joint Applicants argue that if the Commission does not exercise full jurisdiction over stormwater and wastewater service, then the transaction would not be in the public interest and it would be unreasonable for PAWC to assume the risk and uncertainty that it would have significant costs associated with stormwater collection and treatment. JA Brief at 36-37. There is no requirement for the PUC to make the transaction risk free for PAWC, especially when the Joint Applicants are asking for the Commission to expand its jurisdiction over stormwater and to make ratemaking concessions in order to shift all of the risks to PAWC's customers. The Commission has addressed similar requests for relief or remedies which are normally addressed

in rate proceedings and which could impact ratepayers far into the future as part of a petition proceeding.¹² In the petition proceeding, the ALJs posed and answered the following question:

Is it good regulatory policy for this Commission to grant rate case concessions to purchasers of utility franchises prior to the consummation of the contract? In short, the answer to this question is “No.” It sets a bad precedent. As stated above, some of the remedies, if implemented, would seriously impact future ratepayers who simply have no opportunity to participate. In addition, if much of the relief requested were granted, it would send a message which says that the Commission is willing to sweeten the buyer’s side of the bargain by allowing rate relief which may or may not be available in the ratemaking context.

Petition of United Water Resources, Inc. and North East Water, Inc. for a Declaratory Order Approving the Following Financial and Ratemaking Request, Docket No. P-900453 Recommended Decision at 8 (Nov. 20, 1990) (UWR Petition) (excerpt attached as Appendix A).

Regarding the types of relief that can be requested due to the underlying agreements and negotiations, the ALJs cautioned:

The parties have a responsibility to be aware of regulatory parameters. If the buyer and seller conceive and agree to a creative financial package which requires premature rate relief or otherwise exceeds regulatory criteria, then they run the risk of Commission disapproval of the applications for transfer.

UWR Petition, Recommended Decision at 9. In this proceeding, Joint Applicants argue that approval of the ratemaking provisions of their agreement are necessary to the transaction, but as discussed at length in the OCA’s testimony and Brief, the provisions of the agreement are to the detriment of the existing ratepayers and exceed regulatory criteria. The ALJs addressed the introduction of novel financial or ratemaking concepts as well, stating:

We recognize that the Commission should be amenable to novel financial techniques which can be accommodated within the regulatory framework.

¹² A series of filings were made on June 1, 1990, to reflect the proposed transfer of Pennsylvania Gas and Water Company’s water assets to United Water and North East Water (Docket No. A-210018) and the proposed transfer of its natural gas assets to NUI Corporation (Docket No. A-120001). The Petition was filed requesting a declaratory order approving a number of financial and ratemaking approvals related to the proposed transfer of water and natural gas assets.

However, acceptance of novel financial and/or ratemaking concepts should be tempered with an eye toward both history and the future. The rules of review cannot change so quickly as to bind future Commissions and ratepayers outside the established ratemaking procedures and before the purchase is consummated.

UWR Petition, Recommended Decision at 9. The ALJs recommended denial of major components of the relief requested and subsequent Petitions for Leave to Withdraw the water application and the Petition for Declaratory Order were granted by the Commission. UWR Petition, 1991 PaPUC LEXIS 32, *3.

Not only does PAWC want the Commission to take jurisdiction over stormwater which it has never done and for which there is no support, it also wants assurance now that it will be able to shift the costs of the enormous stormwater capital improvements to its existing water customers. Even if the PUC find that it has jurisdiction, it cannot provide the assurance that stormwater costs will be allocated to water customers as part of this proceeding, nor that the variance adjustment will be recoverable in 10 years. At the most, PAWC could be told that it will be permitted to propose such allocations and propose such recovery. No determination can be made in this application that the proposals will be granted in future rate cases because to do so would require this Commission to bind future Commissions and ratepayers which is not appropriate outside of the ratemaking context. If the transaction cannot proceed without these determinations binding future Commissions and ratepayers, which exceed the regulatory criteria, then the Commission should disapprove the transaction.

a. Setting Stormwater Rates and Identifying the Customers.

As explained by Mr. Rubin, the way in which stormwater rates are set vary by municipality but regardless of which methods are used, stormwater rates are set in a very different manner than the way water and wastewater rates are set the PUC. OCA St. 2 at 11-18.

In addition, stormwater customers are not the same as wastewater customers. A commercial parking lot owner, with no water connection or wastewater connection would currently not pay anything under the SSA system (see Tr. 180) or under PAWC's proposed transaction. However, that entity's contribution to stormwater is undeniable and under a system that separately bills for stormwater, that entity would pay its fair share towards the total costs of stormwater.

The Joint Applicants, by ignoring these fundamental differences and proposing that the PUC not only expand its jurisdiction, but then require wastewater customers to bear all of the costs of stormwater service, gut the principles of cost based rates. As discussed below, how a municipality or municipal authority structures wastewater and stormwater service, sets rates, and runs its business, is not under the purview of the PUC, but rather is subject to different statutory framework. However, under the Public Utility Code, rates are set based on costs and cost causation. The Joint Applicants' proposed ratemaking cannot be reconciled with the principles of cost based ratemaking and cost causation.

Under PAWC's proposal, wastewater customers and water customers will pay for the existing stormwater costs for the City of Scranton and the Borough of Dunmore as well as the stormwater-related improvements required under the Consent Decree. Stormwater costs represent more than 85% of the costs of the capital improvements that are necessary under the Consent Decree. See OCA St. 1 at 3-4. That equates to approximately \$144 million in 2012 dollars.¹³ Id.

Therefore, if PAWC is permitted to provide stormwater and wastewater service, it is appropriate to separately allocate stormwater costs so that the appropriate customers can be

¹³The costs will most certainly increase if financed by PAWC because of the taxes and debt cost differences of an investor-owned utility and a municipality.

charged appropriate stormwater rates and the wastewater customers can be charged for wastewater costs.

b. Separate Stormwater Fees Are Not an Anomaly.

Joint Applicants raise a number of arguments against the OCA's position that there are strong policy reasons supporting the separation of stormwater fees. As discussed below, the OCA submits that the Joint Applicants' arguments should be rejected.

Joint Applicants argue that the separation of stormwater and wastewater fees is not legally required. JA Brief at 63-64. Mr. Rubin noted in his direct testimony, "It is difficult to say whether a separate fee for stormwater is required, but such charges are becoming more common and there are strong public policy reasons for having a separate charge for stormwater service." OCA St. 2 at 13. He went on to note that failure to have a separate stormwater fee may result in the charge for stormwater service not being reasonable. Id. Although Joint Applicants argue that there are no legal requirements, they acknowledge that there is legal authority for certain municipalities, such as Scranton, and for municipal authorities, such as SSA, to establish separate stormwater charges based on property characteristics. JA Brief at 64. As discussed by Mr. Rubin, there are strong policy reasons why separate charges should be established given the very different services that are provided.

Next the Joint Applicants argue that separate stormwater fees are not common in Pennsylvania and therefore there is no reason to establish separate stormwater fees. JA Brief at 64-65. The Joint Applicants criticize Mr. Rubin because he could name "only six or seven municipalities" that have established separate stormwater fees in Pennsylvania. This ignores the trending increase in stormwater fees nationwide. The Water Environment Foundation reported that only a few local government agencies had separate fees for stormwater in 1994. OCA St. 2 at 11. By 2014, however, there were approximately 1,500 stormwater utilities in the

United States and Canada. Id. Among those stormwater utilities is the City of Philadelphia.¹⁴ OCA St. 2 at 12. Two-thirds of the City of Philadelphia is served by a combined sewer system. Id. at 12-13. Notably, the stormwater fees do not vary depending on whether the property is served by Philadelphia’s separate stormwater system or by the combined system. Id.

Consistent with the national trend, Mr. Rubin stated that he expected to see the number of stormwater utilities rise in Pennsylvania. OCA St. 2 at 14. In 2013 and 2014, the Pennsylvania General Assembly amended the Municipal Authorities Act to provide specific authority to municipal authorities to establish a separate stormwater fee.¹⁵ OCA St. 2 at 14; 53 Pa. C.S. § 5607(a)(18), (d)(34). The Joint Applicants’ argument relies on the historical situation, rather than looking at the current situation and ignores the impact of the 2013 and 2014 amendments to the Municipal Authorities Act.

c. Implications of a Stormwater Fee versus a Tax

The Joint Applicants argue that Commission should reject Mr. Rubin’s tax versus fee argument in support of charging separately for stormwater service because it is a red herring. JA Brief at 65-67. The Joint Applicants’ position is without merit. “Generally, the closer a charge is to being based on something the consumer can request and control, the more likely it is to be a fee for services rendered.” OCA St. 2 at 17. “The less control the consumer has, or the more automatic the charge, the closer it is to being a tax.” Id.

As Mr. Rubin explained, whether a charge is a fee or a tax has important implications for who can be charged and the maximum amount of the charge:

For example, schools, houses of worship, other types of charitable organizations, and many governmental bodies are exempt from paying taxes, but are required to

¹⁴ The City of Lancaster also has a separate stormwater fee. Tr. 206.

¹⁵ Mr. Rubin noted that the 2013 amendment to the Municipal Authorities Act grandfathered one or two systems that were already charging separate stormwater fees. Tr. 206.

pay fees for utility services. In some jurisdictions, a municipality may be restricted as to the maximum amount of tax it can levy without following a special procedure (such as a voter referendum), but such limitations usually do not apply to fees for utility services. Similarly, utility companies and public authorities in Pennsylvania are permitted to levy fees for utility services so long as the charges are reasonable and non-discriminatory, but they have no taxing authority.

OCA St. 2 at 17.

As part of this discussion, Mr. Rubin provided a very general summary of some of the numerous cases on the issue of the dividing line between a fee for a utility service and a tax. Tr. 208. Mr. Rubin cited the National Association of Clean Water Agencies publication titled, “Navigating Litigation Floodwaters: Legal Considerations for Funding Municipal Stormwater Programs” (2014). Mr. Rubin accurately characterized this publication as containing a summary of many of the cases that distinguish between fees for services (particularly utility services) and taxes.” OCA St. 2 at 17, n.21. Mr. Rubin also cited to the Water Environment Foundation’s User Fee Manual which provides information for developing user fees for stormwater programs. Id. The point of Mr. Rubin’s testimony was simply to note that there are numerous ways to set user fees for stormwater and that one of the issues relates to whether it is viewed as a fee or a tax.

Next, the Joint Applicants argue that Mr. Rubin claimed that absent a separate stormwater fee, federal agencies would not be obligated to pay for combined sewer costs. JA Brief at 68-70. In fact, what Mr. Rubin said was that the 2011 amendment to the Clean Water Act “places certain restriction on federal agencies’ payments for stormwater service, even where there is a CSS.” OCA St. 2 at 17. He explained that the amendment added a special provision that required federal agencies to pay “reasonable service charges” for stormwater service so long as the charge is “based on some fair approximation of the proportionate contribution of the property or facility to stormwater pollution . . . and used to pay or reimburse the costs associated with any stormwater management program....” OCA St. 2 at 16. This discussion was part of his

review of what differentiates wastewater service and stormwater service. See OCA St. 2 at 16. The Joint Applicants historical review of the Clean Water Act is consistent with Mr. Rubin’s discussion. Thus, their mischaracterization of his testimony is without merit and should be rejected.

d. Charging Municipalities or a Municipal Authority for Stormwater Service Is a Viable Option As Is a Stormwater Authority.

If the Commission does not accept the OCA’s primary position that stormwater is not part of the PUC’s jurisdiction, the OCA has proposed that the stormwater costs should be allocated separately from wastewater costs. The OCA provided the only examples of how the PUC has handled this issue, namely the stormwater allocations that were used in the 2004 and 2012 Lancaster Sewer rate cases.

The Joint Applicants object to separately allocating the stormwater “aspects” of the combined sewer system. First, the Joint Applicants argue that establishing a stormwater utility and fees is “beyond the capabilities of many communities in Pennsylvania.” JA Brief at 71 (citing PAWC St. 6R at 30). This argument ignores that seven Pennsylvania communities have existing stormwater fees including the City of Lancaster. Moreover, there is no support for his position that Pennsylvania communities cannot do what 1,500 systems in the United States and Canada have managed to do. OCA St. 2 at 11.

Next the Joint Applicants criticize Mr. Fought’s statement that the allocation between stormwater and wastewater could be based on relative flow volumes. JA Brief at 71-72. In fact, Mr. Fought testified that the Commission used that methodology in the 2004 Lancaster rate case. OCA St. 1 at 12. He also testified that the Commission used a cost allocation study conducted by PAWC witness Elliott’s firm, Gannett Fleming, for the 2012 Lancaster rate case. OCA St. 1S at 8. The OCA’s testimony identifies two ways in which the allocation of stormwater and

wastewater has been handled in two cases before the Commission. None of PAWC witness Elliott's testimony is relevant because he has no experience with the Lancaster cases or any other PUC expertise.

The Joint Applicants also argue that the option of charging the allocated stormwater costs to a municipality or a municipal authority cannot be done. The OCA's point is that the costs should not be charged to wastewater customers and water customers. The OCA's suggestions regarding a stormwater authority is consistent with what other municipalities have done and is consistent with the existing legal framework.

Next, the Joint Applicants argue that the local government structure in Pennsylvania is so complicated that a regulated public utility providing stormwater service is the answer rather than dealing with the local government structure. JA Brief at 73. For all of the legal and policy reasons explained *supra*, investor-owned utility provision of stormwater service is not the answer. PAWC witness Elliott's testimony does not acknowledge the possibility of the use of municipal authorities across the state to address the issues he raises. His testimony also ignores the fact that SSA, an authority founded by the City of Scranton and the Borough of Dunmore has existed for 63 years.¹⁶ There are many solutions that do not involve an unsupported expansion of the PUC's jurisdiction and do not raise all of the other issues that would be involved with an investor-owned utility providing stormwater service. Contrary to the characterization that "OCA's suggestions fall squarely in the category of 'easier said than done'" (JA Brief at 74), it should be noted that the OCA's position is based on whether it is consistent with the Public Utility Code.

¹⁶ The Authority was incorporated on May 18, 1953 by the City of Scranton. SSA St. 1 at 2. In 1966 the Borough of Dunmore became a member of the Authority. Id.

The Joint Applicants also argue that the OCA's testimony about alternative transaction structures is "theoretical". JA Brief at 78-79. In fact SSA witness Barrett testified that SSA initially considered entering into an agreement with a third party to operate and maintain the system or a sale of the system. SSA St. 1 at 5. The City sought and received proposals that included an operation and maintenance of the system, a lease/concession alternative and outright purchase. Tr. 149. In fact, PAWC's proposal included an operation and maintenance option as well as an asset purchase option. See PAWC St. 1 at 5.

In addition, the Joint Applicants argue that the OCA did not present evidence that other types of transactions would provide greater public benefit. However, that position must be rejected. The Joint Applicants have the burden of establishing that their proposed transaction provides affirmative public benefits. The OCA does not have to establish that any other transactions would provide greater benefits. Further, the OCA provided evidence that the proposed transaction does not provide affirmative public benefits. The information provided by Mr. Barrett and the OCA regarding other transaction types simply points out that there were other options that the SSA explored or that could have been considered.

The Joint Applicants then state that 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." JA Brief at 78. The OCA does not disagree except for the portion of the statement regarding the OCA's role vis-à-vis the ratepayers of PAWC. In this proceeding, it is the OCA's role to recommend what is in the best interests of the PAWC ratepayers related to the transaction that has been proposed. If the transaction is not in the best interests of the PAWC ratepayers, then it is the OCA's role to recommend that the transaction be denied.

2. PAWC Cannot Ask For Pre-Approval of Certain Rate Matters Raised by the APA and Exclude Others That Have a Bearing on Whether the Transaction Should Proceed.

PAWC introduced the rate issues into this proceeding by including them in the APA. PAWC Exh. BJK-1, Att. F. Section 7.07(current and future rates: the use of Section 1311(c), CAGR, variance adjustment, rates for SSA customers in years 11 to 13). In Section 11.01 of the Asset Purchase Agreement contains a condition precedent that the PUC “shall have issued a Final Order approving the transaction contemplated hereby without a material modification to the rate-related provisions of Section 7.07.” In addition, PAWC says that if they cannot recover costs, then the transaction is not in the public interest. JA Brief at 35-37. Due to the Joint Applicants’ requests for explicit or implicit pre-approval, they cannot then say that the OCA’s response to those requests is premature and should not be addressed in this proceeding. PAWC argues that the Commission should not be “bogged down with ratemaking issues unless such issues are so fundamental to the transaction that the public interest would be implicated.” JA Brief at 80. Certain ratemaking concessions sought by the Joint Applicants are fundamental to the determination of the public interest as they bear directly on whether there is harm to ratepayers or any affirmative public benefit and must be addressed in this proceeding. While the acquisition premium and the 100 new jobs to Scranton by December 31, 2020 will be addressed in a future rate proceeding (OCA St. 2 at 7, 37), the threshold legal issue of whether stormwater is subject to PUC jurisdiction, and the resulting rate making assurances sought by PAWC in order to proceed with the transaction must be addressed here.¹⁷ The Joint Applicants say that if these assurances are not granted, the transaction is not in the public interest. JA Brief at 35-36.

¹⁷ Those ratemaking assurances include the requested assurance that stormwater and wastewater costs will not be separately allocated, as well as the assurance that PAWC will have the ability to use Section 1311(c) for shifting stormwater costs to water customers, and the assurance that PAWC will bear no risk related to the variance adjustment and that costs of that provision, if any, will be borne by ratepayers.

Thus, OCA's response to those issues does not turn the case into a mini-rate case. Rather, it turns this proceeding into a very important one for PAWC's existing water and wastewater customers who are facing potentially large rate increases over the next 25 years because of the assurances sought by PAWC. Importantly, those customers have had no notice of this proceeding. Thus, the rate concessions sought by the Joint Applicants must be addressed here and, as set forth herein, should not be granted.

PAWC argues that it is proposing a reasonable and gradual phase in for the Scranton customers. There are two problems with this argument. First, it ignores the impact of the 1.9% CAGR provision for the first 10 years. In order for that provision to be met, the existing water and wastewater customers must bear the costs of keeping the Scranton rates artificially below cost of service.

Second, PAWC minimizes the potential impact on Scranton customers of bringing the rates to full cost of service after 10 years of keeping the rates artificially below cost of service. The OCA agrees that the Commission could phase in the rates over a longer period of time than proposed under the APA (Years 11-13). However, the impact of the first 10 years cannot be ignored. Moreover, as discussed below, if the rates are not kept below cost of service during the first 10 years after closing, then that simply means that under PAWC's proposal, its existing customers will bear the cost differential.

PAWC argues that the rate recovery of the variance adjustment is properly reserved for a future base rate proceeding. JA Brief at 84-85. This position is inconsistent with PAWC's own request. PAWC wants an assurance that its shareholders are not going to bear the costs related to the variance adjustment which would mean that the variance adjustment would be collected from its existing ratepayers. Clearly, the amount of the adjustment is not known and cannot be known

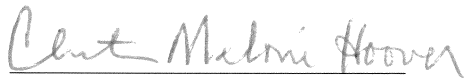
in this proceeding. However, a determination of whether PAWC's shareholders will bear those costs, once they are known, or whether it is another cost that will be borne by ratepayers, can and should be made in this proceeding. PAWC states that it is "lawfully entitled to the opportunity to seek recovery of a Variance Adjustment" in a base rate proceeding that is at least 10 years in the future. As Mr. Rubin stated, the variance adjustment means that existing customers will pay \$104 million over the next ten years to subsidize the purchase price. OCA St. 2 at 4. If PAWC agreed to a 10-year rate limitation for SSA customers rather than an increase in the purchase price, then PAWC's investors must assume the cost of that investment. Id.

Finally, the Joint Applicants state that to the extent any equipment or facility is exclusively related to stormwater, its right to recovery will be addressed in a future base rate proceeding. The OCA disagrees to the extent that the OCA's primary position is that the PUC does not have jurisdiction over stormwater service or assets. However, to the extent the PUC does not adopt the OCA's primary position, the OCA's recommendation is that the stormwater assets, whether combined or exclusively stormwater, must be separated from the wastewater facilities and costs. The OCA provided numerous examples of where that has been done by the Commission in other industries, such as energy and telecommunications. In addition, the Commission has addressed this issue in two Lancaster Sewer cases. The same analysis would need to be done here as well.

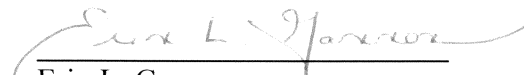
III. CONCLUSION

For the reasons set forth in the OCA's Main Brief and above, the Office of Consumer Advocate respectfully requests that the Commission deny PAWC's application for a Certificate of Public Convenience to purchase the SSA wastewater and stormwater assets and provide stormwater service for compensation. In the alternative, the Application should be conditioned so that PAWC's existing water and wastewater customers are not penalized by paying rates that reflect PAWC's provision of stormwater service to the residents of Scranton and the Borough of Dunmore.

Respectfully submitted,



Christine Maloni Hoover
Senior Assistant Consumer Advocate
PA Attorney I.D. No. 50026
Email: CHoover@paoca.org



Erin L. Gannon
Senior Assistant Consumer Advocate
PA Attorney ID No. 83487
Email: EGannon@paoca.org

Counsel for:
Tanya J. McCloskey
Acting Consumer Advocate

Office of Consumer Advocate
555 Walnut Street 5th Floor, Forum Place
Harrisburg, PA 17101-1923
(717) 783-5048

Dated: July 27, 2016

224282

Attachment A

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

In re: Petition of United Water Resources :
Inc. and North East Water, Inc. for a :
Declaratory Order Approving the Following :
Financial and Ratemaking Request for North :
East Water, Inc., Upon Its Acquisition of :
All of the Water Works and Certain Other :
Property and All Rights Relating to the :
Water Business of Pennsylvania Gas and :
Water Company: (1) Determination of :
Utility Plant for Prospective Ratemaking :
Purposes; (2) Deferred Accounting, :
Valuation and Ratemaking Treatment of Costs :
Associated with Prior Expenditures for the :
Construction of Water Treatment and :
Distribution Facilities Which Have Not Been :
Recognized in Rates; (3) Treatment of :
Leases of Certain Facilities As Operating :
Leases; (4) Qualified Phase-In Plan for :
Customer Charges; (5) Capital Structure; :
(6) Succession to the Rate Case Filed by :
Pennsylvania Gas and Water Company; :
(7) Succession to the Accounting Treatment :
Approved for Pennsylvania Gas and Water :
Company with Respect to Scranton Rate Area :
Water Treatment Plants; and (8) Such Other :
Matters As Are Necessary and Appropriate. :

Docket No.
P-900453

RECOMMENDED DECISION

Before
Richard M. Lovenwirth
and
Louis G. Cocheres
Administrative Law Judges

Dated: November 20, 1990

II. Discussion

A. Introduction

We believe that it is important at the outset to provide a brief description of the context in which this case is being litigated. The instant case is related to three other cases which are simultaneously pending before this Commission and the undersigned judges. More specifically, the PG&W water division assets are being sold to NEW, a wholly owned subsidiary of UWR. The request for approval of the purchase transaction in addition to the issuance of a Certificate of Public Convenience to NEW is pending at Commission Docket No. A-210018 and was assigned to Judge Lovenwirth. Judge Lovenwirth issued his Initial Decision on November 9, 1990, disapproving the purchase transaction due to the failure of UWR to show either that UWR shareholders consented to the acquisition or that their consent was not needed. The Initial Decision is written in a manner which may allow UWR to remedy this omission prior to issuance of a final Commission Order. If the water assets are sold to NEW, the remaining PG&W gas division and its parent, Pennsylvania Enterprises, Inc., will be merged into NUI Corporation (NUI). The request for approval of the merger transaction in addition to the issuance of a Certificate of Public Convenience to NUI is pending before this Commission and was assigned to Judge Lovenwirth at Commission Docket No. A-120001. Judge Lovenwirth issued his Initial Decision on November 7, 1990, which approved

the merger transaction and issuance of a Certificate of Public Convenience to NUI contingent on the sale of the water division assets. And finally, as noted above, PG&W's water division is in the midst of a rate case for its Scranton Rate Area customers. That rate case is pending before this Commission and Judge Cocheres at Commission Docket No. R-901726.

Much of the relief requested by UWR and NEW in the Petition asks for remedies which are normally granted in rate proceedings. Some of the remedies requested could also have immediate use in the application proceedings. It can also be safely said that the decisions requested herein could impact the ratepayers for many years in the future. Since there is an obvious nexus between this case and the pending application and rate cases and future rate cases, we believe it appropriate to address a philosophical question: Is it good regulatory policy for this Commission to grant rate case concessions to purchasers of utility franchises prior to the consummation of the contract? In short, the answer to this question is "No." It sets a bad precedent. As stated above, some of the remedies, if implemented, would seriously impact future ratepayers who simply have no opportunity to participate. In addition, if much of the relief requested were granted, it would send a message which says that the Commission is willing to sweeten the buyer's side of the bargain by allowing rate relief which may or may not be available in the ratemaking context. The Commission in most cases should

not be privy to the actual negotiations for the purchase of utility assets. The parties have the responsibility to be aware of regulatory parameters. If the buyer and seller conceive and agree to a creative financial package which requires premature rate relief or otherwise exceeds regulatory criteria, then they run the risk of Commission disapproval of the applications for transfer. The preceding should not be perceived as rigid adherence to past precedent. We recognize that the Commission should be amenable to novel financial techniques which can be accommodated within the regulatory framework. However, acceptance of novel financial and/or ratemaking concepts should be tempered with an eye toward both history and the future. The rules of review cannot change so quickly as to bind future Commissions and ratepayers outside the established ratemaking procedures and before the purchase is consummated. Thus, we have reviewed these requests and the record with an admittedly conservative outlook.

B. Rate Base Valuation

Instant petitioner requests Commission approval for recognition, for accounting purposes only, of NEW's rate base at the book value of PG&W's rate base, concerning the assets transferred to petitioner at the time of closing.

This requested recognition is to have no rate-making effect.