BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

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

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

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I. INTRODUCTION

Pennsylvania-American Water Company ("PAWC" or the "Company") and The Sewer Authority of the City of Scranton (the "Authority" or "SSA") (collectively, the "Joint Applicants") file this Reply Brief in response to the Main Briefs of the Office of Consumer Advocate ("OCA"), the Bureau of Investigation & Enforcement ("I&E") of the Pennsylvania Public Utility Commission ("Commission"), and the Office of Small Business Advocate ("OSBA") (collectively, the "Statutory Advocates"). Most of the arguments raised by the Statutory Advocates have already been addressed in the Joint Applicants' Main Brief. Accordingly, for the sake of brevity and for the sake of convenience, the Joint Applicants cross-reference several portions of their Main Brief in response to arguments by the Statutory Advocates.

Upon consideration of the substantial record evidence developed in this case and applicable law, the Commission should grant, without modification, the application filed by the Joint Applicants at this docket ("Joint Application") and grant a certificate of public convenience ("CPC") under Section 1102(a) of the Pennsylvania Public Utility Code ("Code"), 66 Pa. C.S. § 1102(a), allowing PAWC to acquire the wastewater collection and treatment system of SSA ("Combined Wastewater System") and related assets (the "Transaction"), as specified in the Asset Purchase Agreement between PAWC and SSA, dated March 29, 2016, ("APA") and to begin service to customers in the applied-for service territory ("Scranton-Area Customers").[1]

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[1] The Joint Applicants note that PAWC also requests the issuance of certificates of filing for the APA and seven municipal agreements (along with associated assignment and assumption agreements) under Code Section 507, 66 Pa. C.S. § 507. *See* Joint Applicants Main Brief at 58-59. None of the Statutory Advocates have indicated opposition to the issuance of the requested certificates of filing. Accordingly, the Joint Applicants do not further address the request in this Reply Brief. Similarly, none of the Statutory Advocates have indicated opposition to the *pro forma* tariff supplement attached to the Joint Application as Exhibit L, as amended (see complete version attached as **Exhibit D** to Joint Applicants Main Brief). Accordingly, the Joint Applicants do not further address the tariff supplement in this Reply Brief.

II. SUMMARY OF ARGUMENT

In the end, this case presents one fundamental issue for disposition by the Commission and all other issues either fall in line behind resolution of that issue or fall outside the limited scope of this application proceeding. That fundamental issue is this: Does the Commission have jurisdiction over the collection, treatment, and disposal of a combined wastewater stream consisting of flows of sewage from homes and businesses, infiltration and inflow, and stormwater ("Combined Wastewater") for the public for compensation ("Combined Wastewater Service")? *Cf.* 66 Pa. C.S. § 102 (regarding definition of "public utility"). The clear answer is "yes."

Commission jurisdiction over Combined Wastewater Service is supported by principles of statutory interpretation, the Pennsylvania General Assembly's intended regulatory regime, good public policy, and the substantial record evidence developed in this case. Combined Wastewater is "sewage" (or "wastewater" – *i.e.*, the currently-preferred term under statutory, industry and regulatory standards). Once stormwater enters a Combined Wastewater system, it mixes with sanitary and industrial wastewater and the combined flow becomes indistinguishable wastewater in need of collection, treatment, and disposal. As such, the Commission's jurisdiction over Combined Wastewater Service is not discretionary; the Commission has an affirmative responsibility under the Code to regulate Combined Wastewater Service.

Indeed, the Code does not distinguish between various forms of wastewater. It refers simply to "sewage" and "wastewater." If the Pennsylvania General Assembly intended to exclude Combined Wastewater from the terms "sewage" and "wastewater," it would have expressly done so. If a party is dissatisfied with the Commission's responsibility to regulate a particular form of wastewater, it should pursue recourse with the Pennsylvania General Assembly – not with the Commission.

Once the Commission affirms that – as a matter of law – it has jurisdiction over Combined Wastewater Service, the issue of the applicability of Act 11 of 2012, 66 Pa. C.S. § 1311(c), ("Act 11") falls in line. The ratemaking tools of Act 11 would be available to PAWC in a future base rate proceeding because Combined Wastewater Service is wastewater service and Act 11 expressly

applies to wastewater. The Joint Applicants seek confirmation of this conclusion of law in this proceeding because a core component of this Transaction is PAWC's ability to request Commission authorization to utilize Act 11 to meet the challenges of the Combined Wastewater System.

The only party to this proceeding that expressly opposes the Commission's statutory responsibility to exercise jurisdiction over Combined Wastewater Service is OCA. OCA's opposition is based on a flawed utopian concept of how stormwater could theoretically be regulated in the Commonwealth and is not based on the law or the practical realities of wastewater service in the Commonwealth. Moreover, in attempting to advance its position, OCA brushes aside the impact that the failure of this Transaction would have upon Scranton and its citizens – arguing that the financial impact of this Transaction upon Scranton is not determinative of the public interest. OCA's narrow view of the public interest should be rejected as contrary to the best interests of distressed communities throughout the Commonwealth and their citizens.

Aside from the threshold jurisdictional issue, the sole test for approval of the Joint Application is whether (1) PAWC is financially, technically, and legally fit to acquire the Combined Wastewater System and begin rendering service and (2) the Transaction provides an affirmative benefit to the public of a substantial nature. The Joint Applicants, for the reasons explained in their Main Brief, have satisfied – by a preponderance of the evidence – their burden of proof that the Transaction is in the public interest. Nevertheless, the Statutory Advocates are advancing arguments that far-exceed the limited scope of this application proceeding and are asking the Commission to predetermine issues that are properly reserved for a future PAWC base rate proceeding. Resolution of such ratemaking issues in this proceeding would violate the due process rights of not only PAWC but also other persons who may have an interest in the purported rate issues.

The Commission should confirm its jurisdiction over Combined Wastewater Service, confirm the applicability of Act 11 to Combined Wastewater Service, and grant the Joint Application without modification. The Joint Applicants have demonstrated by a preponderance

of record evidence that the Transaction is the public interest, and any predetermination of rate issues by the Commission at this time would be unlawful.

III. ARGUMENT

Despite the arguments of the Statutory Advocates addressed in more detail below, the threshold question regarding the Commission's jurisdiction over Combined Wastewater Service is straightforward and should be resolved in favor of the Joint Applicants. The dispositive analysis begins and ends with the language of the Code based on settled principles of statutory construction.

Section 1921(a) of the Statutory Construction Act, 1 Pa. C.S. § 1921(a) provides that the object of all statutory interpretation is to determine the General Assembly's intent based on the express words used in the statute. In making that determination, courts and agencies must apply the express words in a statute and cannot ignore them. *See* 1 Pa. C.S. § 1921(b); *Meier v. Maleski*, 670 A.2d 755 (Pa. Cmwlth. 1996). When the words of a statute might not be viewed as explicit, courts and agencies may consider other matters such as the occasion and necessity for the statute, the object to be obtained, the consequences of a particular interpretation and administrative interpretations. 1 Pa. C.S. § 1921(c); *Meier*, *supra*. To that end, the General Assembly is presumed to know the law and the lay of the land at the time it enacts statutory provisions addressing a particular topic. 1 Pa. C.S. § 1921(c)(2). Unless a statute falls under the strict construction rules, all statutory provisions "shall be liberally construed to effect their objects and promote justice." *See* 1 Pa. C.S. § 1928(c).

In addition, courts and agencies must interpret individual provisions in a statute in a way that gives effect to all the provisions in the statute. *Consulting Engineers v. Licensure Bd.*, 522 Pa. 204, 560 A.2d 1375 (1989) (explaining that individual provisions of a statute are to be interpreted, whenever possible, in a manner that gives effect to the entire statute). Similarly, when separate provisions in a statute deal with the same subject matter, they should be construed as one statute and consistent with one another. 1 Pa. C.S. § 1932(a), (b) ("Statutes or parts of statutes are

in pari materia when they relate to the same persons or things or to the same class of persons or things."; "Statutes *in pari materia* shall be construed together, if possible, as one statute.").

Finally, neither the courts nor agencies may insert exceptions to statutory provisions that are not there. *Pa. School Bds. Ass'n, Inc. v. Cmwlth., Public School Employees' Retirement Bd.*, 863 A.2d 432 (Pa. 2004) ("It is not this Court's function to read a word or words into a statute that do not actually appear in the text where, as here, the text makes sense as it is, and the implied reading would change the existing meaning or effect of the actual statutory language."); *Guinn v. Alburtis Fire Co.*, 531 Pa. 500, 503 n.4, 614 A.2d 218, 220 n.4 (1992) ("[I]t is not within the province of this court to second-guess the legislature and to add words to a statute where the legislature has failed to supply them.") (citing *Kusza v. Maximonis*, 363 Pa. 479, 482, 70 A.2d 329, 331 (1950)); *see also O'Donoghue v. Laurel Savings Ass'n*, 556 Pa. 349, 357-58, 728 A.2d 914, 917-18 (1999).

With those principles in mind, the Commission has jurisdiction over Combined Wastewater Service. Under the Code, the Commission has jurisdiction over "public utilities," defined as (among other things) "[a]ny person or corporations now or hereafter owning or operating in this Commonwealth equipment or facilities for: ... (vii) [s]ewage collection, treatment, or disposal for the public for compensation." 66 Pa. C.S. § 102(1)(v).

Under statutory construction rules, the terms "sewage" and "wastewater" as used in the Code and Commission regulations are synonymous. *See, e.g.*, 66 Pa. C.S. § 102 (using "sewage" to define "public utility"); *compare id.* § 1311 (using "wastewater" in context of Act 11); 28 Pa.B. 801; Commission Docket No. L-00950112. Indeed, the Statutory Advocates essentially concede that "sewer" and "wastewater" are synonyms and that the Commission regulates wastewater service. *See, e.g.*, OCA Main Brief, at 10.

Contrary to the Statutory Advocates' claim that the Code must expressly confer jurisdiction over Combined Wastewater Service, the Code does not exclude Combined Wastewater Service from the Commission's jurisdiction – using instead the unqualified terms of "sewage" and "wastewater" interchangeably. If the Code does not exclude Combined Wastewater systems from

the Commission's jurisdiction, then the Commission has jurisdiction and has a mandatory duty to regulate them. *See* 66 Pa. C.S. § 501(a) ("In addition to any powers expressly enumerated in this part, the commission shall have full power and authority, and it shall be its duty to enforce, execute and carry out, by its regulations, orders, or otherwise, all and singular, the provisions of this part, and the full intent thereof; and shall have the power to rescind or modify any such regulations or orders. The express enumeration of the powers of the commission in this part shall not exclude any power which the commission would otherwise have under any of the provisions of this part.").

The General Assembly had the opportunity to exclude Combined Wastewater Service from the Commission's jurisdiction, but it never did. When the General Assembly enacted Act 11 in 2012, it used the term "wastewater" (as opposed to the arguably more narrow terms "sewer" or "sewage") in connection with the combined revenue provisions for water and wastewater utilities. *See* 66 Pa. C.S. § 1311. At that time, there were hundreds of Combined Wastewater systems in Pennsylvania. PAWC St. No. 6-R, 18:1-2. The General Assembly – presumed to know the number of Combined Wastewater systems in the Commonwealth at the time it enacted Act 11 – had every opportunity to exclude Combined Wastewater Service from Act 11 and (for that matter) from the jurisdiction of the Commission altogether. Yet, the General Assembly never excluded combined wastewater from the pre-existing phrase "sewage" under Code Section 102 or the more contemporary term "wastewater" in Act 11. Thus, the Commission may safely presume that the General Assembly never intended to exclude Combined Wastewater systems from the Commission's jurisdiction because the General Assembly never said so when it enacted Act 11 and neither the Commission (nor the Courts nor the Statutory Advocates) may read into a statute an express exclusion to the Commission's jurisdiction that the legislature itself never added.

Having determined that the Commission has jurisdiction over Combined Sewer systems such as the one at issue here, the question then becomes whether substantial evidence supports the conclusion that the Combined Sewer System collects, treats, and disposes of wastewater to or for the public for compensation. Again, the answer is "yes." The Joint Applicants submitted testimony from Mr. James Elliot, a very credible witness with decades of engineering experience

with the Combined Wastewater System, who testified unequivocally that any stormwater that commingles with sewage or wastewater itself becomes "sewage" or "wastewater." *See* PAWC St. No. 6-R, 4:11-20. There is no evidence in the record to the contrary.

Simply put, the Commission has jurisdiction over the Combined Wastewater System by the express terms of the Code based on binding rules of statutory interpretation. That conclusion harmonizes all the provisions of the Code regarding jurisdiction over sewage or wastewater service and does not read into the Code any exclusion from the Commission's jurisdiction that is not there. Substantial record evidence supports the notion that stormwater combined with any sewage or wastewater becomes "wastewater" (which all parties agree is a Commission jurisdictional service). The Statutory Advocates have not come forward with any evidence suggesting that stormwater commingled with sewage is anything other than wastewater. Accordingly, no other conclusion can be supported by the law and the record evidence.

A. OCA's Arguments Against Commission Jurisdiction Over Combined Wastewater Systems Should be Rejected.

The analysis above is dispositive in the Joint Applicants' favor without further analysis. Nevertheless, OCA raises a variety of arguments questioning the Commission's jurisdiction over Combined Wastewater Service, questioning the public benefits of the Transaction, and prematurely raising rate issues in this narrow application proceeding. The Commission should reject all of OCA's arguments.

1. OCA's Statutory Construction Arguments Regarding the Meaning of "Sewage," "Wastewater," and "Stormwater" Under Pennsylvania Law Are Incorrect.

At the outset of its Main Brief, OCA initially makes a number of statutory interpretation arguments attempting to construe various Pennsylvania laws as distinguishing between "sewage"

and "wastewater," on the one hand, and "stormwater" on the other. *See* OCA Main Brief at 13-15. An examination of these arguments however reveals their fallacy.

First, OCA misconstrues Joint Applicants' arguments concerning the impact of the Commission rule changes that updated terminology to refer to "wastewater" rather than "sewage." The argument is not that the Commission's rulemaking changes expanded the Commission's jurisdiction. Rather, the argument is that the Commission's rulemaking properly recognized that the term "sewage" as used in the Code encompasses all wastewater, and, most directly for purposes of the instant matter, both the terms "sewage" and "wastewater" encompass all of the comingled flows in combined sewers. *See* Joint Applicants Main Brief at 19-24.

Second, OCA's reliance on the recent amendments to the Municipality Authorities Act is misplaced. *See* OCA Main Brief at 13-14. To illustrate, OCA cites to the 2013 amendment to the Municipality Authorities Act,[2] which added clause (18) to 53 Pa. C.S. §5607(a), empowering municipal authorities to undertake projects involving "stormwater planning, management and implementation."

OCA notes (correctly) that prior to that amendment, municipal authorities were empowered to operate "sewer, sewer systems, or parts thereof" and "sewage treatment works." 53 Pa. C.S. § 5607(a)(5),(6). From this, OCA contends that if "stormwater" were commonly understood to be included in the term "wastewater," the addition of Section 5607(a)(18) to allow for stormwater projects would be redundant and "mere surplusage."

OCA misses the logical conundrum created by this interpretation. Under OCA's construction, prior to 2013, it would have been impossible for municipal authorities to operate combined sewer systems. If, as OCA has argued throughout this proceeding, combined sewer systems involve some aspect of "stormwater services" and "stormwater" is not part of sewage, then under OCA's logic, municipal authorities would not have been legally authorized to operate combined sewer systems prior to 2013. Such an interpretation is directly contrary to the reality

[2] Act of July 9, 2013, P.L. 569, No. 2013-68.

that numerous municipal authorities, including the Scranton Sewer Authority, have owned and operated combined sewer systems under the powers granted by the Municipality Authorities Act.[3] Such combined wastewater systems have existed, and exist today, under the "sewer" and "sewage" project powers of municipal authorities, because (as explained in Joint Applicants Main Brief) they are sewage systems.

Given the long-standing and well-accepted practice that municipal authorities can operate combined wastewater systems under their sewage project powers, what the 2013 Municipality Authorities Act amendment did was clarify the power of municipal authorities to undertake pure stormwater projects and activities – what are typically understood to be MS4 systems. It is important to note that the MS4 system, a pure stormwater system, has been excluded from the Transaction and is not considered a part of the combined system which the Authority has agreed to sell to PAWC. The 2013 amendment does not support OCA's contention that stormwater activities associated with combined sewer systems lie outside the traditional understanding of what is encompassed by sewage systems.

Third, OCA cites to the definition of "sewage" in the Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P.L. (1965) 1535, *as amended*, 35 P.S. § 750.1 *et seq.*, for the proposition that stormwater is excluded from "sewage" as defined in that act. OCA is wrong. The Sewage Facilities Act contains a very broad definition of sewage:

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

Under that definition, where human and animal wastes are mixed with any other flow, whether they come from industrial users, groundwater or stormwater, the resulting flows are all "sewage"

[3] The Pennsylvania Department of Environmental Protection's listing of combined sewer systems (PAWC Ex. JCE-3) is replete with references to municipal authority operated combined systems.

under the Pennsylvania Clean Streams Law and Sewage Facilities Act. *See* PAWC St. No. 6-R, 5:14-16. Contrary to OCA's misconception, stormwater is not excluded from that definition; where stormwater mixes with sewage in combined systems, it becomes "sewage."

Accordingly, the Commission should reject the OCA's attempt to construe various Pennsylvania laws as distinguishing between "sewage" and "wastewater," on the one hand, and "stormwater" on the other because the arguments are incorrect. The laws actually support the position of the Joint Applicants.

2. **OCA's Arguments Based on Statutes and Cases from Other Jurisdictions Are Not Well Founded, and Are Contradicted by Pennsylvania Provisions that Treat Stormwater as Sewage and Wastewater.**

OCA erroneously claims that other states' case law and statutes support the proposition that stormwater and sewage are to be treated as distinct concepts unless otherwise specified in state law. Again, an examination of these arguments shows that they are without merit.

First, contrary to OCA's assertion on page 16 of its Main Brief, the Ohio Supreme Court did not hold, in *Northeast Ohio Regional Sewer Dist. v. Bath Twp.*, 44 N.E.3d 246 (Ohio 2015), "that the terms 'sewer' or 'waste water' do not include 'storm water' unless the relevant statute explicitly defines 'sewer' or 'waste water' to include stormwater." Rather, in *Bath Twp.*, the Ohio Supreme Court held that the Bath Township Sewer District had the statutory authority to implement, and establish fees to pay for, a regional stormwater management program based on the language of the statute at hand, which defined "waste water" to include "storm water." 44 N.E.3d at 249-52. Specifically, ORC § 6119.01(B) authorized Ohio sewer districts "[t]o provide for the collection, treatment, and disposal of waste water within and without the district." In turn, ORC § 6119.011 defined "waste water" as "any storm water and any water containing sewage or industrial waste or other pollutants or contaminants derived from the prior use of the water."

Based on this language, the Ohio Supreme Court determined that the sewer district had the authority to regulate and manage pure stormwater (for example, stormwater in MS4 systems), regardless of whether the storm water was combined with sewage or other pollutants. 44 N.E.3d at 250-51. Thus, all stormwater was defined as wastewater, irrespective of whether the stormwater was mixed with other wastewater. The Ohio court did not in any way opine on how the term "wastewater" should be interpreted when it is not expressly defined by statute to include stormwater, and in no way suggested that the fluids flowing in combined sewer systems were not all wastewaters. In fact, *Bath Twp.* is an example of a nearby jurisdiction that reasonably considers the term wastewater to include any stormwater that combines with sewage.

Second, OCA's citations to other state authorities are equally unavailing. That certain statutes in Vermont, the District of Columbia, and New Jersey include provisions defining "sewage" or "wastewater" to include "stormwater" offers no meaningful guidance as to how to interpret the relevant language of the Code. None of the cited laws from other states concern the scope of a state utility commission's jurisdiction over privately offered utility service, and none relate to how flows in combined sewer systems are classified. *See* 24 V.S.A. § 3672 (defining "sewage" for purposes relating to consolidated sewer districts); D.C. Code Ann. § 34-2202.01(8) (defining "sewage collection, treatment, and disposal systems" for purposes relating to the District of Columbia Water and Sewer Authority); N.J.S.A. § 58:11B-3 (defining "wastewater" for purposes relating to New Jersey's wastewater treatment trust).

In fact, a close reading indicates that some of these statutes support Joint Applicants' position. For example, the District of Columbia law cited by OCA defines "sewage collection, treatment, and disposal systems" to mean "all the facilities used, or to be used, for the collection, transmission, treatment, and disposal of sanitary sewage and stormwater flow ...." *See* D.C. Code Ann. § 34-2202.01(8). That definition parallels the definition of "sewerage facility" in Pennsylvania regulations: "[t]he term used to collectively describe a plant and sewer system owned by or serving a municipality" (*see* 25 Pa. Code Ch. 94), under which all wastewater treatment plants and all sewers including separate sanitary sewer systems and combined sewer

systems are "sewerage facilities." PAWC St. No. 6-R, 5:17-24. As explained by Mr. James Elliott, SSA's Combined Wastewater System is a "sewerage facility" as defined in 25 Pa. Code Ch. 94 (the wasteload management regulations governing sewage systems). *See* PAWC St. No. 6-R, 5:22-24.

Similarly, OCA's citation to statutes and regulations in other states containing separate provisions governing stormwater and sewage systems has no bearing on whether the Commission has jurisdiction over combined sewer systems in Pennsylvania. *See* N.H. Rev. Stat. § 149-I:6 (providing municipalities with the authority to adopt ordinances and bylaws relating to sewage systems and stormwater systems, without explicitly addressing combined systems); W.Va. Code St. R. §§150-5-1 and 150-36-1 (establishing rules governing sewer utilities and stormwater utilities, respectively, without specifying the regulatory status of combined systems).

Rather than reviewing inapposite laws from other states, the Commission need not look beyond the borders of Pennsylvania to find a prime example where the term "sewage" has been interpreted to encompass stormwater. OCA touts the City of Philadelphia as the prime example of an entity that has established stormwater fees. The Philadelphia Home Rule Charter ("Philadelphia Charter") provides that the Philadelphia Water Department ("PWD") may "fix and regulate rates and charges ... for supplying *sewage disposal services*;" provided, however, that City Council may alternatively establish an independent rate-making body to establish these charges. Philadelphia Charter § 5-801 (emphasis added). The Philadelphia Charter does not specifically mention the imposition of stormwater charges; it only authorizes fees for "sewage disposal services." Nevertheless, the PWD has imposed and collected separate fees for stormwater services provided by the City's combined and separate stormwater systems since 2010. Prior to this time, the PWD assessed sewer customers a stormwater management charge as part of their monthly sewer bill.

The Philadelphia Water Commissioner's Rate Determination, City of Philadelphia Fiscal Years 2009-2012, Phase II – Stormwater (July 21, 2009), at 1-2, & 13 discusses the history of Philadelphia's stormwater program, most notably finding that "[t]here can be no conclusion

reached other than *the inescapable truth that stormwater is sewage*, whether discharged into PWD's combined sanitary/storm sewer system, separate storm/sanitary sewer system or directly into one the region's rivers, streams, or creeks." (emphasis added) Thus, the absence of an explicit reference to stormwater in the Philadelphia Charter has not been an impediment to Philadelphia; the Charter's reference to "sewage" has been interpreted to encompass stormwater. The same result should be reached with respect to the Commission's jurisdiction in this proceeding – that is, stormwater (at least to the extent it is mixed with other wastewaters in combined sewer systems) is sewage, and the Commission has jurisdiction over all such combined sewage system services.

Accordingly, the Commission should reject the OCA's reliance on inapposite statutes and cases from other jurisdictions, particularly when the Code is clear and Pennsylvania law supports the conclusion that the Commission has jurisdiction over Combined Wastewater systems. There is no other reasonable conclusion.

3. There Is No Requirement That Wastewater and Stormwater in a Combined Wastewater System Must Be Treated as Separate Services, with Stormwater Costs Allocated and Recovered on a Different Basis.

Next, OCA attempts to dissuade the Commission from exercising jurisdiction over a Combined Wastewater system by arguing that such combined systems carry stormwater comingled with other wastewater, that stormwater services should be treated as fundamentally different than wastewater services, and that costs of stormwater services should be recovered from a different set of customers in a different manner. *See* OCA Main Brief at 19-25; OCA St. 2 at 11-16. As a fallback position that the Transaction should not be approved, OCA advocates that if the Commission permits a private company to own and operate a combined sewer system, the Commission should require a cost-of-service study to allocate system costs between wastewater and stormwater, and then mandate the costs allocated to stormwater be billed to either Scranton and Dunmore or to a new authority that could "bill residents for stormwater costs." *Id.* at 43. OCA proposes that the municipalities or hypothetical municipal authority could then impose separate

stormwater fees of the type advocated by Mr. Rubin, based on property characteristics. As examples of such property characteristics, OCA refers to "lot size, ground cover, soil type, ground slope, roof area, paved area, etc." *See* OCA Main Brief at 42.

OCA's arguments are premised on a utopian vision of how it believes stormwater and wastewater in combined systems should be managed and paid for, and not the practical realities of how such systems operate or what is permitted under existing law. OCA invites the Commission to ignore whether adequate legal authority exists in Pennsylvania for the exercise of jurisdiction over a combined system and to instead focus on the imposition and collection of the type of separate stormwater fees which OCA envisions. OCA also asks the Commission to overlook the difficult, time-consuming and resource intensive process that would be required to make OCA's vision of an ideal system of stormwater cost recovery become a reality. Not only is OCA's vision of an ideal stormwater system not required, it runs counter to existing law.

First, to be effective, a stormwater fee system must rest on a solid legal foundation, with clear statutory authority. Although OCA acknowledges that "[i]mportantly, whether and how a jurisdiction can establish a stormwater utility [and adopt stormwater fees] is subject to state legal and constitutional requirements" (*see* OCA Main Brief at 24, citing OCA St. No. 2 at 11-14), OCA carefully sidesteps any evaluation of that important question.

Examination of this question must start with the observation that, with respect to municipal powers, Pennsylvania is a Dillon's Rule state.[4] Except for those municipalities that have adopted home rule charters under the Home Rule Charter and Optional Plans Law,[5] cities, boroughs,

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[4] 22A SUMM. PA. JUR. 2d, Municipal and Local Law § 13:4 (2d Ed. 2016) ("Dillon's Rule is the law of Pennsylvania."); *Warner Cable Communications, Inc. v. Schuylkill Haven*, 784 F. Supp. 203, 211 (E.D. Pa. 1992) ("It is well established that Pennsylvania has adopted the Dillon rule . . . .").

[5] 53 Pa. C.S. §§ 2901-2983. The Home Rule Charter and Optional Plans Law implements PA. CONST. art. 9, § 2, which provides a narrow exception to Dillon's Rule with respect to home rule municipalities: "A municipality which has a home rule charter may exercise any power or perform any function not denied by th[e] Constitution, by its home rule charter or by the General Assembly . . . ." *See City of Philadelphia v. Schweiker*, 579 Pa. 591, 605, 585 A.2d 75, 84 (2004)

townships, and authorities only have and can exercise such powers as are explicitly conferred upon them by state statute by express words or as necessarily implied.[6]

Although the General Assembly has taken the recent step to grant stormwater fee powers to certain *municipal authorities* created for the purpose of performing storm water planning, management, and implementation,[7] and to second class townships[8] (legislation which notably has not yet been tested in practice),[9] the General Assembly has not yet adopted similar statutory authority for all *municipalities*. Legislation has been proposed, but not yet adopted, that would

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(holding that municipalities operating under home rule do not need "express statutory warrant" to enact ordinances).

[6] *Commonwealth v. Ashenfelder*, 413 Pa. 517, 521, 198 A.2d 514, 515 (1964) ("[I]t is well settled that ... political subdivisions of the Commonwealth ... possess only such powers as have been granted to them by the legislature, either in express terms or which arise by necessary and fair implication or are incident to powers expressly granted or are essential to the declared objects and purposes of the [political subdivisions]."); *Kline v. City of Harrisburg*, 362 Pa. 438, 443-44, 68 A.2d 182, 185 (1949) ("Any fair, reasonable doubt as to the existence of power is resolved by the courts against its existence in the [municipal] corporation, and therefore denied."); *In re Valley Deposit & Trust Co. of Belle Vernon*, 311 Pa. 495, 497-98, 167 A. 42, 43 (1933) (same).

[7] The Municipality Authorities Act only recently was amended in 2014 to allow for separate stormwater service fees, and those provisions have yet to be tested in practice. The Act of July 9, 2014, P.L. 1045, No. 2014-123, added clause (34) to 53 Pa. C.S. § 5607(d), providing:

> (d) Powers.–Every authority may exercise all powers necessary or convenient for the carrying out of the purposes set forth in this section, including, but without limiting the generality of the foregoing, the following rights and powers:
>
> * * *
>
> (34) In the case of an authority that performs storm water planning, management and implementation, reasonable and uniform rates may be based in whole or in part on property characteristics, which may include installation and maintenance of best management practices approved and inspected by the authority.

53 Pa. C.S. § 5607(d)(34). Conferring of this stormwater fee power occurred one year after the General Assembly adopted separate legislation amending Section 5607(a)(18), discussed *supra*.

[8] Act of July 1, 2016, No. 2016-62 (amending Section 2704 and 2705 of the Second Class Township Code to "enact and enforce ordinances to govern and regulate the planning, management, implementation, construction and maintenance of storm water facilities" and to adopt "reasonable and uniform fees based in whole or in part on the characteristics of the property benefited by the facilities, systems and management plans."

[9] PAWC St. No. 6-R, 29:13-15.

authorize boroughs (such as Dunmore) and townships to develop and collect stormwater service fees.[10] (*See* PAWC St. No. 6-R, 29:10-19). In other words, while municipalities that have formed stormwater authorities are currently authorized by statute to impose fees for stormwater services through such municipal authorities, boroughs and townships may not do so on a standalone basis under current law. OCA predicates its approach on the existence of assumed state legal authorization that has not yet been broadly extended to many of the communities owning and operating combined sewers.

Second, as explained in Joint Applicants Main Brief at 71-74, even where authorized, establishing stormwater fees of the type advocated by OCA is a complex, time-consuming and expensive process beyond the capabilities of most Pennsylvania communities. The process is a complicated, multi-step effort, involving (1) allocation of combined system costs between wastewater and stormwater; (2) structuring fees to consider multiple property conditions and characteristics (requiring detailed information regarding each of thousands of impacted properties); and (3) calculating and debating exemptions or credits to be accorded to properties that have installed stormwater management facilities.[11] Contrary to the claims of OCA's witness, Scott Rubin, that such stormwater fees are becoming "more common," the plain fact is that, in the real world of Pennsylvania, legal, technical and resource constraints have led only a handful of municipalities, out of many hundreds with stormwater systems and nearly 130 with combined sewers,[12] to adopt stormwater fee regimes of the type that OCA envisions. In OCA's utopian view,

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[10] Such proposed legislation is reflected in Pennsylvania General Assembly, House Bill 1394, P.N. 3165 of 2015 (proposing to authorize boroughs to assess stormwater fees); House Bill 1325, P.N. 3306 of 2015 (proposing to authorize second class townships to assess stormwater fees); and, House Bill 1661, P.N. 3166 (proposing to authorize first class townships to develop stormwater facilities and enact stormwater fees).

[11] Such credits are mandated, for example, by the recently enacted Section 2705(a) of the Second Class Township Code, which requires that townships "provide appropriate exemptions or credits for properties which have installed and are maintaining storm water facilities that meet best management practices and are approved or inspected by the township." Act of July 1, 2016, P.L. 439, No. 2016-62.

[12] PAWC Ex. JCE-3.

the truly common and accepted method for paying for combined wastewater system costs through traditional sewer rates (*see* PAWC St. No. 6-R, 28:16 - 29:6) would be overthrown. The Commission should not premise its jurisdictional determinations on a policy argument which is not grounded in the real world.

Accordingly, the Commission should reject OCA's arguments that stormwater services should be treated as fundamentally different than wastewater services in a combined system and that costs of stormwater services should be recovered from a different set of customers in a different manner because the arguments are incorrect as a matter of fact and of law. OCA's proposed solution is no solution at all.

4. **OCA's Claim that Stormwater Is Intertwined with Other Municipal Functions Such As Streets, and Thus Combined Sewer Systems Must Be Operated by the Same Governmental Entity that Owns Streets, Defies Real World Practice and Is Soundly Rebutted in the Record.**

OCA next claims that stormwater is so intertwined with other municipal functions, particularly streets, that combined sewer systems must be operated by a governmental entity, and specifically the same governmental entity that owns and operates streets. OCA Main Brief at 21-22. For this proposition, OCA quotes a more than page long passage from the direct testimony of Scott Rubin (*see* OCA St. 2 at 20-22). OCA erroneously claims that "Joint Applicants have not rebutted the OCA's evidence on this issue." *See* OCA Main Brief at 22.

First, Mr. Rubin's testimony and OCA's claims on this point are soundly rebutted by, among others, the testimony of Mr. Elliott (*see* PAWC St. No. 6-R, 20:14 - 24:9) and clearly answered in Joint Applicants Main Brief at pages 74-78. To summarize those rebuttals, OCA's position is premised on theories that, again, are not borne out in the practical world. Today, in Scranton and many other communities, the ownership and responsibility for street maintenance and the ownership and management of combined sewer systems are in separate and independent entities (*not* creatures of their creator municipalities), with the combined wastewater system being

owned by an independent municipal authority that is an independent subdivision of the state,[13] while the streets are managed by the municipality and the Pennsylvania Department of Transportation ("PennDOT"). OCA's claim that it is not feasible to separate control of streets from control of any other aspect of stormwater management, including combined sewer systems operations, is simply untrue – as proven every day in many communities across the Commonwealth.[14]

Second, OCA erroneously seeks to erect a structure to preclude any investor owned entity from operating combined wastewater systems. Such a prohibition would preclude well-experienced and well-capitalized utilities from bringing expertise and resources to distressed communities with such systems. As a step toward erecting that structure, OCA claims that stormwater-related activities should only be paid through separate charges collected from property owners and that a private utility cannot collect such bills because they do not have the right to lien property. *See* OCA Main Brief at 22. As noted above, OCA's construct is premised upon a utopian world, in which all stormwater costs are recovered in a particular manner, using separate stormwater fees based on parcel acreage or impervious surface area. OCA conveniently overlooks the fact, underscored by Mr. Elliott's testimony, that with very few exceptions, the costs of Combined Wastewater system operations all across Pennsylvania are currently recovered via sewer system bills paid for by sewer system customers. *See* PAWC St. 6-R, 28:16 - 31:13. Such sewer fees are precisely the type of fees that both investor owned utilities and municipal authorities alike are authorized to establish and enforce.

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[13] *Lehigh-Northampton Airport Authority v. Lehigh County Bd. of Assessment Appeals,* 585 Pa. 657, 672, 889 A.2d 1168, 1178 (2005); *Vernon Twp. Water Authority v. Vernon Twp.*, 734 A.2d 935, 938 n. 7 (Pa. Cmwlth. 1999).

[14] As noted in the list of Combined Wastewater systems provided in PAWC Ex. JCE-3, all across Pennsylvania independent wastewater authorities own and manage combined sewer systems, while clearly the roads and streets in the community are owned and managed by the respective cities, boroughs, or townships and PennDOT. PAWC St. No. 6-R, 22:9-13.

Accordingly, the Commission should reject OCA's contention that combined sewer systems must be operated by a governmental entity. Private enterprise is equally, and in many circumstances better, equipped to handle the challenges of a Combined Wastewater system.

5. Commission Jurisdiction over Infiltration & Inflow is Similar to Commission Jurisdiction over Combined Wastewater Service.

As explained by PAWC witness Mr. Elliott, any mixture of sanitary waste, industrial wastewater, infiltration and inflow of stormwater and groundwater into a sewer line ("I&I"), and stormwater flowing into such lines, constitutes wastewater, and all such wastewater is regulated under the provisions of the Pennsylvania Clean Streams Law, the Sewage Facilities Act, and PADEP regulations relating to sewage. PAWC St. No. 6-R, 4:11-20. Based on Mr. Elliott's explanation of the possible components of Combined Wastewater (to include I&I), OCA suggests that the Joint Applicants are arguing that (i) I&I is the same as stormwater and (ii) stormwater should be subject to PUC jurisdiction. *See* OCA Main Brief at 16-19. OCA misses the point of Mr. Elliott's testimony.

Contrary to OCA's overly simplistic representation of the Joint Applicants' reference to I&I, the Joint Applicants are not arguing for Commission jurisdiction over a service that exclusively relates to stormwater. In fact, the Joint Applicants have made clear that Commission jurisdiction over service that only involves stormwater (that is, municipal separate storm sewer systems or "MS4") is not an issue in this proceeding. Joint Applicants Main Brief at 31-32. The issue in this proceeding, and the only issue in this proceeding, is Commission jurisdiction over Combined Wastewater Service.

The Joint Applicants' reference to I&I is for the purpose of demonstrating that, once stormwater and groundwater enter into a sanitary sewer system, the combined flow is all "sewage" or "wastewater" as those terms are used in the Code. *Cf.* 66 Pa. C.S. §§ 102 (regarding definition of "public utility"), 1311(c) (regarding combined water and wastewater requirement requirement). As explained by PAWC witness Mr. Nevirauskas, the "Commission allows rate recovery for used

and useful facilities associated with I&I, such as equalization tanks and basins, as well as prudently-incurred expenses associated with I&I." PAWC St. No. 4-R, 16:19-21. As such, the Commission has traditionally exercised jurisdiction over a combined flow that includes stormwater and groundwater resulting from I&I. Indeed, OCA and I&E readily concede that I&I is part of wastewater, over which the Commission has jurisdiction. *See* OCA Main Brief at 13, 17; OCA St. 1 at 6 ("'wastewater' (previously sewage) includes domestic wastewater, industrial wastewater, and infiltration/inflow within the sewer system); I&E Main Brief at 10, footnote 20 ("I&E recognizes that varying amounts of storm water enter all wastewater systems, and that reasonable costs of this storm water infiltration are recovered in rates.") The fact is that combined flow of wastewater mixed with stormwater entering a sewer line via I&I is all wastewater and it cannot be segregated.

Likewise, a combined flow which includes wastewater mixed with stormwater collected from catch basins is wastewater and cannot be economically or operationally segregated in a reasonable manner. When a combined flow (regardless of its sources) is collected, treated, or disposed for the public for compensation, a regulated "public utility" service is being provided and the Commission has jurisdiction. *See* 66 Pa. C.S. § 102.

6. <u>Under Existing Law, the Commission Exercises Broad Jurisdiction over Electric, Natural Gas, and Telephone Services even after So-Called "Deregulation."</u>

In its zeal to suggest a parallel between the Commission's alleged lack of jurisdiction in this case and the Commission's lack of jurisdiction over other utility types and to support its theory that the Commission does not have jurisdiction over what it characterizes as commingled wastewater and stormwater services in the Combined Wastewater System, OCA asserts – based on erroneous conclusions from its witness Scott Rubin – that the Commission does not regulate substantial aspects of electric and gas supply and telecommunications services. OCA Main Brief, at 27. Nothing could be further from the truth.

Anyone even remotely close to the "deregulation" actions taken relative to the electric, gas and telecommunication industries over the last 20 years recognizes the misnomer in the term "deregulation." While the nature of the Commission's "regulation" of competitive industries is certainly different in nature and kind than its more traditional regulation of public utilities, it is completely incorrect and indeed misleading to suggest the Commission does not regulate "supply" as suggested by OCA and its witness, Scott Rubin.

It is clear that the Commission asserts jurisdiction and regulatory authority over significant aspects of the competitive components of the electric, gas and telecommunications industries consistent the General Assembly's statutory directives and intended regulatory regimes. For example, electric generation suppliers are "regulated" by the Commission and must be licensed before they commence operations under Code Chapter 28, known as the Electricity Generation Customer Choice and Competition Act, 66 Pa. C.S. §§ 2801-2812. While the Commission does not regulate competitive electric generation suppliers ("EGSs") generally as public utilities (except for limited purposes under Code Section 2809 and 2810), the Commission has routinely asserted its broad powers over EGSs under its general authority in Code Section 501.[15] The Commission has ruled that it has the authority to direct billing adjustments over EGS charges under its Code Section 501 powers to carry out the consumer protections in the Electricity Generation Customer Choice and Competition Act that are applicable to electricity generation service. *Cmwlth. of Pa., et al.* v. *IDT Energy, Inc.*, Docket No. C-2014-2427657, at 17 (Order entered Dec. 18, 2014). While the Commission does not have traditional ratemaking authority over EGSs and does not regulate competitive supply rates or interpret contracts between EGSs and its customers, the

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[15] *See* 66 Pa. C.S. § 501(a) ("In addition to any powers expressly enumerated in this part, the commission shall have full power and authority, and it shall be its duty to enforce, execute and carry out, by its regulations, orders, or otherwise, all and singular, the provisions of this part, and the full intent thereof; and shall have the power to rescind or modify any such regulations or orders. The express enumeration of the powers of the commission in this part shall not exclude any power which the commission would otherwise have under any of the provisions of this part.").

Commission has specifically found that it has jurisdiction to regulate certain aspects of EGS services, including those specified in Code Sections 2807 and 2809. *Id.* at 24.

The Commission operates under a similar regulatory structure with respect to competitive natural gas suppliers ("NGSs") under the Natural Gas Choice and Competition Act, 66 Pa. C.S. §§ 2201-2012. NGSs are subject to licensing requirements and Commission oversight with regard to customer complaints.

The Commission continues to regulate portions of the telecommunications industry in part via Code Chapter 30, Alternative Form of Regulation for Telecommunications Services, 66 Pa. C.S. §§ 3011-3019. In *Joint Petition of Verizon Pennsylvania and Verizon North LLC for Competitive Classification of All Retail Services in Certain Geographic Areas and for a Waiver of Regulations for Competitive Services*, Docket Nos. P-2014-2446303 and P-2014-2446304 (Order entered September 11, 2015), the Commission stated that "while we must regulate consistent with the statutory objectives of Chapter 30, we emphasize that we still *retain jurisdiction over quality of service and affordability matters regardless of the competitive designation of a particular wire center*." *Id.* at 18 (emphasis added). Likewise, in *Petition of Communication Workers of America for a Public, On-the-record Commission Investigation of the Safety, Adequacy, and Reasonableness of Service by Verizon Pennsylvania LLC*, Docket No. P-2015-2509336 (Order entered April 21, 2016), the Commission rejected Verizon's efforts to dismiss a petition seeking an investigation of various aspects of its service because it already had sufficient programs already in place to monitor service.

It is clear that the Commission continues to assert jurisdiction of and regulatory authority over various aspects of "competitive" and "deregulated" industries, via rulemakings, orders, regulations, policy statements, *etc.*, in stark contrast to OCA's unsupported position to the contrary. For each industry, the Commission must abide by the regulatory regime intended by the General Assembly. With regard to wastewater, the General Assembly intended to provide the Commission with broad jurisdiction. If it did not, it would have carved out specific exceptions in the Code.

7. **The City of Lancaster Decision does not Address Commission Jurisdiction over Combined Wastewater Service.**

In its Main Brief, the Joint Applicants explained why the unpublished, pre-Act 11 decision in *City of Lancaster v. Pennsylvania Public Utility Commission*, No. 1968 C.D. 2005 (Pa. Cmwlth. 2006) does not apply in this case. *See* Joint Applicants' Main Brief, at 32-33. OCA nevertheless relies on *City of Lancaster*, quotes from the Court's decision regarding the Commission's methodology for allocating rates among jurisdictional *versus* non-jurisdictional customers, and then makes the sweeping claim that "stormwater service was not jurisdictional to the Commission." OCA Main Brief at 14. OCA is wrong.

Neither the Commission nor the Commonwealth Court held that the Commission lacks jurisdiction over Combined Wastewater systems. Rather, the Commission and the Commonwealth Court, at most, concluded that the Commission could not authorize the City to pass on the costs of Combined Wastewater Services to extraterritorial (jurisdictional) customers that did not receive any Combined Wastewater Services. Properly read, the decision in *City of Lancaster* stands for the unremarkable proposition that the Commission lacks jurisdiction over customers within a municipal utility's corporate borders regardless of the type of service they receive, *see, e.g.*, 66 Pa.C.S. § 1501, but that decision in no way forecloses the Commission's jurisdiction over Combined Wastewater Services, particularly when (as here) the Commission has jurisdiction over *all* of PAWC's services provided to its combined customer base. In short, *City of Lancaster* does not mean the Commission lacks jurisdiction over Combined Wastewater Services.

Accordingly, the Commission should reject the OCA's reliance on *City of Lancaster* for all the reasons stated in the Joint Applicants' Main Brief and for the additional reason that the decision in that case does not stand for the sweeping proposition for which the OCA cites it. The decision has nothing to do with jurisdiction over Combined Wastewater Service; it deals with ratemaking equity between jurisdictional and non-jurisdictional customers (over whose rates the Commission has no control).

8. **Adoption of Either OCA's or I&E's Position on Combined Wastewater Service Would be Contrary to the Public Interest.**

According to a data base compiled by the Pennsylvania Department of Environmental Protection (PAWC Ex. JCE-3), Pennsylvania currently has approximately 129 Combined Wastewater systems. PAWC St. No. 6-R, 18:1-2. Of those, PADEP classifies some 75 wastewater systems as "major" Combined Wastewater systems. *Id.* at 18:2-4. Many of these Combined Wastewater systems serve relatively small communities, such as the towns of the anthracite region in Schuylkill, Carbon, Luzerne and Lackawanna Counties, and likewise a myriad of small communities in western Pennsylvania. These communities are typically older and have more-limited financial capabilities. They experience difficulty in increasing user fees, often have limited staffing for complex programs, and have significant other municipal infrastructure demands upon available funding. *Id.* at 18:12-20.

At least 11 municipalities enrolled in Act 47 are combined sewer system communities. *Id.* at 19:4-7. As explained by Mr. Elliott: "A number of these communities have limited technical and financial capabilities, and their distressed status presents even greater challenges in terms of being able to address federal and state mandates for managing their combined sewer systems and reducing overflows while meeting a myriad of other financial demands, including structural budget deficits, unfunded pension obligations and the like." *Id.* at 19:7-12. These communities would benefit not only from the monetization of their wastewater system assets, but also from professional operation of their systems.

The positions of OCA and I&E in this proceeding would effectively deprive Pennsylvania communities (including those that are financially distressed) of the option of an acquisition of their Combined Wastewater system by a willing and capable investor-owned public utility and, additionally, would thwart Commonwealth policy efforts to regionalize wastewater services. OCA outright rejects Commission jurisdiction over Combined Wastewater Service. OCA Main Brief at 9-29. Even if the Commission exercises jurisdiction, OCA posits that stormwater-related costs must be allocated separately to the customers of the Combined Wastewater system. *Id.* at 41-43.

I&E takes a position similar to OCA's alternative – *i.e.*, allocation of stormwater costs exclusively to customers of the Combined Wastewater system. I&E Main Brief at 9-14. All of these positions would, from practical viewpoint, preclude the acquisition of a Combined Wastewater system by an investor-owned public utility in the Commonwealth.

If the Commission lacks jurisdiction over Combined Wastewater Service, an acquisition as contemplated by the APA simply cannot occur. If the Commission has jurisdiction but a portion of the Combined Wastewater system revenue requirement cannot be spread to the acquiring public utility's larger customer base, acquisitions would not be economically feasible in most circumstances. *See* PAWC St. No. 4-R, 21:4-22:5.

As succinctly explained by Mr. Elliott:

> The practical effect of [OCA witness] Mr. Rubin's interpretation and policy position is that communities faced with combined sewer systems will not have the option to transfer those assets to a more sophisticated and capable public utility company, with a greater range of technical competence and better access to capital to provide a reliable solution to their wastewater challenges. Mr. Rubin's position basically condemns distressed and small communities who have combined sewers, but face resource challenges, from seeking the pathway that many water and wastewater systems have pursued in turning to stronger public utility companies for expertise, resources and management capabilities.

PAWC St. No. 6-R, 20:6-13. In short, OCA and I&E are putting their academic and esoteric theories of how stormwater should be regulated in the Commonwealth above the clear language of the Code and, in the process, are turning a blind eye to the practical realities facing communities throughout Pennsylvania. If the General Assembly had wanted to tie the hands of the Commission to address these types of public interest situations, it would have provided explicit exclusions from the definitions of "sewage" and "wastewater" in the Code. It did not.

B. Aside from the Threshold Jurisdictional Issue, The Proper Scope of Review for the Instant Application Proceeding is Limited to PAWC Fitness and Whether There will be an Affirmative Public Benefit from the Transaction.

Aside from the threshold jurisdictional issue, this application proceeding has a limited scope of review. The Commission's review is limited to determining whether (i) PAWC is technically, financially, and legally fit to own and operate the Combined Wastewater System and (ii) the Transaction will affirmatively promote the service, accommodation, convenience, or safety of the public in some substantial way." *See* Joint Applicants Main Brief at 7, 80-81; *Seaboard Tank Lines v. Pa. Pub. Util. Comm'n*, 502 A.2d 762, 764 (Pa. Cmwlth. 1985); *Warminster Township Mun. Auth. v. Pa. Pub. Util. Comm'n*, 138 A.2d. 240, 243 (Pa. Super. 1958); *City of York v. Pa. Pub. Util. Comm'n*, 449 Pa. 136, 151, 295 A.2d 825, 828 (1972). Code Section 1102(a) requires no more and no less than these findings for the issuance of a certificate of public convenience authorizing PAWC to proceed with the Transaction.

Despite the legal presumption that – as a certificated public utility – PAWC is fit, PAWC presented substantial record evidence regarding its fitness. *See* Joint Applicants Main Brief at 39-44; *South Hills Movers, Inc. v. Pa. Pub. Util. Comm'n*, 601 A.2d 1308, 1310 (Pa. Cmwlth. 1992) (regarding presumption of fitness for public utility). No Statutory Advocate has directly contested PAWC's fitness to own and operate the Combined Wastewater System and, accordingly, there is no substantial record evidence to rebut PAWC's fitness evidence or even the presumption of fitness. Accordingly, the only lawful conclusion is that PAWC is technically, financially, and legally fit to own and operate the Combined Wastewater System.

Aside from OCA's issue of Commission jurisdiction over Combined Wastewater Service, the Statutory Advocates' only opposition to the Transaction relates to the public benefit factor of the acquisition approval standard. However, as discussed in more detail below, their opposition relates exclusively to ratemaking issues that are clearly beyond the limited scope of this proceeding.[16] As discussed in detail in the Joint Applicants' Main Brief, the preponderance of the

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[16] OCA argues that there could be a rate detriment to PAWC's existing water and wastewater customers; there could be a rate detriment to Scranton-Area Customers after year 10

evidence demonstrates that the Transaction will result in affirmative public benefits and, therefore, should be approved. *See* Joint Applicants Main Brief at 44-58.

1. **Determinations Regarding Rate Issues are Beyond the Limited Scope of Review for this Acquisition Proceeding.**

Issues regarding the possible ratemaking implications of the Transaction are beyond the limited scope of this application proceeding and properly reserved for a future PAWC base rate proceeding. The Statutory Advocates' ratemaking arguments are premature and, in any event, rise to the level of undermining the public interest nature of the Transaction. *See* Joint Applicants Main Brief at 80-87. Their arguments should be viewed for what they are: an improper attempt to have the Commission predetermine rate issues in their favor before PAWC's next base rate case.

It is worth reiterating that the APA makes it abundantly clear that Commission approval of the Transaction would neither bind the parties nor the Commission in future PAWC base rate proceedings. *See* Joint Applicants Main Brief at 87. Section 7.07 of the APA explicitly states in multiple locations that PAWC's rate commitments to SSA are "subject to PaPUC approval and applicable law." PAWC Ex. BJG-1 (Section 7.07 of the APA). As such, any concerns that approval of the Transaction would restrict the Commission's authority to determine (and opposing parties' right to advocate) "just and reasonable rates" for PAWC are unfounded. *Cf.* 66 Pa. C.S. § 1301 ("Rates to be just and reasonable").

It is likewise worth reiterating that the Commission cannot resolve prospective rate issues in this application proceeding without violating the due process rights of PAWC and other persons

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following closing of the Transaction; stormwater costs should be separately allocated to Scranton-Area Customers; and, the Variance Adjustment should not be borne by ratepayers. OCA Main Brief at 29-48. I&E argues that stormwater costs must not be recovered from PAWC's current customers; the Variance Adjustment must not be recovered from PAWC customers; the APA's ratemaking terms may violate the concepts of gradualism and rate shock; and, the Transaction may not be eligible for an acquisition adjustment. I&E Main Brief at 9-27. Likewise, OSBA argues that the rates resulting from the APA and the Variance Adjustment may violate the concepts of gradualism and rate shock. OSBA Main Brief at 4-6. For the reasons explained in the Joint Applicants' Main Brief and this Reply Brief, all of these arguments are without merit.

who are potentially interested in rate issues. *See* Joint Applicants Main Brief at 81. Due process is a basic constitutional right which is required by the Pennsylvania Constitution and the Fourteenth Amendment to the United States Constitution. *See English v. North East Bd. of Educ.*, 348 A.2d 494 (Pa. Cmwlth. 1975). Procedural due process requires that interested persons be afforded reasonable notice of the issues raised so that they have an opportunity to present any response or objection. *See generally Bell Atlantic-Pa., Inc. v. Pa. Pub. Util. Comm'n*, 763 A.2d 440 (Pa. Cmwlth. 2000); *Honey Brook Water Co. v. Pa. Pub. Util. Comm'n*, 647 A.2d 653 (Pa. Cmwlth. 1994).

Here, neither PAWC nor any other interested member of the public was given notice that that rate issues would be finally adjudicated in this application proceeding. Only notice of an acquisition application proceeding was afforded. Rate issues – including recovery of a Variance Adjustment through rates, the submission of a depreciated original cost of plant-in-service study, the appropriateness of an acquisition adjustment, the appropriate form of a cost of service study, recovery of expenses associated with the creation of new jobs, and rate gradualism – are not properly before the Commission. Moreover, because of the limited scope of this proceeding, there is no substantial record evidence to support disposition of the rate issues raised by the Statutory Advocates.

For these reasons, the Commission should not resolve rate issues in this proceeding. The issues should be deferred to a future PAWC base rate proceeding in which all interested parties are given notice and an opportunity to be heard. This proceeding should be limited to an adjudication of the threshold jurisdictional issues, whether PAWC is fit (which is presumed and unrefuted), and whether the Transaction will produce an affirmative public benefit of a substantial nature (which it clearly will).

a. The 1.9% Compound Annual Growth Rate contained in the APA is reasonable and not binding on the Commission.

The OCA, I&E and OSBA have each been critical of the 1.9% CAGR and the associated Variance Adjustment detailed in Section 7.07(d) of the APA. I&E and OSBA argue that the Variance Adjustment is contrary to law (I&E Main Brief at 19-22; OSBA Main Brief at. 2-6), while OCA claims the 1.9% CAGR is unreasonable. OCA Main Brief at 41.

It is clear from these alleged criticisms that the Statutory Advocates do not truly understand the rationale for and basis of the 1.9% CAGR. As noted by SSA witness Eugene Barrett, the APA uses the 1.9% CAGR as a benchmark or guideline of affordable rate increases to wastewater customers in the SSA service area for the first ten years of PAWC ownership of the System. SSA St. No. 1, 7:5-7. The 1.9% CAGR was carefully selected by SSA as part of the RFP process to ensure that a new owner of the SSA was "better positioned than the Authority to maintain wastewater rates for the Service Areas at a level *below* the projected rate increases on a standalone basis." SSA St. No. 1, 8:18-21. As Mr. Barrett testified, as part of the Consent Decree process, the SSA evaluated the effect rate increases could have on the affordability of SSA's service for customers. That evaluation led to the SSA's conclusion that in order to meet the estimated requirements of the Consent Decree, the Long Term Control Plan, as well as ongoing investment needs and expense requirements, SSA rate increases could average 4.57% per year for decades. SSA St. No. 1, 8:14-18.

The Statutory Advocates have failed to truly understand the how the *combination* of the 1.9% CAGR and Variance Adjustment provide a powerful and lawful incentive to PAWC to restrain costs, thereby meeting the important RFP objective of mitigating future rate increases. Mr. Barrett explained in detail that the SSA's goal and objective throughout the RFP process was to keep future rate increases for SSA customers at affordable levels. For example, the SSA has testified:

- That the SSA's RFP process sought "an entity better positioned to meet the obligations of the Consent Decree and keep rates for wastewater service at reasonable levels over an extended period of time." SSA St. No. 1, 5:4-5;

- That one of the objectives of the RFP process was "mitigation of future rate increases"; SSA St. No. 1, 5:15;
- PAWC was the bidder best positioned to meet the objectives of the RFP, including the goal of keeping rate increases at affordable levels." SSA St. No. 1, 6:25-26;
- PAWC's large water and wastewater customer base compared to that of the Authority on a stand-alone basis creates potential economies and efficiencies not available to the Authority; SSA St. No. 1, 6:17-19; and,
- Unlike the Authority, PAWC can take advantage of Act 11, which permits water and wastewater revenue requirements to be combined on a public utility system. SSA St. No. 1, 6:19-21.

The 1.9% CAGR and the related Variance Adjustment provide clear protections to customers and a check of PAWC spending during the 10 years after closing of the Transaction. First, as noted above, the 1.9% CAGR benchmark for rate increases over the first ten years of PAWC ownership of the Combined Wastewater System is completely consistent with the customer affordability range of rate increases estimated when the Consent Decree was negotiated and executed. Second, by creating a trigger for the potential payment of a higher purchase for the System price after year ten, *that may or may not be recoverable in rates*, the 1.9% CAGR acts as a powerful incentive for PAWC to control costs on the Combined Wastewater System in the years leading up to year 10. Although the Variance Adjustment is calculated after year ten based on comparing present and future *revenues,* the Statutory Advocates fail to recognize that the most assured way of restraining revenue increases is to control costs and, by controlling costs (and thus required revenues) at reasonable levels, PAWC can avoid payment of a Variance Adjustment.

Despite the Statutory Advocates' suggestions to the contrary, the APA makes it perfectly clear that regardless of PAWC's rate proposals in Zone 11 for the first thirteen years after the closing of the Transaction, it is the Commission and no one else that will decide the magnitude and pace of any rate increases that are approved for PAWC, as well as the extent to which PAWC may utilize Act 11 to move revenue requirement to the combined water and wastewater revenue requirement. Joint Applicants Main Brief at 87.

Any concerns about the 1.9% CAGR and its binding impact on the Commission and the Statutory Advocates are without merit. On the contrary, the 1.9% CAGR provides demonstrative value to SSA customers *and* the balance of PAWC's customers by providing a real incentive (when combined with the Variance Adjustment) to mitigate costs and resulting rate impacts after closing of the Transaction.

b. The Variance Adjustment is a permissible adjustment to the acquisition purchase price and not an impermissible rate refund.

The Variance Adjustment is an adjustment to the purchase price for the Transaction provided for in Section 7.07 of the APA. Joint Applicants Main Brief at 84. If revenues from customers in the service area formerly served by the SSA prove to have exceeded the 1.9% CAGR after year ten following closing of the Transaction, PAWC is obligated under the APA to adjust the purchase for the System to compensate SSA for that incremental amount. *Id.* Section 7.07 of the APA, along with the example of a Variance Adjustment calculation shown in Schedule 7.07, specifies the methodology for calculating the Variance Adjustment.

Importantly, no Variance Adjustment exists today or will exist at the time of Transaction closing. In fact, as repeatedly stated in this proceeding, if and whether a Variance Adjustment will be due and owing is currently speculative and unknown since the calculation of such adjustment, by definition, cannot under the terms of the APA occur until the end of year ten following closing. Joint Applicants Main Brief at 85.

The Variance Adjustment was specifically incorporated into the APA to allow for a *possible* (but my no means certain or guaranteed) change in the overall purchase price for the Combined Wastewater System if the revenues actually collected by PAWC from the former SSA customers exceed the predetermined level based on the 1.9% CAGR during the 10 years following the closing of the Transaction. The Variance Adjustment and the 1.9% CAGR work together to

incent PAWC to control costs, and thus revenues collected to avoid any obligation to make a payment to the SSA at the end of the first ten years of ownership.

I&E's claim (I&E Main Brief at 19-22) that the Variance Adjustment violates Pennsylvania law is indeed ironic given that the adjustment specifically addresses legal defects identified in connection with the sale of the City of Coatesville's water system over 15 years ago. In that sale, the City of Coatesville (as the seller, "City") insisted as part of the bid process that any sale of its waterworks require the City to receive free fire hydrant service from the buyer in perpetuity. In a proceeding before the Commission to obtain approval of the City's proposed sale in 2000, the free hydrant service requirement was modified in response to claims that it violated various provisions of the Code. The revised fire hydrant provision required the utility to bill the City for the fire hydrant service, the City to pay for the amount billed, and the utility to contribute to the City's Economic Development Fund the exact same amount paid by the City for the fire hydrant service. This arrangement – offered as an alternative to free fire hydrant service – was also found to violate Code Section 1303, which prohibits a utility from straying from its approved tariff "directly or indirectly, by any device whatsoever, or in anywise . . . ." 66 Pa. C.S. § 1303; *Phila. Suburban Water Co. v. Pa. Pub. Util. Comm'n*, 808 A.2d 1044 (Pa. Cmwlth. 2002).

In *Philadelphia Suburban Water Company*, the Commonwealth Court found that the revised fire hydrant approach was an unlawful deviation from the utility's retail tariff and thus in violation of Code Section 1303. The court did not agree that the revised fire hydrant approach violated Code Section 1304, which prohibits a public utility from, among other things, making or granting any unreasonable rate preference or advantage to any person, corporation or subject any person to any unreasonable prejudice or disadvantage. 66 Pa. C.S. § 1304. The Commonwealth Court in *Philadelphia Suburban Water Company* specifically advised how the transaction could have been structured to avoid an unlawful deviation from the utility's tariff. The key is developing a purchase price that is not open-ended and indefinite. As structured in the APA, the purchase price to be paid by PAWC for the System will, at the end of ten years following Closing, establish a fixed sale price for the Transaction.

Under the APA, if a Variance Adjustment is ultimately paid by PAWC, it may, at the option of the SSA or its successor, be retained by the SSA or its successor in interest or distributed to customers. The *option* of returning any Variance Adjustment paid by PAWC to customers through PAWC was presented in the APA as a possible alternative so that the Commission could consider and accept or reject PAWC's involvement in the distribution process. Should the Commission find PAWC's involvement unacceptable, the alternative of using an independent third party for the process was also proposed as a means of distributing the funds to customers. The point is that the SSA or its successor as the seller holds all of the rights (*i.e.*, option) to determine what happens to any presently unknown and unknowable Variance Adjustment – *not PAWC or any customers*.

Given this structure, there is no way the Variance Adjustment can be characterized as a refund to customers or as a deviation from PAWC's retail tariff. Not only does PAWC have no choice in the matter, if there is any concern about any distribution of the Variance Adjustment to customers even potentially being characterized as a refund or tariff deviation, the Commission could simply direct the SSA or its successor to retain the Variance Adjustment. There is no intention through the Variance Adjustment for customers to pay less than what is authorized by the Commission. All the Commission has to do is advise if it believes any distribution is inappropriate and it will not be done.

Finally, any potential future distribution of the Variance Adjustment to customers could not reasonably be considered a "refund" because, in accordance with the APA, it would be a one-time, equal distribution payment to then-existing customers. PAWC Exhibit BJG-1 (APA Section 7.07(e)). Any distribution of a Variance Adjustment would *not* be tied to any rate that a particular customer actually paid.

While I&E claims payment of the Variance Adjustment constitutes a violation of Code Section 1304, it bears repeating that there is no Variance Adjustment today and there may never be one. Just as in *Philadelphia Suburban Water Company*, there is no unreasonable preference being made by PAWC as the utility if the hypothetical Variance Adjustment is paid to the SSA (which has no impact on customers at all) or even if it is distributed to customers since that decision

would be made solely by the SSA or its successor and *not* PAWC as the jurisdictional utility. If PAWC is not involved in making the determination about the manner and method of treating the Variance Adjustment, there is no way PAWC could be said to have created an unreasonable prejudice or disadvantage to any customers.

For the reasons so identified, I&E's claim that the as yet non-existent Variance Adjustment violates the Code does not withstand scrutiny and is unsupportable. The Variance Adjustment provisions of the APA are the result of a lawful arms-length negotiation of a purchase price.

c. A determination regarding recovery of a Variance Adjustment through rates is premature.

As explained in the Joint Applicants' Main Brief, the issue of whether PAWC should be permitted to recovery a Variance Adjustment is properly reserved for a future base rate proceeding.[17] Joint Applicants Main Brief at 84-85. The Variance Adjustment is an adjustment to the purchase price that was negotiated at arms-length between PAWC and SSA. PAWC Ex. BJG-1 (Section 7.07 of the APA). Whether PAWC is entitled to recovery of all or a portion of the purchase price (as may be adjusted by a Variance Adjustment) cannot be determined until a depreciated original cost of plant-in-service study is prepared and evaluated in the context of a base rate proceeding. Accordingly, any final adjudication of the permissibility of recovery of a Variance Adjustment is premature.

d. Cost of service issues will be resolved in a future PAWC base rate proceeding and the exact nature of a cost of service study should not be dictated by the limited record developed in this proceeding.

The record developed in this proceeding does not support any final adjudication of cost allocation between PAWC customers. Because the Commission has jurisdiction over Combined

[17] OCA and I&E argue that a Variance Adjustment should not be recovered from PAWC's ratepayers. OCA Main Brief at 44-47; I&E Main Brief at 15-19.

Wastewater Service (as explained above and in the Joint Applicants' Main Brief), there is no need for the Commission to impose a special requirement upon PAWC, as a condition of application approval, to submit a cost of service study in its next base rate case that estimates and segregates stormwater-related costs.[18] Moreover, even if the Commission were to segregate a portion of the stormwater-related costs (which it should not), there is no need to require a special cost of service study. Parties to PAWC's base rate case will have the opportunity to conduct discovery in the context of the rate case.

I&E's preemptive request for a special cost of service study to identify stormwater-related costs is little more than a back-door attempt to predispose the Commission to the conclusion that a portion of Combined Wastewater System revenue requirement cannot be spread to PAWC's combined water and wastewater customer base under Act 11. Because Combined Wastewater is wastewater, PAWC should not be precluded as a condition of application approval from utilizing the ratemaking tools legally available to it under Act 11. Recognizing that PAWC will have the burden of demonstrating that a claim under Act 11 is in the public interest at such time that the claim is actually made, the Commission should reject I&E's request for a special cost of service study as unnecessary and premature. *Cf.* 66 Pa. C.S. § 1311(c) ("The commission, when setting base rates, after notice and an opportunity to be heard, may allocate a portion of the wastewater revenue requirement to the combined water and wastewater customer base if in the public interest.").

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[18] I&E recommends that the Commission require a special cost of service study in PAWC's next base rate case that identifies stormwater-related costs. I&E Main Brief at 12-14. Similarly, OCA recommends that – if the Commission asserts jurisdiction over Combined Wastewater Service – stormwater costs need to be separately allocated to Scranton-Area Customers. OCA Main Brief at 41-43.

e. The prospective ratemaking issue raised in this proceeding is fundamentally different than the ratemaking issue in the *City of Lancaster* decision.

As noted above, the decision in *City of Lancaster* does not stand for the sweeping proposition that the Commission lacks jurisdiction over Combined Wastewater Services and, so, the Commission may disregard the decision without further analysis. To the extent the Statutory Advocates rely on *City of Lancaster* for purposes of deciding how the Commission should allocate rates for Combined Wastewater Services, their reliance on that decision is misplaced for several reasons:

- First, the narrow scope of this proceeding forecloses the Commission's ability to consider rate-allocation issues except to the extent the Commission should conclude that, by necessity, Act 11 applies if the Commission has jurisdiction over Combined Wastewater Service.
- Second, *City of Lancaster* pre-dates Act 11, a significant legislative shift in the public policy of the Commonwealth that encourages cost-sharing among a larger Commission-jurisdictional customer base.
- Third, the circumstances here are far different than the circumstances in *City of Lancaster*. The Commission in that case could not equitably distribute the costs of the Combined Sewer system among non-jurisdictional customers. As a result, jurisdictional customers would bear the burden of subsidizing that service for all of the City's residents, but the Commission could not allocate any costs of serving jurisdictional customers to the City's residents (the non-jurisdictional customers) because the Commission lacks jurisdiction over territorial customers of municipal utilities. That is not the situation here. Under Act 11, PAWC's combined customer base may share in the costs of the acquisition and operations and maintenance of the Combined Wastewater System and, in the future, customers in the Scranton service territory may contribute to costs of acquiring and operating other municipal systems elsewhere in Pennsylvania. The Commission could not apportion costs in that way under the narrow circumstances in the *City of Lancaster* case. *See* N.T. 173:3-24.

Accordingly, the decision in *City of Lancaster* informs neither the jurisdictional issue at the center of this case nor any purported rate-allocation issues prematurely raised by the Statutory Advocates in this narrow application proceeding.

f. The issue of an acquisition adjustment is properly reserved for a future PAWC base rate proceeding.

For the reasons explained in the Joint Applicants' Main Brief, it is premature to speculate whether an acquisition adjustment will be made by the Commission in a future PAWC base rate proceeding.[19] Joint Applicants Main Brief at 83-84. PAWC will prepare a depreciated original cost of plant-in-service study in conjunction with a base rate filing. *See* 52 Pa. Code §§ 69.711, 69.721. Only after examination of the original cost study and consideration of potential acquisition premiums in a base rate case can the Commission determine whether an acquisition adjustment is appropriate.

g. Recovery of expenses associated with newly-created jobs will be resolved in a future PAWC base rate proceeding.

PAWC has specifically agreed that the costs of the 100 new jobs promised in the APA would be subject to the standard review for reasonableness in a subsequent rate case to alleviate any concern that the newly created jobs would result in an unfavorable impact on PAWC's rates or its customers. Joint Applicants Main Brief at 85-86; PAWC St. No. 3-R, 4:1-6; PAWC St. 4-R, 14:12-16; N.T. 118:14-16.[20] I&E and all other parties to PAWC's base rate case will have a full and fair opportunity to examine the jobs in the context of that proceeding. Accordingly, it is premature to make any determination regarding the jobs in this application proceeding – other than

[19] I&E suggests that an acquisition adjustment may not be available to PAWC for the Transaction. I&E Main Brief at 25-27. I&E acknowledges that the "Company has not yet made a claim for an acquisition premium" but wants "to put the Company on notice about the potential concerns that may arise should a claim be made in a future base rate proceeding." *Id.* at 25. Thus, I&E has expressly recognized that disposition of this ratemaking issue is premature.

[20] I&E's concerns that the 100 new jobs "will impact PAWC's revenue requirement and may require additional rate increases" are unfounded. I&E Main Brief at 17. I&E speculates that labor costs could drive rate increases above the 1.9% CAGR and increase a Variance Adjustment. I&E apparently assumes that costs will be allocated exclusively to Scranton-Area Customers, which is not necessarily the case because of Act 11.

a finding that creation of jobs in an economically distressed area like Scranton is an affirmative public benefit.

h. PAWC has proposed a reasonable phase in of rates for Scranton-area customers and the Commission maintains ultimate discretion to ensure "just and reasonable" rates.

PAWC has made several commitments to SSA in the APA intended to phase in rate increases for Scranton-Area Customers in a gradual manner and avoid rate shock, including a commitment to attempt to bring rates for Scranton-Area Customers in line with PAWC's average system rates in equal increments in years 11 through 13 following closing of this Transaction. *See* Joint Applicants Main Brief at 82. Concerns that these commitments could result in rate shock to Scranton-Area Customers are unfounded.[21] Under the terms of the APA, the Commission maintains absolute discretion to set "just and reasonable" rates. *See* PAWC Ex. BJG-1 (Section 7.07 of the APA); 66 Pa. C.S. § 1301. Moreover, as explained by PAWC witness Mr. Nevirauskas, the Commission could – in its expert discretion – determine that rates for Scranton-Area Customers should be phased into PAWC's system average rates over a longer period of time. PAWC St. No. 4-R, 3:8 – 5:4. It is simply premature to speculate as to what rates will be approved by the Commission in the future.

2. SSA's Fitness to Continue to Own and Operate the Wastewater System is Relevant Only to the Extent that, if PAWC is More Fit, There is an Affirmative Public Benefit.

OCA implies that SSA is fit to continue to own and operate the Combined Wastewater System. *See* OCA Main Brief at 39. Even if this were true, it is not relevant to the Commission's review of the Joint Application. The Commission's task is to evaluate whether the new owner is

[21] *Cf.* OCA Main Brief at 36-38; I&E Main Brief at 22-25; OSBA Main Brief at 4-6.

fit and whether there is an affirmative public benefit to the proposed transaction. *Seaboard Tank Lines, supra*; *Warminster Township Mun. Auth., supra*; *City of York, supra.*

The fitness of the prior owner is irrelevant except to the extent that the new owner is more fit – in which case, there is an affirmative public benefit to the transaction. Assuming *arguendo* that SSA is fit to continue to own and operate the Combined Wastewater System, the record evidence supports a finding that PAWC is better-fit to own and operate the System and PAWC's superior fitness represents an affirmative public benefit of the Transaction. *See* Joint Applicants Main Brief at 45-50 (regarding PAWC's larger customer base, ability to provide enhanced service, and better access to diverse capital sources).

3. The Commission Should Make Affirmative Conclusions of Law Regarding the Threshold Issues of Commission Jurisdiction over Combined Wastewater Service and the Availability of Act 11 Treatment for the Revenue Requirement Associated with Combined Wastewater Service.

I&E states in its Main Brief that "PAWC maintains that this transaction cannot proceed to Closing unless it is permitted to recover stormwater service from its water and wastewater customers." I&E Main Brief at 14. This statement is not completely accurate. PAWC is not seeking a predetermination of a rate claim for a combined water and wastewater revenue requirement under Act 11. For the reasons more fully explained in Joint Applicants' Main Brief, PAWC does seek a conclusion of law that, because Combined Wastewater Service is Commission-jurisdictional wastewater service, the ratemaking tools of Act 11 will be available to PAWC. *See* Joint Applicants Main Brief 34-35, 86-87. In other words, PAWC is seeking a determination that it is not legally precluded from making a claim related to Combined Wastewater Service under Act 11. It is not seeking a predetermination that its Act 11 claim must be awarded in full or in part.

PAWC recognizes that specific determinations regarding the extent to which PAWC may utilize a combined water and wastewater revenue requirement under Act 11 will be addressed in

future PAWC base rate proceedings based upon the record evidence developed in those proceedings. *See* 66 Pa. C.S. § 1311(c). Consistent with its position throughout this proceeding, PAWC asserts that ratemaking issues should be reserved for future base rate proceedings but firmly contends that threshold jurisdictional issues must be resolved in this application proceeding in order for the Commission to make a public interest determination.

C. OCA's Assertion that the Transaction Would Not Increase PAWC's Customer Base is Misleading.

If approved by the Commission, the Transaction will result in the addition of 31,000 additional wastewater customers to PAWC's customer base. SSA St. No. 1, 3:18-20. The addition of these wastewater customers will benefit PAWC's entire customer base. As explained by PAWC witness Mr. Nevirauskas:

> While Scranton-area customers may benefit from the sharing of costs initially, PAWC's other customers will undoubtedly benefit from the revenues generated from Scranton-area customers in the future as the systems servicing those customers require capital improvement. Indeed, the Commission should analyze the rate impact of this Transaction not from a 13-year perspective but from a 100-year perspective and recognize that other PAWC customers will benefit from the addition of over 31,000 wastewater customers.

PAWC St. No. 4-R, 4:21-5:4. Through regionalization and the sharing of costs, PAWC's ratepayers will undoubtedly benefit in the long-term from the Transaction.

OCA attempts to diminish the positive impact that the Transaction will have on PAWC's ratepayers by suggesting that PAWC is not actually adding additional customers. OCA Main Brief, Proposed Finding of Fact No. 78 ("The PAWC customer base is not expanding. While SSA serves approximately 31,000 customers, essentially all of those customers are already PAWC water customers. . . . PAWC's total customer count would not increase). This proposed finding of fact is misleading at best and should be rejected in favor of a more accurate finding that recognizes the addition of 31,000 wastewater customers.

PAWC does not dispute that most of the SSA customers are already water customers of PAWC. However, water and wastewater are obviously separate utility systems, separate lines of business and separate revenue streams for PAWC. The addition of 31,000 additional wastewater customers adds 31,000 additional revenue streams and, as Mr. Nevirauskas suggests, the value of that additional revenue to PAWC's overall customer base over the next 100 or more years should not be underestimated.

D. PAWC is Financially Better-Suited to Handle the Challenges of the Wastewater System.

One of the many benefits of the Transaction is that PAWC has better access to diverse capital sources than the SSA over the long term. Joint Applicants Main Brief at 46-49. This is not an idle promise, but a substantial affirmative benefit that has been unjustifiably and inappropriately downplayed in this proceeding. Leading that charge has been the OCA, claiming, based on the testimony of Scott Rubin, 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. N.T. 99; OCA Main Brief at 39. Not only is Mr. Rubin's opinion not supported by any facts, it ignores (i) the reality of the economic situation the SSA confronts daily in an attempt to provide service to a community like Scranton that has been ravaged by one financial crisis after another for more than two decades and (ii) the scale and scope of PAWC's financial resources to not only conduct its own business but to fulfill the SSA's service obligations to customers and the substantial capital spend needed to satisfy the long-term requirements of the Consent Decree.

First, with respect to PAWC's resources, neither OCA nor its witness acknowledge or understand the unrebutted facts that:

- PAWC is the largest water and wastewater provider in the Commonwealth with total assets of $3.9 billion and annual revenues of $613 million in 2015;
- PAWC had net income of about $143 million in 2015; and,

- PAWC has access to a $220 million line of credit, which is more than the purchase price of SSA in the Transaction.

See Joint Applicants Main Brief at 47-48. PAWC unquestionably has superior financial capabilities than SSA.

While SSA has been able to perform reasonably well and maintain a relatively strong position despite the City's long-term financial distress (Joint Applicants Main Brief at 57), OCA and Mr. Rubin have again failed to recognize the synergies between the City's problems and the SSA's ability to maintain long-term financial viability, including the following:

- Any conditions causing customers to not be able to pay for wastewater service and their current taxes are likely to lead to a higher delinquency rate for SSA, which will be noticed by SSA's bond rating agencies; (Joint Applicants Main Brief at 57);
- Higher SSA debt costs will inevitably lead to higher rates for SSA customers (*Id.*);
- Increased sewer delinquencies will negatively impact the SSA's cash flow and its ability to satisfy its operating financial obligations (*Id.*);
- SSA is highly leveraged with an 80.4% debt to plant ratio (N.T. 129:3-6);
- SSA will have to consider substantial rate increases on a stand-alone basis of an average of *4.57% per year* over the next 30 years to maintain its current financial profile and pay for the Consent Decree improvements (Joint Applicants Main Brief at 48);
- SSA's existing rates consume 2.3% of its customers median household income (N.T. 129:22-25);
- The combined populations of Scranton and Dunmore have been steadily declining with each 10-year census since a peak in the 1930s (Joint Applicants Main Brief, at 48);
- Because median household income in the Scranton and Dunmore area has been increasing at a slower rate than the consumer price index, people continue to be unable to afford many services (*Id.*);
- Affordability issues plaguing Scranton area residents and SSA customers, along with the SSA's rate inflexibility and related constraints on its ability to access capital, adversely affects the SSA's future ability to raise revenue (N.T. 130:1-16); and,

- SSA's future incapability to raise revenue calls into question its ability to meet the capital and other spending requirements in the Consent Decree (Joint Applicants Main Brief at 49).

Rather than confront these undisputed facts, OCA relies on the unsupported assertion by an admitted non-expert in the area of financial analysis who merely claims there is no reason why the SSA cannot meet its Consent Decree obligations. To the contrary, there are substantial reasons to question the SSA's ability to continue to provide service and raise the needed capital given the financial demographics of the areas and customers it currently serves. This is precisely the reason SSA embarked on the process leading to PAWC's proposed acquisition of SSA's assets in the Transaction. *See* SSA St. No. 1, 4:25-5:5.

E. The Impact of the Transaction upon the City of Scranton and Surrounding Regions is a Legitimate Public Interest Consideration.

The question before the Commission is whether the Transaction will "affirmatively promote the service, accommodation, convenience, or safety of the public in some substantial way." *City of York* v. *Pa. Pub. Util. Comm'n*, 449 Pa. 136, 151, 295 A.2d 825, 8282 (1972); *Popowsky* v. *Pa. Pub. Util. Comm'n*, 594 Pa. 583, 611, 937 A. 2d 1040, 1057 (2007); Joint Applicants Main Brief at 44. Code Section 1103, 66 Pa. C.S. § 1103, provides that the Commission may issue a certificate of public convenience upon a finding that "the granting of such certificate is necessary or proper for the service, accommodation, convenience, or safety of the public." Joint Applicants Main Brief at 7.

There is no limitation in either the Code or longstanding and controlling case law on the definition of the "public." Nevertheless, both I&E and OCA seek to limit the Commission's consideration of the impact of the Transaction on the City, claiming that to do so would be improperly expanding Commission policy and law. OCA and I&E are wrong on both counts.

First, the Joint Applicants have overwhelmingly demonstrated with unrebutted evidence that the Transaction will help ameliorate Scranton's distressed financial situation while benefitting the SSA's customers. Joint Applicants Main Brief at 52-58. Indeed, the Transaction is the

cornerstone of the City's economic recovery under Act 47 that has been delayed for almost twenty-five years. SSA St. No. 2, 2:21-3:3. Given Scranton's longstanding and tenuous financial condition, closing the Transaction on or before October 31, 2016, and the realization of the anticipated Transaction proceeds will provide immediate relief for purposes of the City's 2017 budget and establish a platform for possible departure from the strictures of Act 47 for the first time in over two decades. Joint Applicants Main Brief at 53-55.

Moreover, as noted repeatedly in the record by SSA witnesses Barrett and Cross, most of SSA's customers are residents and businesses located in Scranton. SSA St. No. 3-R, 10:6-7; SSA St. No. 2-R, 5:5-9. Adverse economic impacts on Scranton's residents by definition create similar adverse impacts on SSA's customers, and vice versa. The synergistic relationship between Scranton and SSA and their respective residents/customers is palpable. In the absence of the timely closing of the Transaction, Scranton could be forced to heap further property tax increases on Scranton residents *and* SSA customers. Continued property tax increases on Scranton's residents will put pressure on them to choose between paying increased property taxes and sewer charges, either of which are likely to increase delinquencies. Increased sewer delinquencies will negatively impact SSA's cash flow and may lead to increases in sewer rates as more ratepayers fall delinquent or leave the City, which creates a downward spiral of rising rates being charged to an increasingly impoverished group of customers. SSA St. No. 3-R, 10:6-14. Thus, the absence of timely relief in this proceeding and the closing of the Transaction this Fall will profoundly and adversely impact the *public*, including Scranton, its residents, SSA, its customers (who are essentially the City's residents), and others.

While the anticipated departure from Act 47 and the overall improvement of Scranton's finances are clear and unrebutted benefits, OCA and I&E are unwilling to characterize them as "affirmative public benefits" for purposes of the Joint Applicants satisfying their evidentiary burden in this proceeding. This is clearly erroneous.

I&E mischaracterizes the Joint Applicants' position by suggesting they are *broadening* the public interest "to include the financial plight of the City of Scranton (City) and requests the

Commission to consider the impact this transaction will have on the City's finances." I&E Main Brief at 4. As noted below, no broadening of any legal standard is necessary for this Commission to lawfully and appropriately consider the positive impacts the Transaction is expected to produce for the City, its residents and SSA's customers who have languished on the financial edge for almost twenty-five years.

OCA's position on the scope of the "public interest" for purposes of this proceeding is enigmatic at best. First, the topic heading in OCA's Main Brief on this issue notes that "[t]he Benefit to the City of Scranton is Not Determinative of the Public Interest." OCA Main Brief at 36. As written, OCA appears to at least acknowledge that while not fully dispositive, the Transaction's benefits to Scranton have some role in evaluating and determining if the Joint Applicants have satisfied their burden of proof. The Joint Applicants agree that potential beneficial impacts on the City from the Transaction are one of several factors to evaluate in considering whether they have satisfied their ultimate burden of proof. However, after appearing to understand the overall context of the public interest analysis, OCA veers into a patently incorrect view by suggesting that the "the Commission has explicitly chosen not to 'expand [the] previous definition of the public interest to include the interests of municipal authorities.'" OCA Main Brief at 36 (other citations omitted). The Commission simply does not have the lawful authority to pick and choose what it considers to be the "public" and essentially parse the definition of "public" in a fashion not authorized by Code Chapter 11 or applicable common law in Pennsylvania. It appears that both OCA and I&E have failed to completely grasp existing Pennsylvania law on what constitutes the "public" for CPC purposes under Code Chapter 11.

The Commonwealth Court has held that when considering whether to grant a CPC under 66 Pa. C. S. § 1103, the "public interest" to be considered is as follows:

> [W]hen the "public interest" is considered, it is contemplated that the benefits and detriments of the acquisition be measured as they impact on all affected parties, and not merely on one particular group or geographic subdivision as might have occurred in this case.

Middletown Twp. v. Pa. PUC, 482 A.2d 674, 682 (Pa. Cmwlth. 1984). The Commonwealth Court stated that the issuance of a CPC "amounting only to a pro forma administrative approval by the Commission ... considering only the interests of Middletown Township or [Newtown Artesian Water Company's] customers now located in Middletown Township would, in fact, be flagrantly shortsighted and contrary to law." *Id.* In *Middletown Twp.*, the presiding Administrative Law Judge considered the interests of customers who were served by the Township authority (not a jurisdictional public utility) as well as the customers of the jurisdictional public utility (*i.e.*, Newtown Artesian). *Id.* at 679. It is clear under *Middletown Twp.* that parties who were not customers of a public utility are properly included in the term "all affected parties."

As noted and cited by I&E, in *Pennsylvania Public Utility Commission v. Bell-Atlantic Pennsylvania*, the *Commission* (not the courts) held that "the Commission has historically defined the public interest as including ratepayers, shareholders and the regulated community."[22] *Bell-Atlantic Pennsylvania*, Docket Nos. R-00953409 et al., 1995 Pa. PUC LEXIS 193 (Order entered Sept. 29, 1995); *see* I&E Main Brief at 4. The language in *Bell-Atlantic Pennsylvania* does not create an exclusive list of the public; rather, it states that the "public interest" *includes* ratepayers, shareholders and the regulated community. This suggests that the "public" is broader than the three identified groups and, on this basis, the holding in *Bell-Atlantic Pennsylvania* does not conflict with the analysis in *Middletown Twp.* of "all affected parties."

In fact, Commission cases after *Bell-Atlantic Pennsylvania* apply the *Middletown Twp.* definition of "public interest." *See Re WorldCom, Inc.*, Docket Nos. A-312025-F0002, A-312036-F0004 (Opinion and Order entered Jun. 18, 1998) (reasoning that the competitive/potential

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[22] In this decision, the Commission indicated that the enactment of Chapter 30 of the Code extended the public interest obligation to include the "promotion and protection of telecommunications competition in Pennsylvania." Therefore, in telecommunications cases, the public interest definition has been extended to include whether there is a public interest in competition. While Code Chapter 30 specifically regulates telecommunications services only, the fact that the Commission broadened the definition of "public interest" in this decision enhances the notion that the "public interest" is not narrowly defined as solely "ratepayers, shareholders, and the regulated community."

purchaser interest of a utility is a "private interest" that "does not equate to the 'public interest.... We read *Middletown Twp. v. Pa. PUC* for the proposition that when the public interest is considered, it is contemplated that the benefits and detriments of the acquisition be measured as they impact on all affected parties, not merely one particular group."); *Joint Application of Bell Atlantic Corporation and GTE Corporation for Approval of Agreement and Plan of Merger*, Docket Nos. A-310200-F0002, A-310222-F0002, A-310291-F0003, and A-311350-F0002 (Opinion and Order entered Nov. 4, 1999) (reasoning that the benefits and detriments of the merger will be measured under the public interest test as they impact on "all affected parties"); *Joint Application of Equitable Resources, Inc.*, Docket No. A-122250-F5000 (Opinion and Order entered Apr. 13, 2007 (agreeing with OCA's argument that *Middletown Twp.* stands for a consideration of the "broad public interest" in merger proceedings, not just the "concerns of one particular group").

While the Commission's 2008 decision in *Application of CMV Sewage Company, Inc.*, Docket No. A-230056-F2002 (Order entered Dec. 23, 2008), relied upon by the OCA (OCA Main Brief at 36) reflects the Commission's consideration of only the three entities listed in *Bell-Atlantic* when performing the "public interest" analysis, this is not what the Commission did in subsequent cases. In *Joint Application of The United Telephone Company of Pennsylvania LLC d/b/a Embarq Pennsylvania and Embarq Communications, Inc. For approval of the Indirect Transfer of Control To CenturyTel, Inc.*, 104 Pa.P.U.C. 176, Docket No. A-2008-2076038 (Opinion and Order entered May 28, 2009), the Commission did not discuss the *Bell-Atlantic* entities, instead citing and applying the Commonwealth Court's standard in *Middletown Twp.* without limiting the "public interest" or "affected parties" to consist solely of ratepayers, shareholders and the regulated community.

When evaluating the totality of existing Pennsylvania law, it is clear that the Commission in CPC proceedings must *at a minimum* consider the impacts upon ratepayers, shareholders and the regulated community (the *Bell-Atlantic* factors), but these are not the sole and exclusive entities that can or should be considered, especially when overwhelming and probative testimony of other

public interest impacts have been placed of record, such as here in connection with the City. The Commission has an obligation to look at the broader public interest.

In the context of this Transaction, the Commission must take cognizance of the public interest in addressing the financial plight of distressed municipalities that has been clearly declared by the General Assembly as part of Section 102 of Act 47:

> (a) Policy.–It is hereby declared to be a public policy of the Commonwealth to foster fiscal integrity of municipalities so that they provide for the health, safety and welfare of their citizens; pay due principal and interest on their debt obligations when due; meet financial obligations to their employees, vendors and suppliers; and provide for proper financial accounting procedures, budgeting and taxing practices. The failure of a municipality to do so is *hereby determined to affect adversely the health, safety and welfare not only of the citizens of the municipality, but also of other citizens in this Commonwealth.*

53 P.S. §§ 11701.102(a) (emphasis added). The General Assembly could hardly have been more clear: addressing the financial problems of distressed municipalities is essential to protecting the health, safety and welfare of not only the citizens of the directly impacted communities, but the citizens of the Commonwealth as a whole. The public interest analysis under Code Chapter 11 would not only be incomplete but unlawful if the Commission were to ignore the unrebutted benefits the Transaction will have on the City, its residents and the SSA customers (all of whom are "affected parties" whose interests much be considered irrespective of whether some or all of them are non-jurisdictional to the Commission), or the broader benefits to the Commonwealth and its citizens in carrying out the policy and objectives of Act 47.

This Transaction is very important to the City, Borough, and their residents. This public interest consideration should not be taken lightly by the Commission.

IV. CONCLUSION

For the reasons detailed in the Joint Applicants' Main Brief and this Reply Brief, the Commission should confirm its jurisdiction over Combined Wastewater Service. Once stormwater enters a Combined Wastewater system, it mixes with sanitary and industrial wastewater and the

combined flow becomes indistinguishable wastewater in need of collection, treatment, and disposal. The combined flow is "sewage" or "wastewater" as those terms are broadly used in the Code. Only the Pennsylvania General Assembly can exclude a particular type of "sewage" or "wastewater" from the Commission's jurisdiction and it has not done so.

Because Combined Wastewater is a form of "wastewater," the Commission should confirm – as a matter of law – that the ratemaking tools of Act 11 are available to PAWC in a future base rate proceeding. Without such an affirmation in this proceeding, a core component of the Transaction is thrown into question. PAWC's ability to request authorization to utilize Act 11 is an underlying premise of the APA.

The Joint Applicants have demonstrated by a preponderance of record evidence that (1) PAWC is financially, technically, and legally fit to acquire the Combined Wastewater System and begin rendering service and (2) the Transaction provides an affirmative benefit to the public of a substantial nature. The Joint Application should accordingly be approved without modification, and a Certificate of Public Convenience and Certificates of Filing should be issued promptly. The attempts of the Statutory Advocates to entice the Commission to predetermine rate issues should be summarily rejected.

V. REQUEST FOR RELIEF

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

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

(ii) The Commission's Secretary issue a Certificate of Public Convenience evidencing Pennsylvania-American Water Company's right under Sections 1102(a)(1) and 1102(a)(3) of the Pennsylvania Public Utility Code, 66 Pa. C.S. §§ 1102(a)(1), (a)(3), to (a) acquire, by sale,

substantially all of The Sewer Authority of the City of Scranton's Sewer System and Sewage Treatment Works assets, properties and rights related to its wastewater collection and treatment system to Pennsylvania-American Water Company (the "Transaction"), and (b) begin to offer or furnish wastewater service, which includes Combined Wastewater Service, to the public in the City of Scranton and the Borough of Dunmore, Lackawanna County, Pennsylvania;

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

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

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

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

c. Interjurisdictional Agreement Between The Sewer Authority of The City of Scranton and The Borough of Moosic, Pennsylvania, dated May 13, 2003 (as will be assigned and

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

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

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

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

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

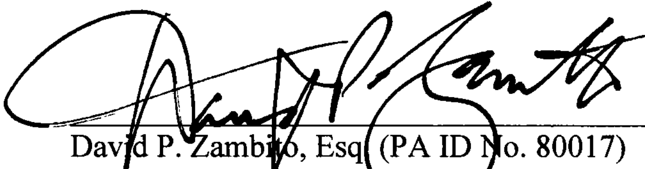
(v) All other approvals required by the Pennsylvania Public Utility Code to carry out the Transaction be granted;

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

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

(viii) This docket be marked closed.

Respectfully submitted,



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