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January 5, 2021

Rosemary Chiavetta, Secretary
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Re: Pennsylvania Public Utility Commission
v.
Pennsylvania-American Water Company
Docket Nos. R-2020-3019369 (Water)
C-2020-3019751
R-2020-3019371 (Wastewater)
C-2020-3019754

Dear Secretary Chiavetta:

Attached for electronic filing please find the Office of Consumer Advocate's Exceptions in the above-referenced proceedings.

Copies have been served per the attached Certificate of Service.

Respectfully submitted,

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cc: The Honorable Conrad A. Johnson (**email only**)
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Certificate of Service

*301393

CERTIFICATE OF SERVICE

Re: Pennsylvania Public Utility Commission : Docket Nos. R-2020-3019369 (Water)
v. : C-2020-3019751
Pennsylvania-American Water Company : R-2020-3019371 (Wastewater)
: C-2020-3019754

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

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Pennsylvania Public Utility Commission	:	Docket Nos. R-2020-3019369 (Water)
v.	:	C-2020-3019751
Pennsylvania-American Water Company	:	R-2020-3019371 (Wastewater)
	:	C-2020-3019754

EXCEPTIONS OF THE
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Dated: January 5, 2021

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I. INTRODUCTION

On December 23, 2020, the Public Utility Commission's (PUC or Commission) Office of Administrative Law Judge issued the Recommended Decision (R.D.) of Administrative Law Judge (ALJ) Conrad A. Johnson regarding Pennsylvania-American Water Company's (PAWC or Company) proposed rate increase for water and wastewater service. The ALJ recommended that the Non-Unanimous Settlement be approved without modification.

Under the Non-Unanimous Settlement, customers would face substantial rate increases. Under the "Step 1 Rate Increase", the Company will increase rates by \$50.5 million on the effective date of the settlement. Under "Step 2 Rate Increase", the Company will increase rates by an additional \$20 million to reach a total of \$70.5 million, effective January 1, 2022. The Non-Unanimous Settlement also applies a temporary credit of \$10.5 million to the Step 1 and Step 2 rate increases, which represents a flow-back of the "Catch-Up" portion of the excess accumulated deferred income tax (EADIT), which was accumulated during the period of January 1, 2018 through December 31, 2020. From January 28, 2023 forward, the "Catch-Up" EADIT balance is extinguished and the rate credit no longer applies, effectively increasing the amount that the customers will be responsible to pay for a third time as a result of the Non-Unanimous Settlement.

In these Exceptions, the Office of Consumer Advocate (OCA) will address the ALJ's recommendation to approve the Non-Unanimous Settlement and his adoption of certain Finding of Facts from the Company's Briefs in support of its filed case. While the ALJ did not issue a specific conclusion on PAWC's underlying filing, these issues are fundamental to determining a reasonable revenue requirement, whether or not the Settlement is approved. As set forth below and in the OCA's Main Brief, Reply Brief, and Comments in Opposition to Settlement, the OCA hereby respectfully requests that the Commission reject the Non-Unanimous Settlement. While

there are provisions that resolve issues in a manner consistent with the OCA's position in this case, the level of the rate increase, the excessive subsidy by water customers of wastewater revenue requirement, the disparate rate impacts, and the lack of a required filing of a stormwater rate are fatal flaws that render the Non-Unanimous Settlement in its current form not in the public interest. Customers are facing extraordinary financial and social challenges. The record shows that, in the near term, PAWC's current rates are adequate to provide safe and reliable service and earn a return for shareholders. If PAWC is concerned about operating revenues during this uncertain time and moving forward, PAWC could defer new construction projects that are not necessary to ensure the current provision of safe and reliable service to existing customers. After the COVID-19 pandemic has passed, PAWC can file again for rate increases when the Company's financial projections will be founded on more stable, and thus reliable, economic conditions. If the Commission determines to allow any rate increase, under a business as usual approach to ratemaking, the evidence supports a reduction to PAWC's water rates and only a modest increase in wastewater rates.

II. EXCEPTIONS

A. Standard of Review

Exception No. 1: The ALJ Erred By Failing to Apply the Appropriate Standard of Review for Non-Unanimous Settlements. R.D. at 122-27; OCA R.B. at 1, 8; OCA Comments in Opposition to Settlement at 3.

In the Recommended Decision, the ALJ applied the following standard in determining that the Non-Unanimous Settlement should be adopted:

While I am mindful of the economic hardship gripping many ratepayers, the Commonwealth, and the nation at large due to the ongoing COVID-19 pandemic, in deciding whether to recommend approval of the Settlement, I am bound by the Commission's policy that encourages settlement and whether the Settlement is in the public interest. *Pa. Pub. Util. Comm'n v. C. S. Water & Sewer Assocs.*, 74 Pa. P.U.C. 767 (1991).

R.D. at 126.

The OCA submits that the existence of a Non-Unanimous Settlement in this proceeding does not bind the ALJ or Commission. In the event of a Non-Unanimous Settlement, the Commission's standard for review is the same as that for deciding a fully contested case, which is the burden of proof standard. 66 Pa. C.S. § 315(b); Joint Application of West Penn Power Co. d/b/a Allegheny Power, et al., Docket No. A-2010-2176520, Order (Mar. 8, 2011). Under the burden of proof standard, the party upon whom the burden is placed must meet that burden by a preponderance of the evidence. Se-Ling Hosiery v. Margulies, 70 A.2d 854, 856 (1950). A preponderance of the evidence is established by presenting evidence that has sufficient weight to "tip the scales" on the side of party presenting it.¹

In further regard to the evidence and arguments considered by the ALJ, the OCA emphasizes that the burden of proof did not shift to the parties challenging the Non-Unanimous Settlement. PAWC's burden, to establish the justness and reasonableness of every component of the rates it proposed in its filing and, subsequently in the proposed Settlement, is an affirmative one and remains with the Company. Lower Frederick Twp. v. Pa. P.U.C., 48 Pa. Commw. 222, 226-27, 409 A.2d 505, 507 (1980) (citations omitted); see also Brockway Glass v. Pa. P.U.C., 63 Pa. Commw. 238, 437 A.2d 1067 (1981).

The OCA further notes that the Non-Unanimous Settlement does not address all of the issues that were raised and litigated by the parties, such as the issue of main extensions discussed

¹ The non-unanimous proposed settlement must also be supported by substantial evidence consistent with statutory requirements. Popowsky v. Pa. PUC, 805 A.2d 637 (Pa. Cmwlt. 2002); ARIPPA v. Pa. PUC, 792 A.2d 636 (Pa. Cmwlt. 2002). For a Commission decision to be supported by substantial evidence, it must be supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Dutchland Tours, Inc. v. Pa. PUC, 337 A.2d 922 (Pa. Cmwlt. 1975). The ALJ's recommendation to adopt the Non-Unanimous Settlement, however, is not supported by substantial evidence. Importantly, the entirety of the "Discussion" and "Recommendation" sections of the Recommended Decision is discussed within the context of the Non-Unanimous Settlement and the non-settling parties' Comments in opposition, rather than the fuller arguments made in briefs. R.D. at 88-127.

further below. As a result, the Recommended Decision does not address or recommend a resolution for all issues pending before the Commission.

B. The Recommendation to Increase Rates Is Not Just and Reasonable.

Exception No. 2: The ALJ Erred by Approving the Substantial Rate Increase Contained in the Non-Unanimous Settlement. R.D. at 62-64, 68, 89-90, 97-101, 108, 115-26, OCA M.B. at 4-20; OCA R.B. at 17, 19, 39.

While the ALJ stated that he was mindful of the ongoing COVID-19 pandemic, the ALJ erroneously concluded that he is bound by the Commission's policy encouraging settlement. See R.D. at 126. As such, the ALJ did not give proper weight to the financial circumstances facing consumers which is necessary in determining just and reasonable rates.

As set forth in the OCA's Briefs and Comments, it is not just and reasonable for PAWC to increase its rates at this time. As OCA witness Scott Rubin explained, given the substantial reductions in employment and wages, there is an unusually large pool of ratepayers unable to afford utility bills. OCA M.B. at 7. Moreover, PAWC's rate filings, which included PAWC's projections that were determined before the Commonwealth became engulfed by the COVID-19 pandemic, were not revised in light of the pandemic. OCA M.B. at 18-19. Instead, PAWC based its filings on data from a time period months earlier, when the Commonwealth and PAWC operated under ordinary circumstances. Circumstances, however, are anything but ordinary.

There is also substantial evidentiary support in the record showing that PAWC could continue operations, recover all of its expenses, and earn a profit with no revenue increase. OCA M.B. at 11; OCA St. 2SR at 5-6; OCA Exh. LA-6, Sch. A. As OCA witness Rubin stated: "Most Pennsylvania businesses would be absolutely thrilled if they could pay all their bills (including various increases in expenses that may or may not occur next year), make all of their debt payments, and still have enough left over to earn a profit on their equity investment." OCA R.B.

at 14; OCA St. 1 at 28-29. While the Company would perhaps not generate as much profit as it would like, PAWC would still be earning a reasonable rate of return. The OCA submits that the overall rate of return of 7.70% for water and 2.84% for wastewater without any change in rates is more than adequate in this time of a pandemic. See OCA M.B. at 4-59; OCA R.B. at 2-20; OCA App. A.1, Table I Total Water and Table I Total Wastewater.

After the COVID-19 pandemic has passed, PAWC can file again for rate increases when the Company's financial projections will be founded on more stable, and thus reliable, economic conditions. OCA M.B. at 11. In these extraordinary times, denying PAWC's rate increase is a reasonable—and temporary—outcome until fewer customers are suffering financially and the future is more ascertainable for ratemaking.²

1. The Principles of Public Utility Regulation Lend Support to the OCA's Position That Increasing Rates During This Financially Challenging Time For Ratepayers Would Not Lead to Just and Reasonable Rates.

The OCA submits that the unprecedented situation at hand provides ample basis for the Commission to deny a rate increase during this time. OCA M.B. at 9-10. Denying PAWC's rate increase at this time allows the Company to continue to earn a fair and reasonable return on its investment and recognizes the realities of the COVID-19 pandemic, which were not accounted for

² This was the outcome recommended in the other base rate proceeding litigated during the pandemic. ALJ Katrina L. Dunderdale concluded:

No party herein recommended Columbia Gas should never be allowed to raise rates, instead arguing that raising rates during the present times is inappropriate and contrary to the public interest, as Pennsylvanians grapple with a bleak economic future.

Those parties advocated that the Commission should not rely on predictions based on data collected prior to the pandemic. To them, Columbia Gas' argument – that a rejection of the increase will expose customers and the public to safety risks because investors will be denied a fair rate of return – belied the fact that Columbia Gas' investors still receive a rate of return, though perhaps smaller than expected, while investors in other areas of the financial markets may not receive as much due to the downturn in the marketplace caused by COVID-19. Columbia Gas' ratepayers, both individuals and businesses, have been devastated by the pandemic.

Pa. PUC v. Columbia Gas of Pa., Inc., R-2020-3018835, R.D. at 47 (Dec. 4, 2020).

in PAWC's rate increase proposals. The OCA's recommendation is supported by the analysis of the requirements of setting just and reasonable rates under 66 Pa. C.S. § 1301, as comprehensively discussed by OCA witness Scott Rubin in OCA Statements 1 and 1SR and the constitutional requirements that guide the setting of just and reasonable rates.

As a consequence of the pandemic and the associated significant job losses across Pennsylvania, there were 30 times as many initial unemployment claims during the week ending March 21, 2020 and 33 times as many during the next week ending March 28, 2020 than the amount during the week ending March 7, 2020 as shown in shown in OCA Statement 1SR, Sch. SJR-10-SR at 1, Figure 3 (Updated). At the end of September, initial unemployment claims had declined since peaking in March at 400,000 claims in one week, but the level of initial unemployment claims in September was still about 50% higher than it was in February 2020. OCA M.B. at 6; OCA St. 1 SR at 3. During September 2020, between 22,000 and 23,000 Pennsylvania workers filed initial unemployment claims each week. Id. Mr. Rubin explained that in the space of 6.5 months (mid-March to the end of September), "more than 39 percent of Pennsylvania's workforce filed an unemployment claim." Id.

The economic repercussions of the COVID-19 pandemic—to the extent yet known—are real and significant in PAWC's service territory, and the OCA submits that the Commission must give great weight to the circumstances of consumers during these extraordinary times when determining just and reasonable rates. Many of the customers who testified at the Public Input Hearings were concerned about being able to pay their bills, including higher water and/or wastewater bills, especially when many have lost their jobs or are suffering from the financial effects of COVID-19; that the increase was large; and that the company should forego any rate increase during this time of economic difficulties for individuals and businesses. See, e.g., Tr.

120-22. State Senator Schwank testified that she was very disturbed that significant rate increases were being discussed in the middle of an economic catastrophe caused by COVID-19.³ Tr. 82-83.

The Pennsylvania Supreme Court aptly addressed the requirement established by Federal Power Comm’n v. Hope Natural Gas Co., 320 U.S. 591 (1944) (Hope) and the balancing of consumer and investor interests in determining just and reasonable rates as follows:

In cases where the balancing of consumer interests against the interests of investors causes rates to be set at a “just and reasonable” level which is insufficient to ensure the continued financial integrity of the utility, it may simply be said that the utility has encountered one of the risks that imperil any business enterprise, namely the risk of financial failure. The express language of the Hope decision weighs against regarding utilities as a protected class of business enterprises which are to be relieved of such normal business risks. Specifically, it was stated in Hope, that investment returns to utility owners ‘should be commensurate with returns on investments in other enterprises having corresponding risks.’

Pennsylvania Elec. Co. v. Pa. P.U.C., 509 Pa. 324 at 331-32 (1985) (internal citations omitted).

In short, Hope sets forth a balancing test, like that which we described in Pennsylvania Gas, supra, for the determination of “just and reasonable” rates, to be applied with the aim of protecting consumers against exploitation at the hands of utility companies while seeking to preserve the financial integrity of utility companies.

Id. at 330 (internal citations omitted); see OCA M.B. at 10.

³ Mr. Rubin cited many examples where utilities have either withdrawn or deferred filing rate increase requests to provide relief to their customers who are likely spending more time at home and/or experiencing some level of income loss during this pandemic. OCA St. 1 at 25-26. For example:

- Minnesota Power significantly reduced its requested rate increase and is refunding more than \$12 million to customers to help alleviate pandemic-related financial concerns.
- California Water Service Co. is eliminating all scheduled rate increases during 2020.
- Chelan County (Washington) Public Utility District is postponing previously approved increases in electric, water, and wastewater rates by six months to provide customers some relief during the pandemic.
- The City of Austin (Texas) reduced its electricity rates by about 4%, eliminated the residential price increment for usage in excess of 1,000 kilowatt-hours per month, and reduced rates for residential water and wastewater consumption by 10%.
- PEPCO, the electric utility serving the District of Columbia and surrounding areas, announced on June 1st that it would forego a \$25 million rate increase scheduled for this year in D.C., make a shareholder donation to its low-income assistance fund, and take other actions to assist customers during the pandemic.
- A report by Moody’s Investors Service expects similar delays in numerous electric, gas, and water utility rate proceedings throughout the U.S. as a way of providing some relief to consumers during the pandemic.
- Most recently, Philadelphia Water Department withdrew its pending request for increases in water, wastewater, and stormwater rates that would have become effective in September 2020 and September 2021.

In Popowsky v. Pa. PUC, the Pennsylvania Supreme Court further held that the Commission has discretion to determine the proper balance between the interests of utilities and ratepayers as follows:

There is ample authority for the proposition that the power to fix “just and reasonable” rates imports a flexibility in the exercise of a complicated regulatory function by a specialized decision-making body and that the term “just and reasonable” was not intended to confine the ambit of regulatory discretion to an absolute or mathematical formulation but rather to confer upon the regulatory body the power to make and apply policy concerning the appropriate balance between prices charged to utility customers and returns on capital to utility investors consonant with constitutional protections applicable to both.

Popowsky v. Pa. PUC, 542 Pa. 99, 108, 665 A.2d 808, 812 (1995) citing Pa. PUC v. Pennsylvania Gas and Water Co., 492 Pa. 326, 337, 424 A.2d 1213, 1219 (1980), cert. denied, 454 U.S. 824, 70 L. Ed. 2d 97, 102 S. Ct. 112 (1981) (emphasis added).

As to those constitutional protections, in Bluefield, the United States Supreme Court discussed the boundaries within which rates would not be deemed too low as to be confiscatory, but also not too high as to be rates to which utilities cannot reasonably be entitled. Bluefield Water Works & Improvement Co. v. Public Serv. Comm’n, 262 U.S. 679, 692-93 (1923). This determination “depends upon many circumstances” and must have “regard to all relevant facts.” Id. at 692. The Court found that the return “should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties.” Id. at 693 (emphasis added). The Court further stated:

[a] public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures.

Id. at 692-93.

OCA witness Rubin testified that the Commission “must focus on what rates are reasonable for consumers to pay under these extraordinary conditions.” OCA M.B. at 10; OCA St. 1 at 22. Mr. Rubin provided cases from other periods of pandemic and economic hardship as precedents in his testimony to address constitutional concerns with his recommendation. OCA St. 1 at 22-24. During the Great Depression, this Commission took steps to protect customers by calling on utilities to reduce their rates so they would earn a return of no more than 6% on their rate base. Re Utility Rates During Economic Emergency, 3 P.U.R. NS 123 (Pa. PSC 1934). In Massachusetts during the 1918 flu pandemic the Supreme Judicial Court of Massachusetts upheld a public service commission ratemaking order that was not expected to permit the utility to earn a profit due to the abnormal times. Donham v. Public Serv. Comm’n, 232 Mass. 309, 317, 122 N.E. 397, 401 (1919) (Donham). The court stated:

To be just and reasonable, within the meaning of the constitutional guaranty, the rates must be prescribed with reasonable regard for the cost to the carrier of the service rendered and for the value of the property employed therein; but this does not mean that regard is to be had only for the interests of the carrier, or that the rates must necessarily be such as to render its business profitable, for reasonable regard must also be had for the value of the service to the public. And where the cost to the carrier is not kept within reasonable limits, or where for any reasons its business cannot reasonably be so conducted as to render it profitable the misfortune must fall upon the carrier, as would be the case if it were engaged in any other line of business.

Id. (emphases added; quoting from Missouri, Kansas & Topeka Ry. Co. v. Interstate Commerce Comm’n, 164 Fed. 645 (1908)). Although the utility was facing hardships of its own, the court noted that it did not deprive the commission of its regulatory responsibility to “exercise its judgment for the protection of the public interests when it does not reduce substantially the revenue proposed to be exacted from the public by the owners of the public utility.” Donham, 232 Mass. at 326, 122 N.E. at 405. The court emphasized that the rates were “likely to be impermanent and experimental.” Id. Mr. Rubin testified that:

[t]he idea that ratemaking must adapt to extraordinary conditions is neither new nor novel. A century ago during another serious pandemic, regulators adapted, took actions that provided relief to the public, and did not inflict long-term harm on the utility.

OCA St. 1 at 24. So, too, must the Commission here consider the substantial impact on the public from such a significant rate increase during this time of pandemic and take the necessary action to protect consumers.

For all of the reasons discussed above and in the OCA’s Main Brief and Reply Brief, the OCA submits that the Recommended Decision failed to adequately address, or mitigate, the reasonable concerns raised due to the COVID-19 pandemic in approving the substantial rate increase contained in the Non-Unanimous Settlement.

2. Even Under a Business As Usual Ratemaking Approach, the Recommended Increase Is Unreasonable.

The ALJ states that the non-Settling Parties’ “leading or primary objection” to the Non-Unanimous Settlement is the COVID-pandemic, which echoed the Public Input Hearing witnesses’ repeated references to economic hardship. R.D. at 122-23. Plainly, the OCA does advocate that, due to the pandemic, no rate increase should be permitted at this time. Maintaining current rates is a reasonable—and temporary—outcome until fewer customers are suffering financially and the future is more ascertainable for ratemaking. That is not the only basis for rejecting the Non-Unanimous Settlement. Under a “business as usual” ratemaking” approach, the evidence of record does not support a \$70.5 million increase or even the Settlement’s Step 1 increase of \$50.5 million. OCA witness Ralph Smith showed that PAWC’s water rates should be *reduced* by approximately \$68 million and that only a modest increase in wastewater rates,

approximately \$31 million, could be supported in a business as usual case.⁴ OCA St. 2SR at 5-6; OCA Exh. LA-6, Sch. A. In the near term, PAWC's rates are more than adequate to ensure the continued provision of safe and adequate service. If anything, the water rates should be reduced.

C. The ALJ Erred in Dismissing Various OCA Adjustments that Support a Lower Revenue Requirement in a Business As Usual Approach than that Contained in the Non-Unanimous Settlement.

Exception No. 3: The ALJ's Finding of Fact #34 Should Be Rejected. R.D. at 40-44, 122-27; OCA M.B. at 23-26; OCA R.B. at 9-11.

PAWC's Main Brief mischaracterized the OCA's testimony by claiming that OCA witness Smith "contends that a year-end rate base is never appropriate for use with any form of FPFTY." PAWC M.B. at 14. The ALJ's Finding of Fact #34 adopts this mischaracterization. R.D. at 41. The OCA did not challenge the use of a year-end rate base for the FPFTY in a traditional, single-year base rate case as contained in the Non-Unanimous Settlement, which the appellate courts and Commission have determined is permissible. The OCA challenged PAWC's use of a year-end rate base in the context of an MYRP.

As discussed in the OCA's Reply Brief, OCA witness Smith testified as follows:

To be clear, although the Commission has allowed the use of a year-end rate base for a FPFTY, the Commission has not allowed year-end rate base in the context of multi-year rate plans that project even further into the future. In my professional opinion, utilizing the end of year rate base for MYRPs would be a radical and extreme departure from traditional ratemaking.

OCA R.B. at 10-11; OCA St. 2SR at 42. OCA witness Smith further testified that based on his experience in other states where MYRPs are used, an average rate year concept is always applied to each rate year in the MYRP.⁵ OCA R.B. at 11; OCA St. 2SR at 42.

⁴ Consistent with the discussion above, Mr. Smith noted that PAWC's FPFTY projections are likely inaccurate because they were developed prior to the pandemic. OCA St. 2SR at 5-6.

⁵ Using an average rate base for RY2 properly matches the collection of the revenue requirement during each year of an MYRP with the incurrence of the projected cost of providing utility service in that year. OCA St. 2 at 21. The Company acknowledges that an MYRP reduces uncertainty to the Company regarding its future operations and

Since the ALJ did not address or adopt a MYRP,⁶ the OCA respectfully requests that Finding of Fact #34 should be rejected.

Exception No. 4: The ALJ's Findings of Fact #66-68 Should Be Rejected and the OCA's Adjustment to Performance Based Compensation Should be Adopted. R.D. at 46-49; OCA M.B. at 27-31; OCA R.B. at 12-14.

The Recommended Decision does not contain any discussion of the OCA's recommended adjustments to PAWC's Operating and Maintenance expenses except to adopt certain findings of fact. See R.D. at 46-49. Related to performance based compensation, Findings of Fact #66-68 incorrectly state that the adjustments advanced by OCA witness Smith were rejected by the Commission in PPL Electric Utilities' 2012 base rate case, rejected again in UGI's 2018 base rate case, and that the Company presented the same evidence the Commission found to be determinative in those prior proceedings. R.D. at 48.

The PPL 2012 base rate case and UGI 2018 base rate case cited in Findings of Fact #66-68, however, are not dispositive of the issue of PAWC's particular performance based compensation claims because they are factually distinct.⁷ Unlike PPL and UGI, PAWC has not

financial results. PAWC M.B. at 11. For PAWC's customers, however, the MYRP subjects them to the "risk of forecasting errors in PAWC's favor that could lead to excessive rates." OCA St. 3 at 77. This risk is exacerbated in the current case, where PAWC's filing was prepared based on projections made before a global pandemic. OCA St. 3 at 76-77. While the OCA does not recommend approval of an MYRP in this proceeding, if the Commission does approve an MYRP, then an average rate base should be used for Rate Year 2 to mitigate the impact of the rate increase on customers. OCA M.B. at 23-25; OCA R.B. at 9-11.

⁶ The OCA also pointed out that there are corollary adjustments to PAWC's proposed payroll costs, capitalization rate, property taxes, and annual depreciation rates, which fall out from the OCA's recommendation regarding use of average rate base for both years of the MYRP, if the Commission determines to approve a MYRP. OCA M.B. at 42-43, 54-56; OCA R.B. at 12, 14; OCA St. 2 at 82-84, 89-93; OCA St. 2SR at 53-56. While the OCA submits that these adjustments are necessary and supported by the record evidence, these issues do not need to be ruled upon because the ALJ did not adopt a MYRP.

⁷ In PPL's 2012 base rate case, the Commission noted that its acceptance of PPL's incentive compensation plan is distinguishable from prior decisions denying incentive compensation plans because PPL provided substantial evidence that the incentive compensation was reasonable or benefited ratepayers. Pa. PUC v. PPL Elec. Util. Co., R-2012-2290497, Order at 26 (Dec. 5, 2012). In UGI's 2018 base rate case, the Commission found that UGI provided substantial evidence which demonstrated that the incentive compensation program as a whole included financial and operating metrics, as well as goals, which benefit customers. Pa. PUC v. UGI Util., Inc. – Electric Div., R-2017-2640058, Order at 73-74 (Oct. 4, 2018).

provided evidentiary support for its claimed inability to retain management. The Commission previously disallowed Philadelphia Gas Works' (PGW) incentive compensation plan for that reason.⁸ Pa. P.U.C. v. PGW, 2007 Pa. PUC LEXIS 45, *75-76 (Sept. 28, 2007). PAWC also was not able to provide any studies that demonstrated a quantitative benefit to ratepayers from the provision of stock-based compensation to PAWC and affiliated service company executives. OCA R.B. at 13-14; OCA St. 2 at 75-76.

The OCA's adjustments to the Company's Annual Performance Plan (APP) and Long Term Performance Plan (LTPP) expenses are reasonable because they are based on PAWC's own stated goals for the program. OCA St. 2SR at 33-35; OCA M.B. at 27-29; OCA R.B. at 12-14. The adjustment to PAWC's stock-based compensation expense (LTPP) is even more reasonable because, in this proceeding, PAWC seeks to have ratepayers take on a cost that has historically been borne by shareholders. OCA St. 2 at 77. Ratepayers should not be required to fully fund executive and management compensation as derived from the Company's APP and LTPP, especially given the current difficulties faced by ratepayers due to the COVID-19 pandemic. In further support of the OCA's adjustments, the OCA notes that PAWC's affiliates in other states

⁸ The Commission determined as follows:

We agree with the finding of the ALJs on this issue. The ALJs' rationale for disallowance of this claim is accurate. The ALJs noted that PGW failed to show by record evidence the requisite documentation to comply with its Management Agreement, that PGW has not presented studies or submitted any data to support its claimed inability to retain competent management personnel without such a program and that the Philadelphia Gas Commission did not allow the expense in PGW's 2007 budget because "clearly articulated, well-defined, quantitative goals and criteria (as are used in private industry for such 'pay-for-performance' programs) are absent." Accordingly, we shall deny the exceptions of PGW on this issue and adopt the recommendation of the ALJs to disallow the \$ 500,000 claimed expense.

Pa. P.U.C. v. PGW, 2007 Pa. PUC LEXIS 45, *75-76 (Sept. 28, 2007).

have recently been denied rate recovery of their incentive compensation programs, both partially and completely, for these very reasons.⁹

Permitting a shareholder-oriented expense to be included in PAWC's revenue requirement, especially when many ratepayers are struggling with financial difficulties due to the COVID-19 pandemic, is neither a reasonable nor appropriate regulatory policy to promote reliable and effective public utility service. OCA M.B. at 30; OCA St. 2 at 76-77. In regard to the APP, the OCA showed that the program's growth strategy and payment of the awards are driven by financial gains to shareholders. OCA St. 2SR at 36. PAWC's stock-based compensation/LTPP expense was previously borne by shareholders; now the Company seeks to shift the entire cost to its ratepayers. OCA R.B. at 13; OCA St. 2 at 77; OCA St. 2SR at 37. The Company's stock-based compensation plan is designed to benefit the Company's shareholders and does not provide any quantitative benefits to those ratepayers. *Id.*; OCA St. 2 at 76. As noted *supra*, Commissions have disallowed APP and LTPP expense claimed by other American Water affiliates.

For these reasons and as discussed further in the OCA's Briefs, the OCA respectfully requests that the Commission adopt the OCA's adjustments to both of PAWC's proposed Performance-Based Compensation claims and decline to adopt Findings of Fact #66-68, based on the reasoning and evidence discussed herein and in the OCA's Briefs.

⁹ Kentucky Public Serv. Comm'n, Electronic Application of Kentucky-American Water Co. for an Adjustment of Rates, Case No. 2018-00358 at 43-44 (July 27, 2019) (denied recovery of 50 percent of APP expense and 100 percent of LTPP for Kentucky American Water Co.); Application of California-American Water Co., 2018 Cal. PUC LEXIS 628 (Cal. P.U.C. Dec. 20, 2018) (reducing California American Water Co.'s APP request by 50%).

Exception No. 5: The ALJ's Adoption of the Non-Unanimous Settlement's 20-Year EADIT Amortization Period Is Not Supported by Record Evidence and Will Result in Unjust and Unreasonable Rates. R.D. at 20, 43, 49-51, 108-09; OCA M.B. at 31-34; OCA R.B. at 14-17.

The Recommended Decision contains findings of fact and summaries of the OCA's recommended adjustments within the context of the Non-Unanimous Settlement. See R.D. at 43, 49-51, 108-09. The OCA notes that the ALJ did not discuss tax issues litigated in this proceeding, but did adopt the terms of the Non-Unanimous Settlement in regard to an important tax issue: the amortization of Excess Accumulated Deferred Income Taxes (EADIT). R.D. at 20.¹⁰

Unprotected EADIT relates to book-tax differences for which there is no mandatory normalization requirement in the Internal Revenue Code. OCA St. 2 at 95. The Commission has discretion under the Tax Cuts and Jobs Act (TCJA) in determining the amortization period for all unprotected EADIT. OCA M.B. at 31; OCA St. 2 at 107-08. The amortization period established in this case will have a significant impact on rates. OCA M.B. at 31-32. The longer the amortization period and the higher the allowed return on equity, the greater the increase to revenue requirement and, ultimately, customer rates. OCA M.B. at 32; OCA Cross Exam. Exhs. 1-2; Tr. 756-57, 761-62 (Wilde). Compared to the roughly 40-year amortization period proposed in the Company's filing, the adjustment resulting from the OCA's recommended use of a three-year amortization period would reduce rate base by almost \$30 million on a total Company basis. OCA M.B. at 32; OCA Exh. LA-7, Sch. B-3; OCA St. 2SR at 31. In terms of revenue requirement impact, the OCA showed that increasing the amortization period for PAWC's unprotected EADIT

¹⁰ The OCA notes that Finding of Fact #86 adopts PAWC's incorrect claim that EADIT represents a "no-cost tax loan." To be clear, the zero-cost capital that comprises the EADIT is not a loan from the government, but is a ratepayer-funded excess balance that needs to be returned to the ratepayers. OCA R.B. at 16; OCA St. 2SR at 20. The OCA further notes that Finding of Fact #86 states as follows: "The Company's proposal for amortizing EADIT avoids the yo-yo effect on customers of a temporary reduction in revenue requirement followed immediately thereafter by a large increase." First, the Company's proposal for amortizing EADIT was not adopted in the Non-Unanimous Settlement. More importantly, PAWC provided no evidence to support its contention that a three-year amortization period necessitates a large increase in a future base rate case.

(at the OCA's recommended cost of capital and return on equity) from three to six years would increase revenue requirement by \$23 million. OCA Cross Exh. 1. Increasing the amortization period from three years to the 20 years proposed in the Non-Unanimous Settlement would increase revenue requirement by \$38 million on a total company basis.¹¹ If a higher return on equity and overall capital is allowed in this case than recommended by the OCA, it will increase the impact of lengthening the amortization period for unprotected EADIT by even greater amounts.¹²

The 20-year amortization period for unprotected EADIT that is provided in the Non-Unanimous Settlement is less than PAWC's initial proposal of 40-years but is still not supported by the record evidence. In contrast, a three-year amortization period is reasonable because it promotes intergenerational equity by returning the excess income tax money to the customers who paid rates based on the previous 35% corporate tax rate and it helps to mitigate the rate impact. OCA M.B. at 33-34; OCA St. 2SR at 19-20; OCA App. A.2, Table II; OCA App. A.3, Exh. LA-8, Sch. C-11 at 5. The excess ADIT was provided by the ratepayers to the Company and only exists because ratepayers were paying PAWC the ADIT as calculated under the previous tax rate.

Also, the OCA's recommended three-year amortization period for unprotected EADIT is consistent with the following three-year amortization periods used by PAWC to account for the TCJA:

- PAWC experienced federal income tax savings from the federal income tax rate deduction from 35% to 21% during a "stub period" commencing January 1, 2018 and determined that returning the "stub period" tax savings over a three-year period is reasonable. OCA St. 2SR at 106.
- The "Catch-Up" EADIT relates to the EADIT amortization recorded by PAWC during the period of 2018 through 2020. OCA St. 2SR at 17. PAWC proposed a three-year period to amortize "Catch-Up" EADIT. OCA St. 2SR at 17; PAWC St. 10R at 11.

¹¹ This amount reflects the OCA's recommended cost of capital and return on equity, as reflected in its Surrebuttal testimony. OCA Cross Exh. 1 (see "Difference" line for different amortization periods).

¹² OCA Cross Exh. 2 (compare the "Difference" line in the tables in OCA Cross Examination Exhibits 1 and 2).

Commissions throughout the country have utilized amortization periods that return the unprotected EADIT to customers over a shorter amortization period, as proposed by the OCA. For example, the California Public Utility Commission found that a two-year amortization period for unprotected EADIT was reasonable for PAWC's affiliate, California-American Water Company.¹³

The 20-year amortization period in the Non-Unanimous Settlement is unreasonable as it does not match the return of the unprotected EADIT to the ratepayers who paid the monies that contributed to the EADIT at issue. OCA St. 2SR at 18. The OCA submits that, both a proper ratemaking approach and the realities of the current economic and public health situation support returning this capital to the customers who supplied it over a shorter time period. As such, the OCA respectfully requests that the Commission adopt a three-year amortization period for PAWC's unprotected EADIT. Further, the OCA submits that if the amortization period is adjusted, a corresponding adjustment to rate base is necessary. OCA App. A.2, Table II (end of Year 2021); OCA App. A.3, Exh. LA-8, Sch. C-11 at 5 (2022 FPFTY); OCA St. 2 at 110; OCA St. 2SR at 55; OCA M.B. at 25, 31-34; OCA R.B. at 14-17.

¹³ Application of California-American Water Co., 2018 Cal. PUC LEXIS 628, *194-197 (Cal. P.U.C. Dec. 20, 2018); see also, In Re: Tennessee American Water Co.'s Response to the Commission's Investigation on the Impact of Federal Tax Reform on the Public Utility Revenue Requirements, 2020 Tenn. PUC LEXIS 101, *4-10 (Aug. 3, 2020) (denied Tennessee American's proposal to use ARAM after considering Mr. Wilde's testimony and instead applied a three-year amortization period for unprotected EADIT); Proceeding on Motion of the Commission on Changes in Law that May Affect Rates, Case 17-M-0815, 2018 N.Y. PUC LEXIS 393 *82-84 (Aug. 9, 2018) (directed New York American to implement a sur-credit which utilizes a three-year amortization period for deferred tax savings, including unprotected ADIT); In the Matter of the Petition of New Jersey-American Water Co., Inc., with Calculation of Rates Under the Tax Cuts and Jobs Act of 2017, Docket Nos. AX18010001, WR18030233 at 3 (N.J. Bd. of Pub. Util., Oct. 28, 2020) (rejected ARAM proposal for unprotected EADIT and instead applied a 15-year amortization period).

Exception No. 6: The ALJ's Adoption of Certain Findings Regarding Fair Rate of Return Is Not Supported by Evidence. R.D. at 52-58; OCA M.B. at 35-53; OCA R.B. at 17-19.

1. Fair Rate of Return

The ALJ found that the return on equities (ROEs) recommended by OCA witness Rothschild for PAWC's water and wastewater operations are below authorized returns for all water utilities in the United States for the last decade excluding the Blue Granite case and that they are below the 9.90% ROE authorized by the Commission for its DSIC. R.D. at 52 (Findings #89-90). Mr. Rothschild utilized the DCF method with the CAPM as a check to arrive at his recommended ROEs of 8.00% and 8.05% for PAWC's water and wastewater operations respectively. OCA St. 3 at 2-3. In contrast to PAWC's approach, Mr. Rothschild's approach recognizes the impact of the pandemic on financial markets and the current low cost capital environment, reflects reasonable returns for investors, balanced with the concern for PAWC customers who will be paying increased rates. OCA St. 3 at 14-18, 29-30. This recommendation should not be compared to higher ROEs approved in a much different capital environment.¹⁴ The OCA's recommended return on equity is reasonable for this utility, in this proceeding under a "business as usual" approach, and supported by the evidentiary record as further discussed in the OCA's Briefs and below. The OCA respectfully requests the Commission adopt the OCA's recommendation with regard to ROE and fair rate of return.

2. Capital Structure

The ALJ determined that PAWC's capital structure was reasonable because it was in the range of equity ratios of a proxy group of utilities. R.D. at 52 (Finding #91). PAWC's capital

¹⁴ Likewise, comparison to the cost of equity applied for DSIC purposes has limited value because that equity rate is not specific to PAWC and is based on reports submitted by Pennsylvania water utilities to the Commission, which are not subject to discovery, cross-examination or evidentiary proceedings such as those used to establish rates in a full base rate proceeding. 52 Pa. Code §§ 71.1, *et seq.*

structure for its water operations is not reasonable, however, because the proxy group it is based on includes several natural gas companies with potentially dissimilar risk profiles, and therefore, different costs of equity, than that of PAWC. OCA St. 3 at 31.

PAWC's proposed capital structure for its water operations has a significantly higher common equity ratio (56.06%) than the seven regulated water companies in Mr. Rothschild's proxy group (51.64%). OCA St. 3 at 3-4, 13. The OCA submits that it was reasonable to accept PAWC's proposed capital structure for its wastewater operations and to derive the capital structure for PAWC's water operations from the seven water utilities in Mr. Rothschild's proxy group.¹⁵ For these reasons, the OCA respectfully requests the Commission adopt the OCA's recommendation with regard to capital structure.

3. Common Equity Cost Rate

The ALJ accepted PAWC's argument that the market volatility caused by the COVID-19 pandemic has led to high valuations of utility stocks and low dividend yields which could make it difficult for PAWC to fulfill its capital needs on reasonable terms. R.D. at 53 (Findings #97-99). Mr. Rothschild explained, however, that high valuations do not distort the results of the DCF method as Ms. Bulkley claims, because the DCF method is specifically designed to measure the return investors expect on the market price of a stock.¹⁶ OCA St. 3SR at 16. The ALJ also found that the Tax Cuts and Jobs Act (TCJA) has had a negative effect on regulated utilities by reducing

¹⁵ The ALJ found that Mr. Rothschild did not explain the inconsistency of his acceptance of the Company's actual capital structure for PAWC's wastewater operations and his recommendation to use a hypothetical average for PAWC's water operations. R.D. at 53 (Finding #94). As addressed by the OCA in its Reply Brief, it was unnecessary for Mr. Rothschild to address PAWC's requested wastewater capital structure because the Company did not propose a higher common equity ratio than Mr. Rothschild's proxy group. OCA R.B. at 17-18.

¹⁶ Mr. Rothschild further notes that Ms. Bulkley claims that current markets are anomalous and have been for several years. OCA St. 3SR at 15. Essentially, Ms. Bulkley requests a 10.80% cost of equity based on projected figures, e.g., interest rates, instead of current market data because she believes the current market is "anomalous." Id. She admitted that she did not know when markets will no longer be anomalous. Id. Mr. Rothschild explained that due to stock market unpredictability, cost of equity could increase, decrease, or remain the same, and therefore, it is in the best interest of PAWC's consumers to set rates based upon current indicated cost of equity. Id.

cash flow which raises concerns for credit agencies. R.D. at 54 (Finding #100). Mr. Rothschild addressed this concern explaining that any impact of the TCJA on PAWC's cost of equity would be reflected in the results of his cost of equity models because the TCJA would impact all companies in his proxy group. OCA St. 3SR at 14. The OCA notes that investor interests are only one of the factors to be considered in determining PAWC's cost of equity. The Hope standard holds that "[t]hese investor interests are appropriate factors to be weighed in the balancing analysis under Hope, but they are not, in themselves, controlling, for other factors must be taken into account."¹⁷ The ALJ erred in placing too much emphasis on PAWC's investor interests in determining PAWC's cost of equity.

a. Discounted Cash Flow (DCF)

The ALJ accepted PAWC's claim that the results of its witness's DCF analysis were significantly below normal market value and that Mr. Rothschild's cost of equity calculation was flawed and too low. R.D. at 55 (Findings #104-05). Mr. Rothschild used the DCF method upon which the Commission primarily relies and has done so for many years.¹⁸ Although PAWC witness Bulkley claimed that Mr. Rothschild's DCF analysis did not rely on earnings growth rates,¹⁹ Mr. Rothschild refuted this assertion by explaining that the model relies on an expectation of future cash flows. OCA M.B. at 44.

Ms. Bulkley critiqued Mr. Rothschild's use of retention growth rates in his DCF model because of potential error.²⁰ First, the OCA submits that Ms. Bulkley did not provide any support for her assertion that Mr. Rothschild's approach would produce error. Second, the OCA maintains

¹⁷ Federal Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591 (1944) (Hope).

¹⁸ OCA M.B. at 48-49; see, e.g., Pa. P.U.C. v. UGI Util., Inc. – Electric Div., Docket No. R-2017-2640058, Order at 106 (Oct 25, 2018); Pa. P.U.C. v. City of Dubois, Docket No. R-2016-2554150, Order (Mar. 28, 2017); Pa. P.U.C. v. York Water Co., 75 Pa. PUC 134, 156-69 (1991); Pa. P.U.C. v. Philadelphia Suburban Water Co., 71 Pa. PUC 593, 631-32 (1989); Pa. P.U.C. v. Pennsylvania-American Water Co., 71 Pa. PUC 210, 279-82 (1989).

¹⁹ PAWC St. 13R at 78-80.

²⁰ Id. at 74.

that the use of current investor expectations is still superior to utilizing historical data especially in the current economic market.²¹ OCA St. 3SR at 8; OCA St. 3 at 29-30.

Finally, use of the DCF does not produce cost of equity results that are too low. Mr. Rothschild refuted this, stating:

[w]ith utility stocks at all-time highs, it is not surprising that the cost of equity for water utilities are at or near all-time lows. [Ms. Bulkley's] claim that the DCF is understating the cost of equity has little to do with the DCF model and much more to do with her speculation that utility stock prices will decrease in the future. The cost of equity should be based on investors' expectations as indicated by market prices and not capital market speculation.

OCA St. 3SR at 12; see also OCA St. 3SR at 6-8. As this Commission has held, determining a fair rate of return is an exercise of informed judgment, based upon the facts of each case.²² For this Company, when market to book ratios for water utilities are almost 3.5 and when ratepayers are facing significant financial hardship, the facts support a lower return on equity. For all of the reasons discussed here and in the OCA's Briefs, the OCA respectfully requests the Commission adopt the OCA's DCF-based recommendation.

b. Capital Asset Pricing Model (CAPM)

The ALJ found that Ms. Bulkley explained the errors in Mr. Rothschild's approach and that she refuted his claims that her CAPM calculation was not market-based because her method was consistent with that used by FERC and other state commissions. R.D. at 56 (Finding #109).

²¹ A cost of equity based on market prices is superior to a cost of equity based on historical data for two reasons: 1) the cost of equity that PAWC has to pay investors is based on capital markets. Interest rates remain at historical lows. It is possible interest rates will increase, but if this was expected, it would already be reflected in current prices, and 2) unpredictability of capital markets. OCA St. 3 at 29-30. Ms. Bulkley also claimed that Mr. Rothschild's approach is "somewhat circular." PAWC St. 13R at 74. Mr. Rothschild explained that his constant growth DCF method is not circular because his conclusion (market-based cost of equity that he recommended be applied to PAWC's book value) is not an input. OCA St. 3SR at 8. Mr. Rothschild further stated that his "input is the earned return on book equity (not market return), and [he] use[s] data from other utility companies (not PAWC). Additionally, my cost of equity result is based on data from a point in time (July 31, 2020 and before), and therefore, my DCF cost of equity result could not have been influenced by PAWC's proposed authorized return in this proceeding." Id.

²² Pa. P.U.C. v. Pennsylvania Power Co., 55 Pa. PUC 552, 579 (1982).

The OCA has not compared Ms. Bulkley's approach to that of FERC or other state commissions. Even if her approach is consistent with that of FERC and other state commissions, that fact alone would not render her method market-based. Mr. Rothschild explained that a market-based approach relies upon current investor expectations and not analyst forecasts. Instead of relying solely on historical data and analyst forecasts, Mr. Rothschild uses current market prices (e.g., stocks, bonds, options, etc.), which measure investors' expectations directly. PAWC witness Bulkley utilizes a non-market based approach which relies on historical data. OCA St. 3SR at 3. For this reason, the OCA respectfully requests the Commission adopt the OCA's recommendation.

c. Expected Earnings Approach

The ALJ reiterated Ms. Bulkley's discussion of the expected earnings approach and the results of her calculation. R.D. at 56 (Findings #110-12). He noted Mr. Rothschild's assertion that this approach does not represent a market-derived cost of equity. R.D. at 56 (Finding #111). As previously explained, the problem with Ms. Bulkley's expected earnings approach is that it does not address the cost of equity at all. OCA St. 3 at 74. Rather, it considers the returns on book equity that were achieved and are expected to be achieved by Value Line in the next 3 to 5 years. Id. Earned return on book equity is an entirely different concept from the cost of equity. Id. Therefore, the OCA respectfully requests the Commission reconsider the ALJ's determination with regard to the expected earnings approach.

4. Management Performance

The ALJ did not render a specific recommendation whether or not PAWC's request that its ROE reflect its "excellent" management performance should be granted.²³ R.D. at 57 (Findings

²³ Specifically, PAWC requested that PAWC's superior management performance should be recognized by granting an ROE at the upper end of the 10.00-10.80% range Ms. Bulkley recommended or, if the Commission were to authorize an ROE less than 10.80%, that it add a management performance adjustment of no less than the 25 basis points. PAWC St. 3 at 75-76.

#114-16). The ALJ found, however, that in arguing that against a bump to the ROE in the midst of the ongoing COVID-19 crisis, the OCA ignores that the Commission approved the same 25 basis point increase for another utility during a major economic crisis—the 2008 Great Recession. R.D. at 58 (Finding #118). The ALJ failed to recognize, however, the admission by PAWC’s witness that “COVID-19 has caused an increase in the level of uncertainty in the market that exceeds the levels seen in the Great Recession of 2008/09.” PAWC St. 13 at 13. It is unconscionable to award a management bonus at a time when PAWC’s customers—both residential and business—are suffering the significant economic impacts from COVID-19. The ALJ also failed to recognize the other factors weighing against approval of a management bonus. First, PAWC should not receive both an acquisition premium and an ROE enhancement for its acquisition of Delaware Sewer Company. OCA St. 3 at 81 (the OCA has not opposed the requested acquisition premium). Second, as discussed in the testimony of OCA witness Alexander, Bureau of Consumer Services (BCS) data shows substandard customer service performance in several areas. For example, BCS found that in 2019 PAWC failed to apply the proper policies in handling 15% of customer complaints and 24% of payment arrangement requests prior to the customer’s informal appeal to BCS. OCA St. 5 at 10-11. The percentage of PAWC’s payment arrangement appeals was the highest of any Pennsylvania water utility. Id. For the same year, BCS recorded 62 verified instances where PAWC misapplied or infringed on Commission regulations. Id. For all of these reasons, the OCA requests that the Commission not approve a management performance bonus at this time.

D. Rate Structure and Cost Allocation

Exception No. 7: The Recommended Decision's Determinations Regarding Stormwater Costs Are Not Supported by the Evidentiary Record. R.D. at 19, 26-27, 62, 94, 114; OCA M.B. at 76-83; OCA R.B. at 24.

The Recommended Decision adopts the allocation of rates agreed to by the settling parties in the Non-Unanimous Settlement. R.D. at 126. Additionally, according to Finding of Fact # 141 “[t]he Settlement addresses Mr. Rubin’s concerns regarding the allocation of stormwater costs in PAWC’s CSS rate zones.” R.D. at 62.

The Settlement addresses some but not all of OCA witness Rubin’s concerns regarding the allocation of stormwater costs in PAWC’s combined sewer service (CSS) rate zones. Mr. Rubin’s adjustments to the water Cost of Service Study (COSS) were accepted and resolved. OCA St. 1 at 37-40, Sch. SJR-8; OCA St. 1SR at 17. Mr. Rubin did not have any adjustments to the sanitary sewer COSS. OCA St. 1 at 40. With regard to stormwater rates, however, the separation of costs between sanitary sewer and stormwater is a key issue to ensure that the costs are accurately assigned. If the costs are not assigned, it requires sanitary sewer customers and water customers (if wastewater costs are shifted to water customers) to pay costs that are not related to wastewater service. The Settlement also does not address Mr. Rubin’s recommendations regarding the combined sewer cost of service studies, rate design, including the scale back if PAWC is granted any increase in revenue requirement, the allocation of wastewater revenue requirement to water customers, the allocation of Steelton water revenue requirement to water customers, and the necessity for the development of a stormwater rate. OCA St. 1 at 35-95. As such, the OCA disagrees with Finding of Fact #141 and respectfully requests that the Commission not adopt the finding in making its determination.

Under the Non-Unanimous Settlement adopted in the Recommended Decision, the Company agrees to propose “potential recovery and rate methodology options for stormwater costs

of combined sewer systems in its next general wastewater or combined water/wastewater base rate filing.” R.D at 26-27. The provision explains that the proposals will include “an analysis of the recovery of such stormwater costs through various methodologies including forms of separate stormwater rates, and a description of the customers to whom the rates would apply.” Id. This provision, although calling for a consideration of methodology options, does not appear to require the Company to propose stormwater rates in its next base rate proceeding. The continued collection of stormwater costs from wastewater and water customers is not reasonable. In the combined-sewer systems, stormwater-related costs account for approximately 46% of the revenue requirement in those three rate zones, or \$31,148,927 of the total \$68,089,360 in combined-sewer system revenue requirements. OCA St. 1 at 50. This Non-Unanimous Settlement provision appears to perpetuate the collection of the stormwater costs through wastewater and water rates beyond the next rate case to the case after that, at least. Permitting PAWC to continue the inequitable collection of stormwater costs from wastewater and water customers, without a clear directive that PAWC shall propose stormwater rates, along with providing the requisite notice in its next rate filing, should be rejected.

Exception No. 8: The ALJ’s Determinations Regarding Rate Design Are Not Supported by the Evidentiary Record. R.D. at 19, 25-27, 59-61, 93, 110-12, 126; OCA M.B. at 61-66; OCA R.B. at 21-23.

The OCA submits that the proposed rate design, distribution of the increase, and wastewater subsidy²⁴ agreed to in the Non-Unanimous Settlement are not supported by the record, are not reasonable, and are not consistent with applicable statutory requirements. The Non-Unanimous Settlement describes the consolidation of rate zones and the customer charges that are set forth in more detail in Appendix A and B (tariffs), Appendix C and D (proof of revenues), and

²⁴ The OCA’s opposition to the wastewater subsidy is discussed further in Exception No. 9, below.

Appendix G and H (bill comparisons). The Non-Unanimous Settlement and Appendices do not provide any explanation of how the customer charges or consumption charges were determined.²⁵ The bill comparisons (Appendices G and H) show the average customer's present rates and the proposed Settlement's impact on an average customer but they do not include the proposed rates for the average customer.

Based on the information provided in the Settlement and Appendices, it is not possible to determine the basis for these changes or to determine whether the impact, from a rate design perspective, results in just and reasonable rates.²⁶ Moreover, the Appendices to the Settlement fail to provide any schedules that show how the Non-Unanimous Settlement allocations provide for any movement toward the system average rate of return. The OCA's proposed rate design is reasonable and supported. See OCA M.B. at 61-67; OCA Comments in Opposition to Settlement at 8-12; OCA Tables A.1-A.3; OCA St. 1 at 88-94.

Exception No. 9: The ALJ's Determination Regarding the Allocation of Wastewater Revenue Requirement to Water Operations Should Not Be Adopted. R.D. at 60-62, 126; OCA M.B. at 67-76; OCA R.B. at 21-23.

In adopting Finding of Fact # 75, the ALJ determined that the Non-Unanimous Settlement implements Section 1311(c) of the Public Utility Code, 66 Pa. C.S. § 1311(c), in a manner that is agreeable to the Joint Petitioners, and is thus in the public interest. R.D. at 126. The OCA submits that the Non-Unanimous Settlement's allocation of wastewater revenue requirement to water operations, however, is not reasonable.

²⁵ The proof of revenues comparisons do not have references tying the information back to PAWC's exhibits in this proceeding.

²⁶ As discussed above, the OCA does not agree with the overall water revenue requirement reflected in the Non-Unanimous Settlement.

The Non-Unanimous Settlement provides for wastewater revenues of \$29,296,281 (Step 1) and \$21,480,685 (Step 2) to be shifted to water customers pursuant to Section 1311(c). Neither the Non-Unanimous Settlement nor the Statements in Support provide any explanation of how that level of subsidy meets the public interest requirement of Section 1311(c). 66 Pa. C.S. § 1311(c).

The evidence in the proceeding does not support this level of subsidy. Originally, PAWC proposed that its water Rate Zone 1 customers pay a subsidy of \$34,628,397 in Rate Year 1.²⁷ The subsidy proposed in PAWC's filing is equivalent to 41% of PAWC's originally proposed FPFTY Rate Zone 1 increase of \$79.25 million. OCA St. 1 at 53. The OCA filed testimony recommending a more reasonable subsidy of 9% (\$7.0 million). OCA St. 1 at 66; see also OCA St. 1 at 51-70. The Bureau of Investigation & Enforcement (I&E) also filed testimony opposing that level of subsidy and recommending a lesser subsidy of 27% (\$21.3 million). I&E St. 4 at 30; I&E St. 3 at 79. Yet, under the Non-Unanimous Settlement, the Step 1 subsidy of \$29.3 million (¶ 71.d) is equal to approximately 76% of the \$38.7 million rate increase allocated to water Rate Zone 1 customers. Non-Unanimous Settlement Appendix C, Sch. 3 - Step 1. In 2022, the subsidy would decline to \$21.5 million, representing approximately 45% of the combined Step 1 and Step 2 rate increase allocated to water Rate Zone 1 of \$47.7 million. Non-Unanimous Settlement Appendix C, Sch. 3 - Step 2. In other words, the allocation in the Non-Unanimous Settlement is substantially higher than PAWC's filed-for allocation or the allocation recommended by I&E or the OCA.

Section 1311(c) allows, but does not require, the Commission to allocate a portion of the wastewater revenue requirement to a combined water and wastewater customer base if it is in the public interest. 66 Pa. C.S. § 1311(c). Section 1311(c) was enacted as part of Act 11 of 2012 and has been used by PAWC in its rate cases filed in 2013 and 2017 to propose a shift of wastewater

²⁷ PAWC's original filing included a proposed subsidy in Rate Year 2 of \$35 million, or 4.7% of the total proposed revenue for water Zone 1. PAWC St. No. 1 at 30.

revenue requirement to water Zone 1 customers. However, the issue of how the Commission should consider proposals made pursuant to Section 1311(c) has not been litigated because both of PAWC's cases were resolved by settlement.²⁸ In the 2013 and 2017 rate cases, as well as in this case, Mr. Rubin provided criteria that can be used to evaluate the proposed Section 1311(c) subsidies. See OCA St. 1 at 56-63; OCA M.B. at 67-76.

This is the first rate case that includes both Section 1329 acquisitions and a request to subsidize those acquisitions by shifting costs to water customers pursuant to Section 1311(c). 66 Pa. C.S. §§ 1311(c) and 1329. The ratemaking interplay, as proposed by PAWC, would require its water Zone 1 customers to pay a substantial subsidy that is primarily due to the seven acquisitions completed by PAWC to date under Section 1329. Using Section 1311(c) in combination with a Section 1329 acquisition “might result in water customers throughout the Commonwealth subsidizing municipal government purposes in a few locations while also promoting profit growth for utility shareholders.” OCA St. 1 at 64.

The Recommended Decision's determination that the allocation of revenue requirement contained in the Non-Unanimous Settlement is in public interest because the implementation of Section 1311(c) of the Public Utility Code was agreeable to the Joint Petitioners is unreasonable and fails to meet the standard of approval for non-unanimous settlements. As noted in the OCA's Main Brief, Mr. Rubin recommended that the Commission permit a limited subsidy from Rate Zone 1 water customers to be paid to each Section 1329 rate area, but that the subsidy should not compensate the Company for the full return on the purchase price increment it paid over the net original cost of the property. OCA St. 1 at 65-70; OCA M.B. at 74-76. Using Section 1311(c) to

²⁸ Pa. P.U.C. v. Pennsylvania-American Water Co., Docket No. R-2013-2355276, Order (Dec. 19, 2013) available at <https://www.puc.pa.gov/pdocs/1262225.docx> (last visited on Nov. 20, 2020); Pa. P.U.C. v. Pennsylvania-American Water Co., 2017 Pa. PUC LEXIS 249 (Dec. 7, 2017).

shift most of the costs of the Section 1329 acquisitions to its statewide water customers is not reasonable. Moreover, there is no substantial evidence showing that the Non-Unanimous Settlement's allocation of wastewater revenues to water customers is in the public interest.

E. Low-Income Customer Assistance

Exception No. 10: The ALJ's Determinations Regarding Low-Income Customer Assistance Are Not Reasonable Nor Supported by Evidence. R.D. at 64-71; OCA M.B. at 83-90; OCA R.B. at 24-25.

First, the ALJ found that PAWC is incapable of implementing a tiered discount program as recommended by OCA witness Colton because it does not have the information needed to categorize customers into tiers or ask participants to update income information. R.D. at 66-67 (Finding #163). However, PAWC obtains income information from customers to determine eligibility for the BDP, which demonstrates its ability to collect the necessary data. OCA St. 4SR at 7-9. Therefore, the OCA respectfully requests the Commission adopt the OCA's recommendation.

Second, the ALJ determined that the Company already has extensive outreach to its customers and should not be required to hire an independent expert to develop an outreach plan to identify and enroll eligible low-income customers in the BDP as recommended by OCA witness Colton. R.D. at 67-68 (Finding #167). The ALJ states that PAWC regularly communicates with customers and has agreed to expand community outreach to communities in need, enhance training materials and call scripts, and establish a low-income advisory group for the purpose of soliciting input to enhance its H2O Help to Others Program. R.D. at 68 (Finding #168). The OCA maintains that while these efforts may be beneficial for PAWC's low-income customers, PAWC's existing outreach has resulted in enrollment of only 16.7% of its 119,859 income-eligible customers. OCA St. 4 at 44-59. An independent review of what PAWC can do to increase the enrollment of its

eligible customers is necessary and reasonable to ensure PAWC reaches as many of these customers as possible.

F. Service Quality and Customer Service Issues

Exception No. 11: The ALJ Erred by Not Requiring PAWC to Establish Specific Performance Standards. R.D. at 71; OCA M.B. at 94-97, 99; OCA R.B. at 25-28, 30.

The Non-Unanimous Settlement does not contain any provisions related to performance standards. The ALJ did not address the OCA's recommendations except to adopt findings of fact reflecting the OCA's position. R.D. at 71 (Findings #184-86). The ALJ erred, however, by not affirmatively requiring PAWC to adopt standards for its customer service performance. The recommended standards are reasonable because they are (1) based on the level of performance PAWC has currently or historically achieved and will thus help to ensure that customer service performance remains at existing levels or better²⁹ or (2) necessary because PAWC is substantially underperforming compared to other major Pennsylvania utilities.³⁰ The Commission has previously imposed performance standards in a base rate proceeding and the OCA respectfully requests that the Commission exercise its authority to prescribe the standards recommended by the OCA for PAWC.³¹ The specific standards recommended by the OCA are provided in the testimony of OCA witness Alexander. OCA St. 5 at 30; see also OCA St. 5 at 7-8, 10-14, 18-19, 30; OCA St. 5SR at 6, 8-9, 12, 14-15, 18-19; OCA Exhs. BA-2, BA-3. The OCA also recommends

²⁹ Frequency of Main Breaks, Kept Field Appointments, Response time to BCS complaints and Customer Billing inquiries. OCA St. 5 at 9, 13, 18-19; OCA St. 5SR at 12; OCA Exh. BA-3. As discussed below, for Average Monthly Response Time for Leaks, the OCA recommends that PAWC begin tracking this data and propose a standard based on the Company's own historical performance. OCA St. 5 at 9; OCA St. 5SR at 12.

³⁰ Call Center Annual Average Speed of Answer, Call Center Annual Abandonment Rate, Justified Complaints and Complaint Infractions. OCA St. 5 at 7-8, 10-14; OCA St. 5SR at 8-9, 14-15; OCA Exh. BA-2.

³¹ Pa. P.U.C. v. Philadelphia Gas Works, Docket No. R-00005654, Order at 33-34 (Nov. 22, 2000). Pa. P.U.C. v. Philadelphia Gas Works, Docket No. R-00005654, Order at 33-34 (Nov. 22, 2000). Section 523(a) affirmatively requires the Commission to evaluate the "efficiency, effectiveness, and adequacy of service" in a base rate case and Section 1504 gives the Commission express statutory authority to prescribe just and reasonable standards to be imposed and followed. 66 Pa. C.S. §§ 523(a), 1504.

that PAWC be required to submit quarterly reports regarding its performance in the areas addressed by the standards.³² OCA St. 5 at 30.

1. Call Center Performance Standards

The data provided by PAWC shows extremely poor performance in its ability to answer calls in a timely manner and avoid a significant abandonment rate. OCA St. 5 at 7. The data supports the following conclusions:

- The 2018 results are not reasonable and significantly below what is tolerated at other Pennsylvania utilities.
- The 2019 results show improvement but are still below best practices.
- The 2020 results reflect a very poor performance in January with some improvement due in part to the reduced volume of calls evident in April associated with the COVID-19 pandemic and the moratorium on termination of service.

OCA M.B. at 96; OCA St. 5 at 7-8. While PAWC's performance improved from 2018 to 2019, OCA witness Alexander also pointed out that there is a dramatic swing in call center performance from month to month in 2019 and 2020, which indicates an ongoing difficulty in meeting a reasonable target performance on a routine basis. OCA St. 5 at 8; OCA Exh. BA-2. Customers who call PAWC in any month should be provided with reasonable customer service.

2. Response Time to Leaks and Outage Restoration, Keeping Customer Appointments

PAWC does not currently track the time from the utility becoming aware of a main break until the repair is completed. Because ensuring that the utility's distribution system is operating to prevent loss of service and to respond promptly to correct leaks and disruptions is an essential duty of any water utility,³³ the OCA recommended that PAWC begin to track leak information for

³² The OCA also recommended that PAWC should be required to submit a quarterly analysis to BCS of its complaint trends, which identifies the underlying root cause of the disputes and complaints and documents the steps taken to respond to this analysis. OCA St. 5 at 10-12; OCA St. 5SR at 8-9. While the OCA submits that this recommendation is reasonable and supported by the record evidence, this issue does not need to be ruled upon because the ALJ did not make a determination.

³³ 66 Pa. C.S. § 1501 (service "shall be reasonably continuous and without unreasonable interruptions or delay"); 52 Pa. Code § 65.20 ("Leak detection. A system of leak detection should be utilized on a regular basis, with leaks being repaired as expeditiously and economically as possible").

breaks that disrupt service and, based on that data, propose a performance standard within 60 days of the Commission's Order in this proceeding.³⁴ OCA St. 5 at 9 (citing PAWC St. 2R at 4); OCA St. 5SR at 12.

The Company reported that it met 98% of its customer field appointments in 2019 and has an internal goal to maintain this level of performance. OCA St. 5 at 9 (citing PAWC Response to OCA-I-001, Att. 4, 5). OCA witness Alexander agreed that a 98% standard is reasonable and typical of major utilities, thus the OCA recommends using PAWC's 2019 level of performance as the standard for keeping appointments. Id.

3. Customer Billing Accuracy and Resolution of Inquiries

PAWC already tracks certain billing performance metrics related to billing accuracy and resolution of inquiries. OCA St. 5 at 18-19. The Company's "baseline" appears to set a target for 90% to 95% of these customer contacts and concerns to be resolved in less than 20 days. During the last two years, the Company generally met or exceeded that baseline. Id. Accordingly, the OCA recommends that PAWC should be required to continue its objective to resolve 90% of its billing inquiries within 20 days.

Exception No. 12: The ALJ Erred by Not Requiring PAWC to Conduct Regular Audits of Its Out of State Call Centers Regarding Pennsylvania-Specific Requirements. R.D. at 72; OCA M.B. at 98; OCA R.B. at 28-29.

The Non-Unanimous Settlement does not contain any provisions related to the performance of PAWC's call centers. The ALJ did not adopt or discuss the OCA's recommendation that PAWC should be required to conduct regular audits of its call centers in Kentucky and Tennessee (operated by third-parties), to ensure they are complying with Pennsylvania-specific

³⁴ The OCA agreed that response time data could be limited to breaks that disrupt service. OCA M.B. at 95.

requirements.³⁵ The ALJ made one Finding of Fact (#192) that is related to PAWC’s argument that the third-party customer service representatives already receive Pennsylvania-specific training and the Company monitors the performance levels on a daily basis. PAWC M.B. at 66-67. The training and monitoring do not appear to be sufficient, however, because the documentation of BCS-verified infractions shows a repeated instance of PAWC representatives threatening termination prior to resolution of a dispute.³⁶ OCA St. 5 at 11 (citing PAWC Response to OCA-IX-002); OCA St. 5SR at 16. Further, there is more needed in the evaluation of Pennsylvania-specific issues than the monitoring that PAWC currently conducts. See OCA St. 5 at 14 (citing PAWC Response to OCA-IX-013, Attachment) (other internal footnote omitted); see also OCA St. 5SR at 17 (citing PAWC Response to OCA-XX-004(T) (Confidential)). For these reasons, the OCA requests that the Commission adopt the OCA’s recommendation.

Exception No. 13: The ALJ Erred by Not Requiring PAWC to Develop and Implement Customer Satisfaction Surveys. R.D. at 73; OCA M.B. at 101-02; OCA R.B. at 31-32.

The Non-Unanimous Settlement does not contain any provisions related to customer satisfaction surveys. The ALJ did not adopt or discuss the OCA’s recommendation that PAWC develop a program of routine customer satisfaction surveys consistent with those approved by BCS for major Pennsylvania electric and gas utilities. OCA St. 5 at 18; OCA St. 5SR at 9-10. The ALJ made one Finding of Fact (#197) that suggests that PAWC’s existing survey is adequate. R.D. at 73 (citing PAWC M.B. at 68). PAWC’s “survey” is made up of only two questions – whether customers are “overall satisfied with American Water” and about the “overall performance” by the

³⁵ The OCA also recommended that PAWC be required to report the result of the audits to BCS as part of the quarterly reporting discussed in Exception 11, above.

³⁶ The third-party CSRs are responsible for handling outbound calls to customers who have received a termination notice. OCA St. 5SR at 13, 16, 17.

CSR. OCA St. 5 at 18 (citing PAWC Response to OCA-I-001, Att. 7). The questions are insufficient because they do not obtain more detailed information concerning the customer's review of the actual recent transaction. OCA St. 5 at 18. The BCS-approved survey used by major Pennsylvania electric and gas utilities obtains information from customers about their experience in reaching the utility, using the automated phone system and interacting with the customer representative, in addition to their overall satisfaction.³⁷ OCA St. 5 at 18. Although the surveys originated from statutes and rulemakings related to electric and gas utilities, the questions asked in the surveys are not industry-specific and are equally applicable to PAWC and the measurement of its customers' satisfaction. OCA St. 5SR at 9. For these reasons, the OCA respectfully requests that the Commission adopt the OCA's recommendation.

Exception No. 14: The ALJ Erred by Not Requiring PAWC to Modify Its Training Materials for Termination of Service. R.D. at 74; OCA M.B. at 102-03; OCA R.B. at 32.

The OCA raised a concern that PAWC's field personnel may encounter situations where it may be appropriate, even if not mandated, to halt the termination process. For example, encountering children at the door or evidence of lack of understanding due to language or mental disability, suggest that there would be a threat to health and safety if the termination was implemented at that time. OCA St. 5SR at 10-11. PAWC's training documents do not expressly include these additional situations.³⁸ Id.; OCA St. 5 at 18.

³⁷ The BCS customer satisfaction surveys for electric and gas utilities are described and presented in the annual Customer Service Performance Reports available at http://www.puc.state.pa.us/filing_resources/customer_service_performance_reports.aspx. The report for 2019, for example, discusses the common survey process, questions and results on pages 18 to 26. <https://www.puc.pa.gov/media/1187/customer-service-report2019.pdf>. Reports are posted for the past 20 years and indicate the same questions related to customer satisfaction have been utilized since 2002.

³⁸ PAWC agreed to modify its training materials to reflect situations where it is mandated to halt the termination process; this agreement is reflected in the ALJ's findings. R.D. at 74 (Finding #199) (citing PAWC St 17R at 14).

The ALJ declined to adopt the OCA's recommendation on the basis of his finding that "It would be unreasonable to require the Company to train its field representatives to detect conditions that would result in danger or harm to those at the residence at the time of termination of essential water service." R.D. at 74 (Finding #202). PAWC has acknowledged, however, that when field representatives "encounter circumstances not specifically identified in the law or PUC regulation, they are instructed to contact their supervisor and/or business performance team members before terminating service." PAWC M.B. at 68-69. As clarified in its Reply Brief, the OCA agrees with this overall approach. The OCA simply recommends that PAWC modify its training materials to explicitly empower the employee to use their discretion to withdraw and seek guidance from management before terminating service, when they do observe an unusual condition that could result in danger or harm from termination. OCA St. 5SR at 11. This would make the written materials consistent with PAWC's description of its instructions and is, therefore, reasonable and

Exception No. 15: The ALJ Erred by Not Adopting the OCA's Recommendation Regarding Service at Higher Pressures. R.D. at 75; OCA M.B. at 103; OCA R.B. at 33.

The ALJ did not adopt the OCA's recommendation that if the Company provides pressures higher than 125 psi, it should either provide a pressure reducer or an insurance policy covering the repair or replacement of the customer's service line. R.D. at 75. The ALJ appears to accept PAWC's argument that service lines are adequately protected by the tariff requirement that customers install a pressure regulator on the inlet side of the meter when the static pressure is in excess of 100 psi. R.D. at 75 (Finding #207). OCA witness Fought explained, however, that in many instances the pressure regulator is installed inside the building and protects the meter and the interior plumbing from high pressures. OCA St. 6SR at 11. This does not protect the customer's service line between the curb box and the building from higher pressures. Id. To

adequately protect PAWC's customers from damage as a result of high pressures, the OCA respectfully requests the Commission adopt the OCA's recommendation.

Exception No. 16: The ALJ Erred by Not Adopting the OCA's Recommendation for PAWC to Pursue the Two Main Extensions Recommended by the OCA under Tariff Rule 27.1(F). R.D. at 76; OCA M.B. at 103-08; OCA R.B. at 33-36.

The Non-Unanimous Settlement does not address the OCA's proposed main extensions. The ALJ did not address the OCA's recommended main extensions except to adopt certain findings of fact. See R.D. at 76 (Findings # 208-13). Those findings suggest that the ALJ accepted PAWC's claim that it should not be required to make the extensions because the Company investment per residency is higher than the Company is required to invest under Tariff Rule 27.1. The ALJ erred by not recognizing that the residents seeking water service have alleged health and/or safety concerns that meet the criteria in Tariff Rule 27.1(F). OCA M.B. at 103-08; OCA R.B. at 33-36. Tariff Rule 27.1(F) is an exception to the general rule requiring the customer to contribute toward the costs for main extensions where there is a substantial public need, and the public health and safety may be compromised without access to a public water supply.³⁹ PAWC did not provide any evidence to refute the evidence showing these requirements are met for the two main extensions recommended by the OCA.

In addition, the ALJ's findings of fact do not accurately characterize the OCA's recommendations in this case. Findings of Fact #209 and #211 incorrectly state that the OCA

³⁹ PAWC's Tariff Rule 27.1(F) provides:

Where substantial public need exists and the public health and safety may be compromised by the absence of a public water supply in a portion of the Company's authorized service territory, the Company, subject to the Commission's prior approval, may install main extensions and Special utility services facilities without the payment of the Customer Contribution that would otherwise be required under subparagraphs (A)(3) and (D)(2), respectively of the Rule 27.1.

Pennsylvania-American Water Co. Water Tariff, Supplement No. 2 to Tariff Water Pa. PUC No. 5, First Revised Tariff Page No. 89 (effective Jan. 1, 2018).

proposed main extensions in Areas 1 and 2 that would only serve 4 customers and potential service degradation would result. R.D. at 76. As the OCA discussed in its Reply Brief, the OCA recommended that PAWC pursue additional potential customer connections in Areas 1 and 2 beyond those specifically identified in the OCA witness Fought's testimony and the public input testimony of Area 1 customer, Robert Teagarden. OCA R.B. at 34. The Area 1 customer may be the last in a series of prior Tariff Rule 27.1(F) main extensions. OCA R.B. at 34. The OCA also identified that for Area 2 there may be a total of approximately 20 customers. Id.

Finding of Fact #212 concluded that the proposed main extensions will require PAWC to spend more than the amount PAWC is required to expend pursuant to Tariff Rule 27.1. R.D. at 76.⁴⁰ As discussed in the OCA's Reply Brief, the finding applies the incorrect standard. OCA R.B. at 34-35. Tariff Rule 27.1(F) does not look at costs in the light of a customer Contribution in Aid of Construction (CIAC).⁴¹ Tariff Rule 27.1(F) also does not apply a cap to the Company investment required for the main extensions because the purpose is to address situations where there is a significant health and/or safety need for service that might otherwise be cost-prohibitive. Applying the same cap as set forth in Tariff Rule 27.1 would completely eliminate the need for the exception created by Tariff Rule 27.1(F). OCA R.B. at 34-35.

Finding of Fact #210 states that Steubenville Pike is not within the PAWC's certificated service territory. R.D. at 76. As discussed in the OCA's Reply Brief, the fact that Steubenville Pike is currently outside of the Company's service territory should not be considered an

⁴⁰ The ALJ failed to consider that PAWC's cost calculation was flawed due to PAWC's error in the number of potential customer connections and did not include any potential third-party funding sources for Area 2 customers or the possible cost offsets from low-interest PENNVEST loans. OCA R.B. at 34-35.

⁴¹ Pennsylvania-American Water Company Water Tariff, Supplement No. 2 to Tariff Water Pa. PUC No. 5, First Revised Tariff Pages No. 89 (effective Jan. 1, 2018).

impediment. OCA R.B. at 35.⁴² The area is adjacent to PAWC's service territory and near another customer who received a main extension as a result of PAWC's 2017 base rate proceeding. Id.⁴³

For these reasons set forth above and in the OCA's Main Brief and Reply Brief, the OCA requests that the Commission adopt the OCA's recommendation to pursue the two proposed main extensions under Tariff Rule 27.1(F). OCA M.B. at 103-08; OCA R.B. at 33-36.

Exception No. 17: The ALJ Erred by Not Issuing a Decision on the Issue of Sewage Backups. R.D. at 77; OCA M.B. at 108; OCA R.B. at 36.

The ALJ did not discuss or make any findings with regard to the OCA's recommendation that PAWC be required to (1) ensure the implementation of the LTCPs do not cause more sewage backups and (2) provide information to its customers with basements connected to combined sewers about how to eliminate sewage backups. OCA St. 6SR at 5-6. PAWC did not address or refute these recommendations. OCA R.B. at 36. The OCA submits the ALJ erred by not recommending that PAWC be required to take these actions to protect customers from sewage backups. As such, the OCA respectfully requests the Commission adopt its recommendation.

G. Tariff Changes

Exception No. 18: The ALJ Erred by Accepting PAWC's Proposed Changes to its Limitation of Liability Tariff Provisions. R.D. at 84-86; OCA M.B. at 109-11; OCA R.B. at 36-38.

The ALJ erred in his rationale for accepting PAWC's proposed limitation of liability language. R.D. at 84-86 (Findings #252-58). The Policy Statement specifies that "State law

⁴² Subject to Commission approval, PAWC could apply for a certificate of public convenience under Sections 1102(a) and 1103(a) of the Public Utility Code to extend its service territory to serve these potential customers. 66 Pa. C.S. §§ 1102(a), 1103(a). Since PAWC is already a certificated public utility in Pennsylvania, the Commission may apply the standard of "continuing fitness to serve" to the application. See Blue Bird Coach Lines, Inc., 72 Pa. P.U.C. 262 (1990); Re V.I.P. Travel Servs., Inc., 56 Pa. P.U.C. 625, 631 (1982).

⁴³ As the OCA discussed in its Reply Brief, the OCA notes that prior to the alleged fracking incident that impacted the aquifer serving the Area 2 customers, PAWC appears to have previously explored the idea of serving the customers on Steubenville Pike. OCA R.B. at 36, fn. 62.

permits utilities to limit their liability for interruption or cessation of service.”⁴⁴ 29 Pa.B. 2147 (emphasis added). If PAWC’s proposed language were to be approved, it would apply to injury or damages that are not related to cessation of service, including personal injury, which is in direct contradiction to the following statement by the Commission:

‘The limitation may apply in the event of interrupted service or property damage only, and not personal injury. No consumer should be expected to bear the burden of personal injury or death in order to maintain reasonable rates for all consumers.’

Id. at 2148. The ALJ stated that, among other things, “PAWC’s proposal protects PAWC and its customers from plaintiffs seeking ‘deep pockets’ that are increasingly targeting utilities.” R.D. at 85 (Finding #256). The PUC addressed this concern in its Policy Statement stating that it is appropriate to permit limitations on liability for negligent acts in certain cases. 29 Pa.B. at 2148. The Policy Statement does not support limiting liability for reckless and intentional actions,⁴⁵ however, as PAWC proposes to do. This is consistent with the cases cited in the Policy Statement and PAWC’s Main Brief. DeFrancesco v. West Penn Water Co., 329 Pa. Super. Ct. 508, 478 A.2d 1295 (1984) (DeFrancesco); Behrend v. Bell, 242 Pa. Super. Ct. 47, 363 A.2d 1752 (1976), vacated on other grounds, 473 Pa. 320, 374 A.2d 536 (1977) (Behrend); OCA St. 5 at 22-23. Neither DeFrancesco nor Behrend support limiting liability for reckless or intentional acts, they address negligence only. PAWC’s existing water tariff limits liability for negligence only and the Company should not be permitted to broaden that language to include reckless and intentional acts.

Moreover, even with regard to negligent acts, PAWC’s proposed limitation is too broad. OCA St. 5 at 22-23; OCA St. 5SR at 18-19. As noted in the Policy Statement, liability may be

⁴⁴ In the Policy Statement, the Commission adopts (and quotes at length from) the analysis in a March 17, 1997 Declaratory Order. The Commission specifies that while the 1997 Declaratory was vacated, “we did not abandon the above-cited analysis of the March 17, 1997, Declaratory Order.” 29 Pa.B. at 2148.

⁴⁵ The PUC distinguished between a “negligent” act of omission and more serious misconduct characterized as “reckless” or “willful” and determined that it “is appropriate to permit limitations on liability for negligent acts in certain cases.” 29 Pa.B. at 2148.

limited, but the utility may not be totally exculpated from exposure to damage claims. 29 Pa.B. at 2148 (citing DeFrancesco). It is not apparent on the face of PAWC's proposed language in which situations one or more of the conditions it includes would not apply. OCA St. 5 at 22-23; OCA St. 5SR at 18-19. For all of these reasons, the OCA respectfully requests the Commission reject PAWC's proposed tariff revisions to limit its liability for negligent, reckless and intentional acts.

III. CONCLUSION

Based on the foregoing and for the reasons articulated in the OCA's Main and Reply Briefs, in addition to the Comments filed by OCA in opposition to the Non-Unanimous Settlement, the OCA respectfully requests that the Commission grant the OCA's Exceptions and adopt the OCA's positions as discussed above.

Respectfully submitted,

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