

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Application of Pennsylvania-American Water	:	
Company, Pursuant to the Pennsylvania Public	:	A-2019-3014248
Utility Code, 66 Pa.C.S. § 1102(a) and 1329,	:	
For Approval of 1) the Transfer, by Sale, of	:	
Substantially all of the Borough of Kane	:	
Authority's Assets, Properties and Rights Related	:	
To Its Wastewater Collection and Treatment	:	
System to Pennsylvania-American Water	:	
Company; 2) the Rights of Pennsylvania-	:	
American Water Company to Begin to Offer or	:	
Furnish Wastewater Service to the Public in the	:	
Borough of Kane, and in a portion of Wetmore	:	
Township, McKean County, Pennsylvania; and	:	
3) for Approval of the use for Ratemaking	:	
Purposes of the Lesser Fair Market Value or the	:	
Negotiated Purchase Price of the Borough of	:	
Kane Authority's Assets Related to its	:	
Wastewater Collection and Treatment System	:	

**RECOMMENDED DECISION**

Before  
Joel H. Cheskis  
Deputy Chief Administrative Law Judge

**INTRODUCTION**

This decision recommends that a joint petition for settlement be approved in its entirety without modification because it is in the public interest and supported by substantial evidence. This decision finds that the settlement complies with the relevant sections of the Public Utility Code regarding acquisitions of water and wastewater assets, properties and rights and is consistent with Commission regulations promoting settlements. The Commission must act on this application no later than its Public Meeting on August 6, 2020.

## HISTORY OF THE PROCEEDING

On December 2, 2019, the Pennsylvania American Water Company (PAWC) filed an application with the Pennsylvania Public Utility Commission (Commission) asking the Commission to approve the Asset Purchase Agreement (APA) entered into between PAWC and the Borough of Kane Authority (Authority), the Borough of Kane (Kane) and Wetmore Township by which PAWC will purchase the wastewater system presently owned by the Authority pursuant to Sections 1102 and 1329 of the Public Utility Code, 66 Pa. C.S. §§ 1102, 1329. The filing was amended on December 6, 2019. On December 10, 2019, PAWC filed information in response to a completeness review conducted by the Commission's Bureau of Technical Utility Services. On December 11, 2019, the Commission informed PAWC that the application had been conditionally accepted pending compliance with certain service and notice requirements.

On December 27, 2019, the Office of Small Business Advocate (OSBA) filed a notice of intervention.

On January 22, 2020, PAWC notified the Commission that it had completed providing individualized notice of the application to the customers of PAWC and Kane and complied with all requirements of the conditional acceptance.

On February 6, 2020, the Commission notified PAWC that it had accepted the application for filing and a notice of the application was published in the Pennsylvania Bulletin with a protest deadline of March 9, 2020. 50 Pa.B. 1229 (Feb. 22, 2020).

On February 6, 2020, the Office of Consumer Advocate (OCA) filed a protest and public statement. On February 10, 2020, the Commission's Bureau of Investigation (I&E) entered an appearance. On February 18, 2020, the Authority filed a petition to intervene.

On February 7, 2020, the Commission issued a Notice establishing an Initial Prehearing Conference for Wednesday, March 11, 2020 beginning at 1:00 p.m. in Hearing Room 5 of the Commonwealth Keystone Building in Harrisburg and assigning me as the Presiding

Officer. A prehearing conference order dated February 7, 2020 was also issued setting forth various rules that would govern the prehearing conference.

On March 2, 2020, the parties submitted a Stipulation Regarding Discovery Rule Modifications memorializing, and seeking approval of, modifications to the Commission's discovery rules that the parties agreed to.

The prehearing conference convened on March 11, 2020, as scheduled. Erika McLain, Esquire and Carrie B. Wright, Esquire appeared on behalf of I&E; Santo Spataro, Esquire, Harrison Breitman, Esquire and Erin Gannon, Esquire, appeared on behalf of OCA; David Zambito, Esquire and Elizabeth Triscari, Esquire, appeared on behalf of PAWC; Carl Shultz, Esquire appeared on behalf of the Authority; and Sharon Webb, Esquire appeared on behalf of OSBA. Each party had previously submitted a prehearing conference memorandum as requested in the prehearing conference order. A scheduling order was informally issued on March 19, 2020 memorializing the procedural matters agreed to at the prehearing conference.<sup>1</sup> A hearing notice was issued establishing evidentiary hearings for this matter for April 20, 2020 and April 21, 2020, as agreed to during the prehearing conference.

Pursuant to the scheduling order, on March 27, 2020, the OCA filed the direct testimony of Ralph C. Smith along with accompanying attachments and exhibits.

Also on March 27, 2020, PAWC filed two Joint Stipulations – one stipulation it entered into with I&E and the other stipulation it entered into with OSBA.

On April 6, 2020, an off-the-record conference call was held with the presiding officer and the parties where the parties indicated they had reached an agreement in principle to resolve this proceeding. As a result, on April 15, 2020, a hearing cancellation notice was issued formally cancelling the hearings scheduled for April 20, 2020 and April 21, 2020.

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<sup>1</sup> Due to the Covid-19 pandemic, official service of the Scheduling Order was delayed.

On April 17, 2020, a Joint Petition for Approval of Settlement of All Issues (settlement) was submitted by PAWC, the OCA and the Authority. On April 17, 2020, I&E submitted a letter indicating it did not oppose the settlement and on April 20, 2020 the OSBA submitted a letter indicating it did not oppose the settlement. The following attachments were included with the settlement: Appendix A (proposed ordering paragraphs), Appendix B (statement in support of PAWC), Appendix C (statement in support of the Authority) and Appendix D (statement in support of OCA).

Also on April 17, 2020, a Joint Stipulation for the Admission of Evidence (stipulation) agreed to by PAWC, the Authority, OCA, OSBA and I&E was filed. Through the stipulation, the parties agreed to the admission of the following documents into the record of this proceeding:

A. Pennsylvania-American Water Company Statements and Exhibits

1. PAWC Statement No. 1 – Direct Testimony of Daniel P. Bickerton, and PAWC Exhibit DPB-1 (this Exhibit is the Application, which was previously filed with the Secretary of the Pennsylvania Public Utility Commission);
2. PAWC Statement No. 2 – Direct Testimony of Michael J. Guntrum, P.E. and PAWC Exhibits MJG-1 through MJG-2;
3. PAWC Statement No. 3 – Direct Testimony of Rod P. Nevirauskas and PAWC Exhibit RPN-1; and
4. PAWC Statement No. 4 – Direct Testimony of Jerome C. Weinert, PE, ASA, CDP, and Appendix A.

B. Authority Statements and Exhibits

1. Authority Statement No. 1 – Direct Testimony of Donald E. Payne; and
2. Authority Statement No. 2 – Direct Testimony of Harold Walker III.

C. Office of Consumer Advocate Statements and Exhibits

1. OCA Statement No. 1 – Direct Testimony of Ralph C. Smith and Exhibits RCS-1 through RCS-7.

In addition, in light of the difficulties created by the Covid-19 pandemic in holding a public input hearing, the parties agreed to the admission of the customer comments filed in the public folder in the Secretary's Bureau for this case into the evidentiary record of this proceeding as Joint Exhibit 1. This exhibit consists of all the public comments submitted in response to the published notices of the application and individualized customer notices to the customers of PAWC and Kane. Both of these stipulations will be approved as part of this decision and the parties will be directed to file two copies of the stipulated documents to the Commission's Secretary's Bureau for inclusion in the official file of this case.

The record in this case closed on April 17, 2020 when the settlement was submitted. For the reasons discussed below, the settlement will be recommended for approval in its entirety without modification because it is in the public interest and supported by substantial evidence.

## DISCUSSION

### Settlement Terms

In the settlement, the parties agreed to resolve all outstanding issues. The relevant terms of the settlement are as follows, with the original paragraph numbering provided in the settlement:

#### **A. Approval of Application**

21. The Application shall, subject to the other terms and conditions contained in the Settlement, be approved as being in the public interest and the Commission shall issue such Certificates of Public Convenience as may be necessary to evidence its approval pursuant to 66 Pa. C.S. § 1102(a) of (i) the transfer, by sale, of the Authority's assets, properties and rights related to its wastewater collection and treatment system to PAWC as provided in the Application, and (ii) PAWC's right to begin to offer, render, furnish and supply wastewater service in the areas served by the Authority as indicated in the Application.

## **B. Tariff**

22. The *pro forma* tariff supplement attached to the Application as Appendix A-12, including all rates, rules and regulations regarding conditions of PAWC's wastewater service, shall be permitted to become effective immediately upon closing of the Transaction.

## **C. Fair Market Value for Ratemaking Rate Base Purposes**

23. Pursuant to 66 Pa. C.S. § 1329, PAWC shall be permitted to use \$17,560,000 for ratemaking rate base purposes for the acquired assets.

24. The Parties agree that the adjustments to the appraisals reflect a compromise of the various positions of the Parties. All Parties reserve the right to present adjustments and oppose adjustments to appraisals and methodologies, inputs and assumptions in appraisals in future cases and proceedings, whether or not raised in this proceeding. The Parties further agree, however, for the purposes of this proceeding, that the following adjustments are explicitly accepted by the Parties:

(a) Market Approach: If "comparable acquisitions" are used in determining market value, the proxy group will include all Section 1329 acquisitions for which the Commission has entered a final order.

(b) Cost Approach: If the reproduction cost methodology is used, valuation of the collection mains will not be treated differently or as a special circumstance unless reasonably justified.

## **D. Rates**

25. Except as explicitly stated herein, nothing contained in the Settlement or in the Commission's approval of the Application shall preclude any Petitioner from asserting any position or raising any issue in a future PAWC base rate proceeding.

26. In the first base rate case that includes the Authority's wastewater system assets, PAWC will submit a cost of service study that removes all costs and revenues associated with the operation of the Authority's system.

27. In the first base rate case that includes the Authority's wastewater system assets, PAWC will also provide a separate cost of service study for the Authority's system.

28. In the first base rate case that includes the Authority's wastewater system assets, PAWC will propose to move the Authority's system to its cost of service or 1.46x the current Authority rate, whichever is lower, based on a separate cost of service study for the Authority's system; provided, however, that PAWC will not be obligated to propose Authority wastewater rates in excess of PAWC's proposed Rate Zone 1 system-average rates. The Parties acknowledge, however, that PAWC may agree to rates other than those proposed for Authority customers in the context of a settlement of the base rate case. OCA, I&E and OSBA reserve their rights to fully address this proposal, and to make other rate proposals in the base rate case.

29. The current average Authority rate is \$51.87 per month based on 3,630 gallons of monthly usage.

#### **E. Distribution System Improvement Charge**

30. If PAWC proposes to modify its Long-Term Infrastructure Improvement Plan ("LTIP") to include the Authority's wastewater system, PAWC will not reprioritize other existing capital improvements that the Company already committed to undertake in other service areas. Upon approval by the Commission of such modification to its LTIP, PAWC shall be permitted to collect a Distribution System Improvement Charge ("DSIC") related to the Authority's wastewater system prior to the first base rate case in which the Authority's assets are incorporated into rate base.

#### **F. Claims for Allowance for Funds Used During Construction and Deferred Depreciation**

31. The Parties acknowledge that the Application includes a request that (i) PAWC be permitted to accrue Allowance for Funds Used During Construction ("AFUDC") for post-acquisition improvements not recovered through the DSIC for book and ratemaking purposes, and (ii) PAWC be permitted to defer depreciation related to post-acquisition improvements not recovered through the DSIC for book and ratemaking purposes. Any claims for AFUDC and deferred depreciation related to post-acquisition improvements not recovered through the DSIC for book and ratemaking purposes will be addressed in PAWC's first base rate case which includes the Authority's wastewater system assets. The Parties reserve their rights to litigate their positions fully in future rate cases when these issues are ripe for review. The Parties' assent to this term should not be construed to operate as their preapproval of PAWC's requests.

## **G. Transaction and Closing Costs**

32. The Parties acknowledge that the Application includes a request that PAWC be permitted to claim transaction and closing costs associated with the Transaction. The Parties agree that they will not contest this request in this proceeding, but they reserve their rights to litigate their positions fully in future rate cases when this issue is ripe for review. The Parties' assent to this term should not be construed to operate as their preapproval of PAWC's request.

33. The inclusion of outside legal fees, if any, in PAWC's transaction and closing costs under the Asset Purchase Agreement between PAWC and the Authority shall be separately identified in PAWC's next base rate case, and OCA, I&E and OSBA reserve the right to challenge the reasonableness, prudence, and basis for such fees.

## **H. Low Income Program Outreach**

34. In the first full billing cycle commencing within 30 days after closing of the Transaction, PAWC shall include a bill insert or onsert to former Authority customers regarding PAWC's low income programs and shall also include such information in a welcome letter to the Authority's customers. The bill insert or onsert and welcome letter shall include, at a minimum, a description of the available low income programs, eligibility requirements for participation in the programs, and PAWC's contact information.

## **I. Report on Status of Missing Easements**

35. One year after closing on the Transaction, PAWC shall file a report at this docket number regarding the status of any missing easements for the Authority's system. The report will include the dollar value of each easement obtained during the year after closing.

## **J. Approval of Section 507 Agreements**

36. Pursuant to 66 Pa. C.S. § 507, the Commission shall issue Certificates of Filing or approvals for the following agreements between PAWC and a municipal corporation:<sup>2</sup>

(a) the Asset Purchase Agreement By and Among the Borough of Kane Authority, as Seller, together with the Borough of Kane and Wetmore Township, and Pennsylvania-American Water Company, as Buyer, dated as of November 4, 2019, and

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<sup>2</sup> The OCA does not join in this paragraph but does not oppose PAWC's request.

(b) the Agreement by and between the Borough of Kane Authority, the Township of Wetmore and the Borough of Kane, dated July 8, 1992.

**K. Other Necessary Approvals**

37. The Commission shall issue any other approvals or certificates appropriate, customary, or necessary under the Pennsylvania Public Utility Code to carry out the transaction contemplated in the Application in a lawful manner.

Settlement at 5-10. The settlement is also conditioned on the standard settlement conditions found in most settlements submitted to the Commission. For example, if the Commission modifies the settlement, any petitioner may elect to withdraw from the settlement and proceed with litigation and, in such event, the settlement will be void and of no effect. Id. at 10. Furthermore, the settlement is made without any admission against or prejudice to any position which any petitioner may adopt in the event of any subsequent litigation of these proceedings or any other proceeding. Id. The parties also agreed to waive their rights to file Exceptions if the settlement is recommended for approval without modification. Id. at 11.

Legal Standard

Section 1102(a) of the Public Utility Code, 66 Pa. C.S. § 1102(a), permits a public utility to undertake certain actions only upon Commission approval evidenced by a certificate of public convenience. Among the activities that require Commission approval is the following:

(3) For any public utility or an affiliated interest of a public utility . . . to acquire from, or to transfer to, any person or corporation . . . by any method or device whatsoever, including the sale or transfer of stock and including a consolidation, merger, sale or lease, the title to, or the possession or use of, any tangible or intangible property used or useful in the public service....

66 Pa. C.S. § 1102(a)(3). The acquisition proposed by the joint application falls under Section 1102(a)(3).

When a certificate of public convenience is required under Section 1102, pursuant to Section 1103(a) of the Public Utility Code, 66 Pa. C.S. § 1103(a), the Commission may issue the certificate only upon a finding or determination that the granting of such certificate is “necessary or proper for the service, accommodation, convenience, or safety of the public.”

According to the Pennsylvania Supreme Court, satisfying this standard requires the Commission to find that a proposed transaction would “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, 141, 295 A.2d 825, 828 (1972); *see also*, Popowsky v. Pa. Pub. Util. Comm’n, 594 Pa. 583, 611, 937 A.2d 1040, 1057 (2007) (when addressing the issue of affirmative public benefits “the appropriate legal framework requires a reviewing court to determine whether substantial evidence supports the Commission's finding that a merger will affirmatively promote the service, accommodation, convenience, or safety of the public in some substantial way”). In addition, Section 1103(a) allows the Commission to impose upon its issuance of a certificate of public convenience “such conditions as it may deem to be just and reasonable.” 66 Pa. C.S. § 1103(a).

Additionally, pursuant to Section 1103 of the Code, PAWC must show that it is technically, legally, and financially fit to own and operate the assets it will acquire from the Authority. Seaboard Tank Lines v. Pa. Pub. Util. Comm’n, 502 A. 2d 762, 764 (Pa.Cmwlth. 1985); Warminster Twp. Mun. Auth. v. Pa. Pub. Util. Comm’n, 138 A.2d 240, 243 (Pa.Super. 1958). As a certificated public utility, there is a rebuttable presumption that PAWC possesses the requisite fitness. South Hills Movers, Inc. v. Pa. Pub. Util. Comm’n, 601 A.2d 1308, 1310 (Pa.Cmwlth. 1992); *see also*, 66 Pa. C.S. § 1329.

With regard to the recently enacted Section 1329 of the Public Utility Code, this section sets forth a procedure which permits a public utility to utilize fair market valuation for ratemaking purposes instead of the original cost of construction of the acquired facilities minus the accumulated depreciation. 66 Pa. C.S. § 1329. Section 1329 of the Public Utility Code addresses the valuation of the assets of municipally or authority-owned water and wastewater systems that are acquired by investor-owned water and wastewater utilities or entities. The acquiring utility is authorized to collect a distribution system improvement charge (DSIC).

Section 1329 also enables a public utility or other acquiring entity's post-acquisition improvement costs not recovered through a DSIC to be deferred for book and ratemaking purposes. In sum, Section 1329 helps mitigate the risk that a utility will not be able to fully recover its investment when water or wastewater assets are acquired from a municipality or authority.

If the parties agree to the Section 1329 process, an "acquiring public utility" and the seller of the municipal system each select a utility valuation expert (UVE) from a list of such experts established and maintained by the Commission. The selected UVEs perform independent appraisals of the system to establish its fair market value. Also, the acquiring public utility and the seller select one licensed engineer to conduct an assessment of the tangible assets of the seller which is incorporated into the valuations of the UVEs.

After receiving the valuations, the acquiring public utility must apply for a certificate of public convenience under Section 1102 of the Code and include the following as an attachment to the Section 1102 application: copies of the UVE appraisals; the agreed purchase price; the ratemaking rate base; the transaction and closing costs incurred by the acquiring public utility that will be included in its rate base; and a tariff containing a rate equal to the existing rates of the selling utility at the time of the acquisition and a rate stabilization plan, if applicable. 66 Pa.C.S. § 1329(d)(1). For applications involving an acquiring public entity under Section 1329(d)(1), the Commission has a six-month deadline for issuing a determination.

Of note, the Commonwealth Court recently addressed Section 1329 in McCloskey v. Pa. Pub. Util. Comm'n, 195 A.3d 1055 (Pa. Cmwlth. 2018), *alloc. denied*, 207 A.3d 290 (Pa. 2019) wherein the Court vacated and remanded a decision of the Commission granting an application for approval of a jurisdictional water company to acquire the wastewater system assets of New Garden Township and the New Garden Sewer Authority. The Court vacated the Commission's decision and directed the Commission to provide notice to all ratepayers pursuant to Section 53.45 of the Commission's regulations pertaining to notice of new tariffs and tariff changes. 52 Pa. Code § 53.45. The Court directed the Commission to receive additional evidence from ratepayers regarding the acquisition and then enter a new order. The Commission has not yet acted in response to the Court's directives.

In its application filed in this case, PAWC also seeks approval of an asset purchase agreement (APA) and other connected agreements pursuant to Section 507 of the Public Utility Code, 66 Pa. C.S. § 507. Section 507 requires that contracts between a public utility and a municipal corporation (except for contracts to furnish service at regular tariff rates) be filed with the Commission at least 30 days before the effective date of the contract. The Commission approves the contract by issuing a certificate of filing, unless it decides to institute proceedings to determine whether there are any issues with the reasonableness, legality, or any other matter affecting the validity of the contract. Should the Commission initiate proceedings, the contract or agreement is not effective until the Commission grants its approval. Section 507 is a filing requirement and does not require service of the filing on any potentially interested parties.

Finally, with regard to the legal standard applied in this case, the parties submitted a settlement of all issues. Commission policy promotes settlements. 52 Pa. Code § 5.231. Settlements lessen the time and expense the parties must expend litigating a case and at the same time conserve administrative resources. The Commission has indicated that settlement results are often preferable to those achieved at the conclusion of a fully litigated proceeding. 52 Pa. Code § 69.401. The focus of inquiry for determining whether a proposed settlement should be recommended for approval is not a “burden of proof” standard, as is utilized for contested matters. Pa. Pub. Util. Comm’n v. City of Lancaster – Bureau of Water, Docket No. R-2010-2179103 (Opinion and Order entered July 14, 2011) (Lancaster). Instead, the benchmark for determining the acceptability of a settlement or partial settlement is whether the proposed terms and conditions are in the public interest. Id., *citing*, Warner v. GTE North, Inc., Docket No. C-00902815 (Opinion and Order entered April 1, 1996) (Warner); Pa. Pub. Util. Comm’n v. CS Water and Sewer Associates, 74 Pa. PUC 767 (1991). In addition, the Commission has held that parties to settled cases are afforded flexibility in reaching amicable resolutions, so long as the settlement is in the public interest. Pa. Pub. Util. Comm’n v. MXenergy Electric Inc., Docket No. M-2012-2201861 (Opinion and Order entered Dec. 5, 2013).

It is against this legal backdrop that the settlement will be viewed.

## Public Interest Analysis

As noted above, the benchmark for determining whether a settlement should be approved is whether the proposed terms and conditions are in the public interest. *See, Lancaster, Warner, supra.* In the settlement, the parties did not state why the settlement is in the public interest. As discussed further below, however, PAWC, the Authority and OCA submitted statements in support of the settlement, articulating their individual arguments and reasons why approving the settlement without modification is appropriate and in the public interest.

### **PAWC**

In its statement in support of the settlement, PAWC notes that, as an initial matter, the fact that the settlement resolves all of the issues in this proceeding is, in and of itself, strong evidence that the settlement is reasonable and in the public interest, particularly given the diverse interests of the parties and the active roles that each has taken in this proceeding. PAWC added that the parties and their experts have considerable experience in these acquisition proceedings and that the settlement reflects a carefully balanced compromise of the interests of the parties and satisfies the requirements of the Public Utility Code. PAWC then presented specific reasons why the settlement is in the public interest.

First, PAWC noted that, pursuant to Section 1103 of the Public Utility Code, it is technically, financially and legally fit to own and operate the system it is acquiring. PAWC also noted that the transaction will affirmatively promote the service, accommodation, convenience or safety of the public in some substantial way and that the transaction with the conditions described in the settlement benefits all of the stakeholder groups impacted by the transaction, including the public at-large, the borough and township, the existing customers of the authority and PAWC's existing customers.

In particular, PAWC stated that the authority will receive the purchase price of \$17,560,000 which will be used to stabilize the real estate tax base, defease all sewer debt, fully fund pension plans and fund storm sewer improvements, among other things. The township will be able to focus on the core functions of local government and PAWC will offer employment to

each of the current wastewater treatment plant operator employees. PAWC also noted several specific ways that the settlement will benefit the Authority's existing customers, including \$11.2 million investment in capital improvements in the system, gaining protections of the Public Utility Code, the Commission and the public advocates, and enhanced customer service, including low income customer assistance programs. PAWC also noted that its own wastewater and water customers will benefit, in part by adding more than 2,000 customers to PAWC's customer base to spread the cost of investing in and maintaining the system over a larger base, among other things.

PAWC also noted the benefits of its agreement in the settlement to submit two cost of service studies in the first base rate case that includes the authority's assets that will be used to establish a revenue requirement for the system.

Second, with regard to approvals required under Section 1329, PAWC noted that the settlement is in the public interest because the parties compromised on certain adjustments to the evaluators' appraisal methodologies, noting that the agreed upon value of \$17,560,000 is supported by substantial evidence of record. PAWC added that the settlement should be approved because it furthers the legislative intent behind the enactment of Section 1329. With regard to rates, PAWC noted that it committed to adopting the Authority's current customer charge and consumption charge in effect on the date of closing. With regard to the DSIC, PAWC noted that the settlement is in the public interest because it will not begin charging a DSIC until the eligible system plant is approved by the Commission in a modified wastewater long-term infrastructure improvement plan. Next, PAWC noted that the settlement is in the public interest because it may include a claim for allowance for funds used during construction (AFUDC) relating to the acquisition in its first base rate case that includes the Authority's wastewater system assets. With regard to deferred depreciation and transaction and closing costs, PAWC noted that the settlement makes clear that the parties do not oppose its request to defer depreciation on post-acquisition improvements that are not included in DSIC and they reserve their right to litigate their positions fully in future rate cases on both of these issues. PAWC noted that the settlement is in the public interest because of the provision that requires the Authority to retain \$1,000,000 of the purchase price in an escrow account for one-year post-closing to secure missing easements.

Finally, PAWC noted in its statement in support that the settlement is in the public interest because the parties agree that the Commission should approve an amendment to the application wherein PAWC requests the Commission approve the agreement between the Authority, the Township of Wetmore and the borough dated July 8, 1992 which PAWC will assume at closing that provides for the financing and construction of a wastewater collection system in the township.

### **Borough of Kane Authority**

In its statement in support of the settlement, the Authority stated that the settlement is in the public interest because it is the result of an examination of the proposed transaction and compromise by the active parties. The Authority noted that the parties engaged in informal and formal discovery and that the settlement balances the interests of all parties involved. The Authority then noted PAWC's agreement to submit a cost of service study that removes all costs and revenues associated with the operation of the system and a separate study for the Kane system. The Authority also noted the various actions it took to mitigate concerns raised by the OCA regarding rate shock, the cost of service studies, AFUDC, the long-term infrastructure improvement plan (LTIIP) and reporting on missing easements. The Authority noted the interest of the local governments of the Authority in selling the system and PAWC's interest in purchasing the system. Doing so, the Authority contends, is in the best interest of their constituents. The Authority then identified specific reasons why it believes the settlement is in the public interest, including further regionalization of the wastewater operations in Pennsylvania, greater access to technical resources for operation of the system, greater access to capital for necessary system investments, access to PAWC's customer assistance programs and maintenance of the existing local workforce and operational expertise, among other things. The Authority also noted that the settlement is in the public interest because it reduces the costs of further litigation while conserving limited administrative resources.

### **OCA**

The OCA noted in its statement in support that the settlement is in the public interest because it addresses the matters raised in the pre-served testimony of its witness. In

particular, the OCA noted that its recommended adjustments to the appraisals resulted in an average appraisal amount that is higher than the \$17,560,000 purchase price and that the OCA agreed that the ratemaking rate base should be \$17,560,000. The OCA added that the settlement adopts the OCA's recommendation that a cost of service study that removes all costs and revenues associated with the operations of Kane's water system, as well as a separate cost of service study for the Kane system, be provided in PAWC's first base rate case which includes the Authority's assets in rate base. The OCA noted that these settlement terms will provide a means to set rates for the Authority's customers that differ, if appropriate, from rates established for other wastewater customers which will help mitigate the potential level of subsidy by PAWC's other customers and applies the principle of gradualism.

Additionally, with regard to the DSIC, the OCA noted that the parties agreed that PAWC may apply the DSIC to customers in the Authority's service area prior to the first base rate case if certain conditions are met. The OCA noted PAWC's commitment that it will not reprioritize other existing capital improvements that it already committed to undertake in other service areas which addresses a concern raised by the OCA. Next, the OCA noted that the settlement is in the public interest because the parties agreed to accept two adjustments that the OCA proposed that reflect accepted financial and ratemaking principles and help improve the reliability of data used in appraisals and the integrity of the result. The OCA also noted the settlement provisions regarding the low-income customer assistance plans as a reason the settlement is in the public interest. The OCA also recognized the provisions of the settlement regarding AFUDC, deferral of depreciation, transaction costs and legal fees as being in the public interest in support of adopting the settlement. The OCA noted that the parties reserve their rights to litigate future claims for AFUDC and deferral of depreciation on post-acquisition projects pursuant to Section 1329(f) and transaction costs in future rate cases. Lastly, the OCA noted the provision of the settlement that provides \$1,000,000 to be retained for one year following the closing date for purposes of missing easements, noting that this provision and related reporting will ensure that the proceeds from the transaction are being allocated in furtherance of the public interest.

## **OSBA and I&E**

As noted in the settlement, OSBA and I&E do not join this Settlement, but also do not oppose it.

### Disposition

The joint petition for settlement will be recommended for approval in its entirety without modification because it is in the public interest and supported by substantial evidence. The settlement complies with the relevant sections of the Public Utility Code regarding acquisitions of water and wastewater assets, properties and rights and is consistent with Commission regulations promoting settlements. As the Commission has addressed more applications made pursuant to Section 1329 of the Public Utility Code, the settlement of the cases has fallen into a familiar pattern. The settlement in this proceeding resembles other settlements which have been submitted in other proceedings involving Section 1329 which have also been found to be in the public interest and, therefore, approved by the Commission.

As a preliminary matter, the settlement is in the public interest because of the negotiated price of \$17,560,000 that was fully analyzed and vetted by the parties and determined to be reasonable, the core issue in these proceedings.

Furthermore, the settlement is in the public interest because PAWC has agreed to provide two cost of service studies in its first base rate case in which it includes the Authority's assets in rate base. One cost of service study removes all costs and revenues associated with the operations of Kane's wastewater system and a separate cost of service study for the Kane system. As the OCA noted, these studies will provide information to establish rates that reflect costs for the Kane system and are, therefore, in the public interest. These studies will help ensure that all customers are being charged just and reasonable rates. The agreement in the settlement to include two cost of service studies formed the basis of the joint stipulations entered into between both PAWC and OSBA as well as PAWC and I&E. In those stipulations, those parties agreed to the two cost of service studies included in the settlement in exchange for neither the OSBA nor

I&E filing direct testimony in this proceeding. The settlement is in the public interest because it incorporates those joint stipulations.

In addition, as with past settlements of cases involving Section 1329, this settlement contains agreements regarding PAWC's DSIC. This provision of the settlement is in the public interest because it ensures that PAWC will not reprioritize other existing capital improvements that it already committed to undertake in other service areas. As with other settlements, this settlement also contains provisions regarding AFUDC, deferral of depreciation, transaction costs and legal fees where the settlement provides that the parties reserve their rights to litigate future claims in PAWC's next base rate case. These provisions are also similar to the treatment of these issues in other settlements of cases involving Section 1329. Additionally, the settlement is similar to settlements of other Section 1329 cases in that it also includes the approval of the agreement between PAWC, the Authority, the borough and Township of Wetmore for the financing and construction of a wastewater collection system in the township which connects to the Authority's system and transports sewage to the Authority's system for treatment and disposal. PAWC sought Commission approval of this agreement pursuant to Section 507 of the Public Utility Code and the settlement allows for approval of the amended application which sought approval of that agreement. Doing so is in the public interest.

Two additional issues that are present in this settlement that warrant approving the settlement as being in the public interest relate to provisions regarding PAWC's low-income customer assistance programs and the allocation of \$1,000,000 for the purpose of missing easements to the extent there are any. With regard to the low-income customer assistance programs, the settlement is in the public interest because Kane's customers will be provided with timely information that may be helpful to them achieving utility service. With regard to the issue of missing easements, this provision is also in the public interest because it includes a reporting requirement that will help ensure that the proceeds from the transaction are being allocated in furtherance of the public interest.

The settlement is also in the public interest because there are public interest benefits in Kane borough and township removing itself from the business of providing utility service and, instead, monetizing assets that they believe it could use for better purposes. To the

extent that Kane borough and township believe that entering into this transaction is in the best interest of the township residents, then so too is approving this settlement in the public interest.

In addition to all of these individual factors that support approving the settlement as being in the public interest, the settlement is also in the public interest because of general benefits of agreeing to a settlement. The settlement will save the parties from expending substantial time and expense involved with further litigation. Although the parties exchanged discovery and some pre-served testimony, additional costs could have included additional rounds of pre-served testimony, lengthy hearings, briefs, exceptions and possible appeals. Avoiding such expenditures minimizes the costs that might ultimately be passed on to the ratepayers, and also conserves the resources of all other parties involved in these proceedings and Commission resources as well.

The settlement should be approved as being in the public interest because the parties have engaged in extensive discovery and other litigation-related efforts in order to properly investigate and resolve the issues presented. These efforts demonstrate that the initial filings and the responses to the filings have been thoroughly vetted and considered by all concerned parties. The settlement is also the result of extensive and fruitful negotiations between all the parties and represents what each party believes to be a fair and reasonable compromise. This is of particular note as the parties in this matter have diverse and competing interests but were able to reach a settlement on all issues. These efforts also demonstrate that the parties are satisfied that there are no unresolved evidentiary issues at this point in the proceeding.

The settlement is supported by substantial evidence. On appeal, decisions of the Commission will be examined to determine if they are supported by substantial evidence. 2 Pa.C.S. § 704. The parties submitted a Joint Stipulation for the Admission of Evidence when the settlement was submitted on April 17, 2020. In that stipulation, the parties agreed to the admission of 7 pieces of pre-served written testimony filed by PAWC, the Authority and the OCA along with their accompanying exhibits, all of which were accompanied by the necessary witness verifications. The inclusion of that pre-served testimony supports adopting the settlement.

In addition, the parties also agreed to the authenticity of, and admission into the evidentiary record in this matter of, Joint Exhibit 1, which consists of all the public comments submitted in response to the published notices of the Application and individualized customer notices to customers of PAWC (both water and wastewater) and Kane. The parties explained that the original intent to hold a public input hearing on this matter became infeasible due to the outbreak of the Covid-19 pandemic. As a result, and in consideration of these extraordinary circumstances, the parties stipulated that, in lieu of a telephonic public input hearing, the customer comments filed in the public folder for this case would be admitted into the evidentiary record. Joint Exhibit 1 will be admitted into the record of this proceeding and further supports the adoption of the settlement as being in the public interest and supported by substantial evidence. The parties are commended for working toward this resolution and are directed to submit two copies of Joint Exhibit 1 for inclusion in the Secretary's Bureau's official files.

Finally, as with other settlements of cases involving Section 1329 of the Public Utility Code, the settlement is in the public interest and should be approved without modification because it satisfies the various goals of the General Assembly in enacting Section 1329. As the Commission noted in the Tentative Implementation Order entered July 21, 2016 at Docket Number M-2016-2543193, there are a number of water and wastewater systems owned by municipal corporations or authorities throughout the Commonwealth where sale to an investor-owned public utility can facilitate necessary infrastructure improvements and ensure the continued provision of safe, reliable service to customers at reasonable rates. As the Commission further noted in the subsequent Tentative Supplemental Implementation Order entered September 20, 2018 at the same docket:

The development of water and wastewater service throughout the Commonwealth over the years has led to the creation of large numbers of geographically dispersed water and wastewater systems owned by municipal corporations or authorities. For these systems, sale to a larger, well-capitalized and well-run regulated public utility or entity can be prudent because it can facilitate necessary infrastructure improvements and access to capital markets, and, ultimately, it can ensure the long-term provision of safe reliable service to customers at reasonable rates.

Id. at 4.

Prior to the enactment of Section 1329, the valuation of utility property discouraged such acquisitions because the value of the property was defined as the original cost of construction less accumulated depreciation rather than the acquisition cost. As a result, systems that are greatly depreciated or constructed using grants or contributions in aid of construction could have valuations so low that sales of the systems would be less advantageous or could cause financial hardships to the municipal corporations and authorities. Section 1329 mitigates the risk that a utility will not be able to fully recover its investment when water and wastewater assets are acquired from a municipality or authority. The settlement filed in this docket is consistent with that goal by helping to ensure the provision of safe and reliable utility service and just and reasonable rates.

As a result, the settlement will be recommended for approval without modification because it is in the public interest, consistent with the Public Utility Code and supported by substantial evidence. Again, the parties are commended for obtaining a complete resolution of these issues in this case. Settlements can be difficult under normal circumstances. Achieving the settlement during the Covid-19 pandemic was likely even more difficult.

#### CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter of, and the parties to, this application proceeding. 66 Pa. C.S. §§ 1102, 1103, 1329.
2. A certificate of public convenience is required for any public utility to begin to offer, render, furnish or supply within this Commonwealth service of a different nature or to a different territory than that authorized. 66 Pa. C.S. § 1102(a)(1).
3. A certificate of public convenience is required for “any public utility . . . to acquire from . . . any person or corporation, including a municipal corporation, by any method or device whatsoever . . . the title to, or possession or use of, any tangible or intangible property used or useful in the public service.” 66 Pa. C.S. § 1102(a)(3).

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

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

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

7. An applicant for a certificate of public convenience must demonstrate that the transaction will affirmatively promote the service, accommodation, convenience or safety of the public in some substantial way. City of York v. Pa. Pub. Util. Comm'n, 449 Pa. 136, 151, 295 A.2d 825, 828 (1972).

8. In granting a certificate of public convenience, the Commission may impose such conditions as it may deem to be just and reasonable. 66 Pa. C.S. § 1103(a).

9. Section 1329 of the Public Utility Code sets forth a procedure which permits a public utility to utilize fair market valuation for ratemaking purposes instead of the original cost of construction of the acquired facilities minus the accumulated depreciation. 66 Pa.C.S. § 1329.

10. A contract between a municipality and a public utility (other than a contract to furnish service at regular tariff rates) must be filed with the Commission at least 30 days before the effective date of the contract. The Commission may approve it by issuing a certificate of filing or institute proceedings to determine whether there are any issues with the reasonableness, legality, or any other matter affecting the validity of the contract. 66 Pa. C.S. § 507.

11. Commission policy promotes settlement. *See* 52 Pa. Code § 5.231.

12. A settlement lessens the time and expense that the parties must expend litigating a case and, at the same time, conserves precious administrative resources. The Commission has indicated that settlement results are often preferable to those achieved at the conclusion of a fully litigated proceeding. *See* 52 Pa. Code § 69.401.

13. In order to accept a settlement, the Commission must determine that the proposed terms and conditions are in the public interest. Pa. Pub. Util. Comm'n v. York Water Co., Docket No. R-00049165 (Order entered Oct. 4, 2004); Pa. Pub. Util. Comm'n v. C.S. Water and Sewer Assocs., 74 Pa. PUC 767 (1991).

14. The settlement and its proposed terms and conditions are in the public interest and, therefore, should be approved without modification.

### ORDER

THEREFORE,

IT IS RECOMMENDED:

1. That the Joint Petition for Approval of Settlement of All Issues, submitted by Pennsylvania-American Water Company, the Office of Consumer Advocate, and the Borough of Kane Authority on April 17, 2020, including all terms and conditions thereof, is approved without modification.

2. That Joint Stipulation for the Admission of Evidence agreed to by all the parties and submitted on April 17, 2020 is hereby approved and the parties are directed to provide two copies of the pre-served testimony identified in the stipulation to the Commission's Secretary's Bureau for inclusion in the official file of this proceeding.

3. That Joint Exhibit 1, which consists of all the public comments submitted in response to the published notices of the Application and individualized customer notices to customers of PAWC (both water and wastewater) and Kane and dated April 17, 2020, is hereby approved and the parties are directed to provide two copies of the exhibit to the Commission's Secretary's Bureau for inclusion in the official file of this proceeding.

4. That the Application filed by PAWC on December 2, 2019, and amended on December 6, 2019, is approved.

5. That the Commission's Secretary's Bureau shall issue Certificates of Public Convenience under 66 Pa. C.S. §§ 1102(a) and 1103(a) evidencing Commission approval of: (i) the transfer, by sale, of the Authority's assets, properties and rights related to its wastewater collection and treatment system to PAWC as provided in the Application, and (ii) PAWC's right to begin to offer, render, furnish and supply wastewater collection and treatment service in the areas served by the Authority as indicated in the Application.

6. That PAWC, upon closing of the Transaction, shall issue a compliance tariff supplement, consistent with the *pro forma* tariff supplement attached to the Application as **Appendix A-12**, to be effective upon closing of the Transaction.

7. That, pursuant to 66 Pa. C.S. § 1329(c), the Commission approves a rate base addition of \$17,560,000 associated with the acquisition of the System.

8. That, although the parties may present adjustments and oppose adjustments to appraisals in future cases, for purposes of this proceeding, the Commission accepts the following adjustments:

(1) Market Approach: If "comparable acquisitions" are used in determining market value, the proxy group will include all Section 1329 acquisitions for which the Commission has entered a final order.

(2) Cost Approach: If the reproduction cost methodology is used, valuation of the collection mains will not be treated differently or as a special circumstance unless reasonably justified.

9. That, at the time of filing the first base rate case that includes the Authority's wastewater system assets, PAWC shall submit a cost of service study that removes all costs and revenues associated with the operation of the Authority's system.

10. That, at the time of filing its next base rate case, PAWC shall also provide a separate cost of service study for the Authority's system.

11. That PAWC shall, in the first base rate case that includes the Authority's wastewater system assets, propose to move the Authority's system to its cost of service or 1.46x the current Authority rate, whichever is lower, based on a separate cost of service study for the Authority's system; provided, however, that PAWC will not be obligated to propose Kane wastewater rates in excess of PAWC's proposed Rate Zone 1 system-average rates. The Commission recognizes that the Office of Consumer Advocate, Bureau of Investigation & Enforcement and Office of Small Business Advocate reserve their rights to fully address this proposal and to make other rate proposals in the base rate case.

12. That PAWC may propose to modify its Long Term Infrastructure Improvement Plan to include the Authority's wastewater system, subject to the condition that PAWC will not reprioritize other existing capital improvements that the Company already committed to undertake in other service areas. Upon approval by the Commission of such modification to its Long Term Infrastructure Improvement Plan, PAWC shall be permitted to collect a Distribution System Improvement Charge related to the Authority's wastewater system prior to the first base rate case in which the Authority's assets are incorporated into rate base.

13. That PAWC may accrue Allowance for Funds Used During Construction for post-acquisition improvements not recovered through the Distribution System Improvement Charge for book and ratemaking purposes. The Commission recognizes that the Parties reserve their rights to litigate their positions fully in future rate cases when this issue is ripe for review and does not construe the Parties' assent to this term to operate as their preapproval of PAWC's request.

14. That PAWC may defer depreciation related to post-acquisition improvements not recovered through the Distribution System Improvement Charge for book and ratemaking purposes. The Commission recognizes that the Parties reserve their rights to litigate their positions fully in future rate cases when this issue is ripe for review and does not construe the Parties' assent to this term to operate as their preapproval of PAWC's request.

15. That PAWC may include, in its next base rate case, a claim for transaction and closing costs related to the acquisition of the Authority's system. Outside legal fees, if any, shall be separately identified in PAWC's next base rate case. The Commission recognizes that the Parties reserve their rights to litigate their positions fully in future rate cases when this issue is ripe for review and does not construe the Parties' assent to this term to operate as their preapproval of PAWC's request.

16. That, in the first full billing cycle commencing within 30 days after closing of the Transaction, PAWC shall include a bill insert or onsert to former Authority customers regarding PAWC's low income programs and shall also include such information in a welcome letter to Authority customers. The bill insert or onsert and welcome letter shall include, at a minimum, a description of the available low income programs, the eligibility requirements for participation in the programs, and PAWC's contact information.

17. That, one year after closing on the transaction, PAWC shall file a report at this docket number regarding the status of any missing easements for the Authority's system. The report will include the dollar value of each easement obtained during the year after closing.

18. That the Secretary's Bureau issue Certificates of Filing or approvals for the following agreements between PAWC and a municipal corporation:

(1) the Asset Purchase Agreement By and Among the Borough of Kane Authority, as Seller, together with the Borough of Kane and Wetmore Township, and Pennsylvania-American Water Company, as Buyer, dated as of November 4, 2019, and

(2) the Agreement by and between the Borough of Kane Authority, the Township of Wetmore and the Borough of Kane, dated July 8, 1992.

