

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Application of Pennsylvania-American Water	:	A-2020-3021460
Company – Wastewater Division (PAWC-WD),	:	
under Sections 1102 and 1329 of the Pennsylvania	:	
Public Utility Code, 66 Pa C.S. §§ 1102(a) and	:	
1329 (relating to enumeration of acts requiring	:	
certificate and valuation of acquired water and	:	
wastewater systems), for approval of: (1) the transfer,	:	
by sale, of substantially all of the wastewater	:	
system assets, properties and rights of Upper	:	
Pottsgrove Township related to its wastewater	:	
collection and conveyance system; (2) the right	:	
of PAWC-WD to begin to offer or furnish wastewater	:	
service to the public in Upper Providence	:	
Township, Montgomery County, and a portion of	:	
Douglass Township, Berks County, Pennsylvania;	:	
and (3) the use for ratemaking purposes of the lesser	:	
fair market value or the negotiated purchase price of	:	
the Upper Pottsgrove Township assets related to its	:	
wastewater collection and treatment system.	:	

**RECOMMENDED DECISION**

Before  
Jeffrey A. Watson  
Administrative Law Judge

**TABLE OF CONTENTS**

I.	INTRODUCTION .....	1
II.	HISTORY OF THE PROCEEDING .....	2
III.	FINDINGS OF FACT.....	7
IV.	DISCUSSION.....	16
	A. Legal Standard .....	16
	B. Settlement Terms .....	20
	a. Approval of Application.....	20
	b. Tariff.....	20
	c. Fair Market Value for Ratemaking Rate Base Purposes .....	20
	d. Fair Market Value Appraisals .....	21
	e. Engineering Assessments.....	21
	f. Easements, Rights of Way, and Liens.....	21
	g. Inflow and Infiltration Study.....	222
	h. Rates.....	22
	i. Distribution System Improvement Charge.....	233
	j. Claims for Allowance for Funds Used During Construction and Deferred Depreciation .....	23
	k. Transaction and Closing Costs.....	233
	l. Low Income Program Outreach .....	24
	m. Approval of Section 507 Agreements.....	255
	n. Other Necessary Approvals.....	25
	o. Public Input Hearing .....	25
	p. Standard Settlement Conditions.....	26
	C. Public Interest Analysis – Positions of the Settling Parties .....	27
	i. PAWC’s Position.....	27
	ii. OCA Position .....	33
	iii. I & E’s Position.....	38
	iv. OSBA’s Position.....	50
	v. Township’s Position.....	54
	vi. Shadeland’s Position.....	58
	D. Discussion of Settlement Terms .....	58
	E. Opposition to the Proposed Settlement.....	76

i.	Borough and Authority Objections to Settlement.....	76
ii.	PAWC Reply to Objections.....	78
iii.	Township Response to Objections.....	79
F.	Disposition.....	79
G.	Authority and Borough Objections to the Settlement and Opposition to the Application.....	84
i.	Authority and Borough’s Position .....	91
ii.	PAWC’s Position .....	95
iii.	Township’s Position.....	101
iv.	I&E’s Position.....	102
H.	Disposition of Unresolved Issue .....	106
V.	CONCLUSIONS OF LAW .....	112
VI.	ORDER .....	116

## I. INTRODUCTION

This Decision recommends that the Joint Petition for Approval of Non-Unanimous Settlement of All Issues (Joint Petition, Settlement or Settlement Petition) filed by Pennsylvania-American Water Company (PAWC or Company), the Office of Consumer Advocate (OCA), the Office of Small Business Advocate (OSBA), the Commission's Bureau of Investigation and Enforcement (I&E), Upper Pottsgrove Township (UP, Upper Pottsgrove or Township) and Shadeland Development Corporation (Shadeland) (collectively, the Joint Petitioners or Settling Parties), be approved without modification, because it is supported by substantial evidence and is in the public interest. This Decision finds that the Settlement complies with the relevant Sections of the Public Utility Code regarding applications for the acquisition of wastewater system assets and is consistent with the Pennsylvania Public Utility Commission (Commission) regulations promoting settlements.

This Decision further recommends that the litigated issues in this case be decided against the Pottstown Borough Authority (PBA or Authority) and the Borough of Pottstown (BP or Borough), Joint Protestants in this case. The Authority and Borough asserted that the Township owes them a substantial amount of money for system improvements and has refused to consent to the assignment of the sewage treatment service agreement (STSA) between the Authority, Borough and Township to PAWC. The Settling Parties have agreed that the assignment of the STSA by the Township to PAWC is a condition precedent to the closing with PAWC and the monetary claims can be resolved in a court of competent jurisdiction. This Decision recommends denying the claims asserted by the Borough and Authority. This issue regarding consent to the assignment of the contract between the Authority, Borough and Township to PAWC is a condition to the closing and therefore adequately resolved by the Settling Parties.

The statutory deadline for the Commission to act in this proceeding is October 14, 2021.

## II. HISTORY OF THE PROCEEDING

On November 24, 2020, PAWC filed its Application (as amended, the Application), pursuant to Sections 1102(a) and 1329 of the Pennsylvania Public Utility Code (Code), 66 Pa.C.S. §§ 1102(a) and 1329, requesting, among other things, that the Commission issue Certificates of Public Convenience to PAWC for the transfer to PAWC, by sale, of substantially all of the assets, properties and rights of Upper Pottsgrove (the Transaction), related to Upper Pottsgrove's wastewater collection system (the System), and to set the fair market value of the acquisition for rate-base ratemaking purposes.

On December 30, 2020, Gina L. Miller, Esq., entered her appearance on behalf of I&E.

On January 13, 2021, OSBA filed its Notice of Intervention, Public Statement and Verification, and Erin K. Fure, Esq., entered her appearance on behalf of OSBA.

On February 3, 2021, OCA filed a Protest and Public Statement, together with the Notices of Appearance of Christine Maloni Hoover, Esq., Erin L. Gannon, Esq., Santo G. Spataro, Esq.,<sup>1</sup> and Harrison W. Breitman, Esq.

On February 23, 2021, the Commission notified PAWC that the Application had been conditionally accepted for filing. According to that Secretarial Letter, the Commission would not finally accept the Section 1329 Application until PAWC complied with certain service and notice requirements.

On April 12, 2021, PAWC notified the Commission that it had complied with the service and notice requirements of the February 23, 2021 Secretarial Letter. PAWC filed proof of publication in local newspapers together with a verification confirming satisfaction of the conditions stated in the February 23, 2021 Secretarial Letter.

---

<sup>1</sup> Mr. Spataro filed a Withdrawal of Appearance on April 12, 2021.

On April 14, 2021, the Commission notified PAWC that it had accepted the Application for filing. The Commission further notified PAWC that notice of the Application would be published in the *Pennsylvania Bulletin* with a protest deadline of May 17, 2021. The notice was published on May 1, 2021. 51 Pa. B. 24. The Secretarial Letter also referenced the deadline to file Protests by May 17, 2021.

On April 15, 2021, the Commission issued a Telephonic Prehearing Conference Notice scheduling a prehearing conference for 10:00 a.m. on May 19, 2021.

On April 15, 2021, a Prehearing Conference Order was issued.

On April 26, 2021, a Petition to Intervene was filed by Upper Pottsgrove Township. No objections were filed to this Petition to Intervene.

On May 14, 2021, Shadeland Development filed a Petition to Intervene in the proceeding. In its Petition to Intervene, Shadeland averred that it is the current owner of a sanitary sewer line and related improvements (collectively, the Sewer Line). Joint Preliminary Objections were filed by PAWC and Upper Pottsgrove Township on May 18, 2021.

On May 14, 2021, Pottstown Borough Authority and the Borough of Pottstown filed Protests in the proceeding. Joint Preliminary Objections were filed by PAWC and Upper Pottsgrove Township on May 18, 2021.

A prehearing conference was held on May 19, 2021, as scheduled. PAWC, the Township, the Authority and Borough, I&E, OCA, OSBA, and Shadeland were represented by counsel. With regard to Shadeland 's Petition to Intervene filed on May 14, 2021, and the Protests filed by the Authority and the Borough, the Borough, Authority and Shadeland were permitted to file responsive pleadings to the Preliminary Objections by the close of business on Friday, May 21, 2021. PAWC and the Township were permitted to file a response not later than Monday, May 24, 2021, at noon. A Prehearing Order was entered on May 20, 2021, memorializing these deadlines set at the prehearing conference.

On May 21, 2021, the Authority and Borough filed an Answer to the Joint Preliminary Objections of PAWC and Upper Pottsgrove. The Joint Protestants aver that the likely failure of Upper Pottsgrove to ever obtain the necessary consent to assign the STSA to PAWC in order to complete the transaction ought to be allowed to be brought before the Commission. The Joint Protestants further aver that the Protest is necessary to inform the Commission of the Township's failure to satisfy its obligations under the July 2, 2013 Settlement Agreement to reimburse the costs of a sewage expansion called the Siphon Project, and that such failure is a good faith basis for the Joint Protestants to withhold consent to the assignment of the STSA to PAWC. Absent the Protest, the Joint Protestants argued they would lose their rights to raise this concern to the Commission, and the Commission will be unable to weigh such detrimental effects in rendering its decision as to whether the Application is in the public interest. The Joint Protestants further averred that the transaction cannot close, and PAWC cannot serve its potential customers, without the assignment of the STSA to PAWC. Accordingly, PAWC cannot demonstrate to the Commission that it has the ability to provide adequate wastewater collection, treatment or disposal capacity to meet present and future customer demands.

On May 24, 2021, PAWC and the Township filed an Answer to the Responsive Pleading filed by the Authority and Borough.

On May 27, 2021, an interim order was entered granting in part and denying in part, the Joint Preliminary objections of PAWC and Upper Pottsgrove. The request to dismiss the claim for money damages set forth in the Joint Protest of Pottstown Borough Authority and the Borough of Pottstown was granted, as the Commission lacks the authority to award money damages in this proceeding. The preliminary objection requesting dismissal of the Joint Protest as legally insufficient, and the remaining Preliminary Objections of PAWC and Upper Pottsgrove, were denied.

On May 21, 2021, Shadeland filed an Answer to the Joint Preliminary Objections of PAWC and Upper Pottsgrove. In the Answer, Shadeland avers it constructed the Sewer Line which provides or will provide sanitary sewer service to 164 residential units, 73 of which are related to Shadeland's developments.

With regard to the preliminary objection that the Commission lacks jurisdiction to determine the ownership of the Sewer Line, Shadeland averred it is the owner of the Sewer Line because it has not been formally offered for dedication. For the Township to become the owner of the Sewer Line, Shadeland asserted, it has to offer the Sewer Line for dedication and the Township must accept dedication of the Sewer Line. Shadeland further averred the Construction Agreement requires Shadeland to dedicate the Sewer Line to the Township. Shadeland argued PAWC cannot acquire the Sewer Line from the Township if the Township does not own the Sewer Line.

On May 27, 2021, the Joint Preliminary Objections of PAWC and Upper Pottsgrove Township to the Petition to Intervene filed by Shadeland Development Corporation, were denied and the Petition to Intervene of Shadeland Development Corporation was granted.

A telephonic public input hearing was held at 6:00 p.m. on June 2, 2021. Testimony and exhibits were presented by Attorney Joan London on behalf of Artisan Construction, LLC, as discussed more fully below.

On June 8, 2021, the parties notified the undersigned presiding officer that all parties had waived cross examination and the hearing scheduled for June 10-11, 2021 was cancelled.

On June 9, 2021, the parties filed the Joint Stipulation for the Admission of Evidence.

On June 10, 2021, an interim order was entered approving the Joint Stipulation for the Admission of Evidence. The Parties stipulated to the admission of the following evidence:

A. PAWC Statements and Exhibits -

PAWC Statement No. 1 – Direct Testimony of Scott D. Fogelsanger, PAWC Statement No. 1, with PAWC Exhibit SDF-1 and PAWC Exhibit SDF-2 (this Exhibit is the Application, as amended, which was previously filed with the Secretary of the Commission).

PAWC Statement No. 1-R – Rebuttal Testimony of Scott D. Fogelsanger, PAWC Statement No. 1-R.

PAWC Statement No. 2 – Direct Testimony of Michael J. Guntrum, P.E. and PAWC Exhibits MJG-1 through MJG-3.

PAWC Statement No. 3 – Direct Testimony of Rod P. Nevirauskas, with PAWC Exhibit RPN-1.

PAWC Statement No. 4 – Direct Testimony of Jerome C. Weinert, PE, ASA, CDP, with PAWC Exhibit JCW-1.

B. Upper Pottsgrove Statements and Exhibits -

Upper Pottsgrove Statement No. 1 – Direct Testimony of Trace Slinkerd, with UPT Exhibit TS-1.

Upper Pottsgrove Statement No. 1-R – Rebuttal Testimony of Trace Slinkerd.

Upper Pottsgrove Statement No. 2.0 – Direct Testimony of Harold Walker, III, with Appendix A.

C. PBA/BP -

PBA/BP St. No. 1 – Direct Testimony of Justin M. Keller, with Exhibits A through F

D. Shadeland -

Direct Testimony of Richard Mingey, with Exhibits A through C.

On June 17, 2021, an interim order was entered revising the litigation schedule and on June 22, 2021, a second interim order was entered again revising the litigation schedule.

On June 25, 2021, a Joint Petition for Approval of Non-Unanimous Settlement of All Issues and Statements in Support of Settlement was filed by PAWC, OCA, OSBA, I&E, Upper Pottsgrove Township and Shadeland Development Corporation.

On June 29, 2021 Objections to the Settlement and a Joint Main Brief were filed by the Authority and Borough.

On June 29, 2021 PAWC and the Township filed their Main Briefs. The Township and Authority also filed responses to the Objections to the Settlement.

On July 1, 2021, Reply Briefs were filed by Authority and Borough, the Township, PAWC and I&E.

The record in this proceeding was closed on the Reply Brief Date of July 1, 2021.

### III. FINDINGS OF FACT

The following Findings of Fact were submitted in the Joint Petition. I adopt those findings,<sup>2</sup> based upon the stipulation of the Settling Parties and the record in this proceeding.

#### Parties

1. PAWC, a subsidiary of American Water Works Company, Inc. (American Water), is the largest regulated water and wastewater public utility duly organized and existing under the laws of the Commonwealth of Pennsylvania. It furnishes water and wastewater service to the public in a service territory encompassing more than 400 communities in 36 counties. Overall, PAWC serves a combined population of over 2,400,000 across the Commonwealth. PAWC St. No. 1, p. 11. As of September 30, 2020, PAWC served approximately 671,943 water customers and approximately 75,341 wastewater customers across Pennsylvania. PAWC St. No. 1, p. 12.

2. Upper Pottsgrove is a First Class Township in Montgomery County, Pennsylvania. It has approximately 5,739 residents. Upper Pottsgrove St. No. 1, pp. 4-5.

---

<sup>2</sup> For ease of reference, the findings are adopted, verbatim, including paragraph numbering, subheadings and footnotes, as they appear in the Joint Stipulation of Proposed Findings of Fact, Appendix A.

3. I&E serves as the Commission's prosecutory bureau for the purposes of representing the public interest in ratemaking and service matters, and enforcing compliance with the Code and Commission Regulations and Orders. See Implementation of Act 129 of 2008; Organization of Bureaus and Offices, Docket No. M-2008-2071852 (Order entered Aug. 11, 2011).

4. The OCA is a Commonwealth agency created by Act 161 of 1976 to represent the interests of consumers before the Commission. 71 P.S. § 309-2.

5. The OSBA is a Commonwealth agency created by Act 181 of 1988 to represent the interests of small businesses before the Commission. 73 P.S. § 399.41.

#### The System

6. The System is a wastewater collection and conveyance system. Upper Pottsgrove St. No. 1, p. 5. It is not a combined sewer system, nor is it a municipal separate storm sewer system (MS4 System). PAWC St. No. 2, p. 4. As of December 31, 2019, the System provided service to approximately 1,447 customers, including two residents of Douglass Township.<sup>3</sup> PAWC St. No. 1, p. 12.

#### The Transaction and the Asset Purchase Agreement

7. Upper Pottsgrove sold its wastewater system pursuant to arm's length negotiations. On February 5, 2020, Upper Pottsgrove issued the Upper Pottsgrove Township Request for Bids (RFB) for the sale of the wastewater system assets. On March 16, 2020, PAWC submitted a proposal to acquire the wastewater system assets and subsequently, PAWC submitted a Response to Upper Pottsgrove's best and final offer on March 20, 2020. On April 20, 2020, Upper Pottsgrove's Commissioners approved the sale of the wastewater system assets

---

<sup>3</sup> These two customers were the subject of a Petition for Declaratory Order filed by Upper Pottsgrove at Docket No. P-2020-3021526, in which Upper Pottsgrove sought a declaratory order that service to these customers does not constitute the provision of public utility service to the public pursuant to Section 102 of the Code. The Commission issued the requested Declaratory Order on October 8, 2020.

and execution of the Asset Purchase Agreement by and among Upper Pottsgrove Township, as Seller, and Pennsylvania-American Water Company, as Buyer (the APA). On April 28, 2020, Upper Pottsgrove and PAWC entered into the APA for the sale of substantially all the assets, properties, and rights of Upper Pottsgrove's System at an agreed-upon price of \$13,750,000. PAWC St. No. 1, pp. 7-8, 10.

### The UVE Appraisals

8. The Application seeks to utilize the process set forth in 66 Pa.C.S. § 1329 to determine the fair market value of the System assets and the ratemaking rate base of those assets. PAWC St. No. 1, p. 6. As required by Section 1329, PAWC and Upper Pottsgrove jointly retained the services of LTL Consultants and AUS Consultants to complete the Engineering Assessment Study of Upper Pottsgrove Township's Wastewater System Assets. PAWC Exhibit SDF-1 Appendix A-15-a.

9. As also required by Section 1329, the Application included the appraisals of PAWC's utility valuation expert (UVE), AUS Consultants, Inc. (AUS), and Upper Pottsgrove's UVE, Gannett Fleming Valuation and Rate Consultants, LLC (Gannett Fleming). PAWC Exhibit SDF-1 Appendices A-5.1 and A-5.2.

10. AUS is registered as a utility valuation expert with the PUC. PAWC St. No. 4, p. 1. AUS prepared a fair market valuation report dated as of April 28, 2020. AUS's fair market value report utilized the cost approach, the income approach, and the market approach. PAWC Exhibit FM-1 Appendix A-5.1. AUS filed a verification that states the fair market value report was prepared in compliance with the Uniform Standards of Professional Appraisal Practice ("USPAP"). PAWC Exhibit SDF-1 Appendix A-9.1. AUS's fair market value report concluded that the value of the Upper Pottsgrove System was \$17,023,691. PAWC St. No. 4, p. 3.

11. Upper Pottsgrove retained the services of Gannett Fleming to complete an appraisal of the System. Upper Pottsgrove St. No. 2, p. 3. Gannett Fleming is registered as a

utility valuation expert with the PUC. Upper Pottsgrove St. No. 2, p. 4. Gannett Fleming issued a fair market valuation of the System as of August 31, 2020. Upper Pottsgrove St. No. 2, p. 3. Gannett Fleming's fair market value report utilized the cost approach, the income approach, and the market approach. PAWC Exhibit SDF-1 Appendix A-5.2. Gannett Fleming filed a verification that states its fair market valuation report was prepared in compliance with USPAP. PAWC Exhibit SDF-1 Appendix A-9.2. Gannett Fleming's fair market value report concluded that the value of the Upper Pottsgrove System was \$17,617,000 (rounded). Upper Pottsgrove St. No. 2, p. 13.

#### PAWC's Financial Fitness

12. PAWC had total assets of approximately \$5.3 billion and annual revenues of \$689 million for 2019. For 2019, PAWC had operating income of approximately \$330 million and net income of approximately \$187 million. PAWC St. No. 3, p. 5.

13. In addition to generating positive operating cash flows, PAWC may also obtain financing through: (i) equity investments; (ii) a \$400 million line of credit through American Water Capital Corp. (AWCC); and (iii) long term debt financing at favorable rates from AWCC, the Pennsylvania Infrastructure Investment Authority (PENNVEST), and the Pennsylvania Economic Development Financing Authority (PEDFA). PAWC St. No. 3, p. 6.

14. PAWC will initially fund the Transaction with short-term debt and will later replace it with a combination of long-term debt and equity capital. PAWC St. No. 3, p. 6. PAWC does not anticipate that the acquisition of the Upper Pottsgrove System will have a negative impact on PAWC's cash flows, credit ratings or access to capital. Therefore, the Transaction will not deteriorate in any manner PAWC's ability to continue to provide safe, adequate, and reasonable service to its existing customers at just and reasonable rates. PAWC St. No. 3, p. 10.

15. PAWC is a financially-sound business that can financially support the acquisition of the System as well as the ongoing operating and investment commitments that will

be required to operate, maintain and improve those assets. PAWC St. No. 3, p. 5. Given its size, access to capital and its recognized strengths in system planning, capital budgeting and construction management, PAWC is well-positioned from a financial perspective to ensure that high quality wastewater service meeting all federal and state requirements is provided to Upper Pottsgrove's customers and maintained for PAWC's existing customers. PAWC St. No. 3, p. 8.

#### PAWC's Technical Fitness

16. PAWC currently employs approximately 1,100 professionals with expertise in all areas of water and wastewater utility operations, including engineering, regulatory compliance, water and wastewater treatment plant operation and maintenance, distribution and collection system operation and maintenance, material management, risk management, human resources, legal, accounting and customer service. PAWC St. No. 2, p. 8. As a subsidiary of American Water, PAWC has available to it additional resources of highly trained professionals who have expertise in various specialized areas. These operations and process experts have deep experience in the operation and maintenance of every possible type of wastewater treatment technology, as well as the experience available to support PAWC's operations staff and facilities. *Id.*

17. PAWC's Glen Alsace operations center is located within 15 miles from Upper Pottsgrove. PAWC's Royersford operations center is located within 10 miles from Upper Pottsgrove. These operations centers house both the local operations team and operations support staff. PAWC St. No. 2, p. 6.

18. The Upper Pottsgrove System will be managed as part of PAWC's Exeter wastewater department within PAWC's Southeast Area operations. The Southeast Area provides a range of shared support services -- including purchasing, environmental compliance, health and safety, meter reading, customer service work and PA One Call. The wastewater operations in Upper Pottsgrove will be supported by common shared support services. PAWC St. No. 2, p. 6.

### PAWC's Legal Fitness

19. PAWC is a Commission-regulated public utility with a good compliance history. PAWC St. No. 1, p. 15. There are no pending legal proceedings that would suggest that PAWC is not legally fit to provide service to Upper Pottsgrove customers. *Id.* PAWC has the expertise, the record of environmental compliance, the commitment to invest in necessary capital improvements and resources, and the experienced managerial and operating personnel necessary to provide safe and reliable sewer services to the existing customers of Upper Pottsgrove. PAWC St. No. 1, p. 12.

### Benefits of the Transaction and the Settlement

20. The Transaction will benefit Upper Pottsgrove by improving its financial condition and outlook and by enabling it to reallocate its administrative time to focus on other key initiatives. The Transaction will also increase Upper Pottsgrove's tax base through increased development opportunities. Upper Pottsgrove St. No. 1, p. 8-9.

21. PAWC is a large, financially-sound company that has the capacity to finance necessary capital additions and improvements that will benefit Upper Pottsgrove's customers. PAWC is well-positioned to ensure that high quality wastewater service meeting all applicable state and federal regulatory requirements is provided to Upper Pottsgrove's customers. PAWC St. No. 1, pp. 13-14.

22. PAWC is subject to the jurisdiction of the Commission requiring PAWC to provide adequate, efficient, safe, and reliable service at just and reasonable rates. Upper Pottsgrove is not regulated by the Commission and does not need to comply with the Code, the Commission's Regulations or Orders. PAWC St. No. 1, p. 14. After Closing on the Transaction, I&E, OCA and OSBA will be statutory representatives for Upper Pottsgrove's customers. PAWC St. No. 2, p. 16.

23. Upper Pottsgrove's current customers also will have access to additional bill payment options, extended customer service and call center hours, enhanced customer information and education programs, and access to PAWC's customer assistance programs. Access to PAWC's customer assistance programs is particularly important during the on-going COVID-19 Pandemic. PAWC St. No. 1, p. 14; PAWC St. No. 2, pp. 13-15.

24. Although the amount that will be added to PAWC's rate base will be determined in this proceeding, any impacts on the rates of PAWC's existing customers would occur only upon Commission approval as part of a base rate proceeding. The Transaction will have no immediate rate impact on PAWC's existing customers. PAWC St. No. 3, p. 10.

25. The Transaction will add approximately 1,447 new customers to PAWC's existing wastewater customer base of approximately 75,341 customers (or an increase of more than 1.9%). PAWC St. No. 1, p. 12.

26. The Transaction will not result in unnecessary duplication of operations or facilities following Closing. PAWC St. No. 2, p. 7.

#### Ratemaking Rate Base

27. The Settlement proposes a ratemaking rate base of \$13,750,000, based on the agreed-to purchase price of \$13,750,000. This amount was less than the average of the two UVE appraisals ( $\$17,023,691 + 17,617,000 = \$17,320,346$ ). PAWC St. No. 3, p. 7.

#### Rate Stabilization Plan

28. PAWC states that the APA between PAWC and Upper Pottsgrove does not contain a "rate stabilization plan" as defined by 66 Pa.C.S. § 1329(g). PAWC St. No. 3, p. 18. The Asset Purchase Agreement provides that Upper Pottsgrove wastewater rates will be reduced from \$215.00 to \$195.00 per quarter prior to closing. PAWC St. No. 3, p. 17. PAWC will adopt the Upper Pottsgrove rates at the time of closing, of \$195.00 per quarter (\$65.00 per

month). *Id.* Those rates will be addressed and adjusted, without any form of contractual restriction, in PAWC's first base rate case in which the System is included. PAWC St. No. 3, p. 18.

Distribution System Improvement Charge, Allowance for Funds Used During Construction, Deferred Depreciation, and Transaction and Closing Costs

29. PAWC requested authority from the Commission to approve the collection of a distribution system improvement charge (DSIC) related to the Upper Pottsgrove System in the future, prior to the first base rate case in which the System plant-in-service is incorporated into rate base. PAWC St. No. 4, p. 4.

30. PAWC will make post-acquisition improvements in the Upper Pottsgrove System. As such, PAWC will likely accrue allowance for funds used during construction (AFUDC) for post-acquisition improvements. PAWC St. No. 3, p. 21. PAWC also intends to defer depreciation on non-DSIC-eligible post-acquisition improvements for book and ratemaking purposes. *Id.*

31. Transaction and closing costs that PAWC may seek to recover include the UVE's appraisal fee and the buyer's closing costs, including reasonable attorney fees. PAWC is unable to determine the exact extent of transaction and closing costs at this time. In its Application, PAWC estimated the anticipated range of transaction and closing costs as \$553,000 to \$763,000. PAWC St. No. 3, p. 15; PAWC Ex. SDF1 App. A-10. Any transaction and closing costs that PAWC seeks to claim are not properly reviewed, and cannot be approved, in this Section 1329 proceeding. Instead, PAWC's transaction and closing costs are properly reviewed in its next base rate case that follows the acquisition, and they will be subject to the preponderance of evidence standard in that review. PAWC St. No. 3, p. 15; *Implementation of Section 1329 of the Public Utility Code*, Docket No. M-2016-2543193 (Final Implementation Order entered October 27, 2016) (Final Implementation Order) p. 14.

### Rates

32. As required by Section 1329, PAWC included a pro forma tariff supplement in its Application. PAWC Ex. SDF-1 App. A-12. Upon Closing of the Transaction, PAWC will adopt Upper Pottsgrove's current metered and unmetered rates then in effect. PAWC St. No. 3, p. 16.

33. After PAWC closes on the Transaction, System customers will be subject to PAWC's prevailing wastewater tariff on file with the Commission with respect to miscellaneous fees and charges, rules and regulations for wastewater service. Upper Pottsgrove customers will be billed on a monthly basis and Upper Pottsgrove's existing rates will be prorated for purposes of calculating monthly billing. PAWC St. No. 3, p. 16.

### Customer Notice

34. PAWC provided a non-binding estimate of possible rate impacts for existing customers and Upper Pottsgrove customers. PAWC Exhibit SDF-1 Appendix A-18-d. These estimates were prepared in accordance with the Commission's Order in *Application of Pennsylvania-American Water Company Pursuant to Sections 1102 and 1329 of the Public Utility Code for Approval of its Acquisition of the Water System Assets of the Steelton Borough Authority*, Docket No. A-2019-3006880 (Opinion and Order entered October 3, 2019) (Steelton Order). PAWC St. No. 3 p. 11. Ultimately, any rate impacts of the acquisition will be determined by the Commission in future base rate proceedings. PAWC St. No. 3, p. 15.

35. As a condition of Closing and subject to 66 Pa.C.S. § 703(g), PAWC will require that Upper Pottsgrove acquire clear title to the sewer line of which Shadeland Development Corporation (Shadeland) claims ownership in its Petition to Intervene (the Sewer Line). This result could be accomplished by: dedication to Upper Pottsgrove, determination of a court of competent jurisdiction that dedication is not necessary, or other evidence reasonably satisfactory to PAWC. PAWC St. No. 1-R, p. 4-5.

## Municipal Agreements

36. In the Application, PAWC requested that the Commission approve the APA. In addition, PAWC requested that the Commission approve two contracts that Upper Pottsgrove will assign to PAWC: (i) the September 13, 2004 Sewage Treatment Service Agreement between Upper Pottsgrove Township, Borough of Pottstown and Pottstown Borough Authority; and (ii) the March 28, 1994 Joint Sewage Transportation Agreement between Upper Pottsgrove Township and Lower Pottsgrove Township Authority. Application ¶ 45. In the Settlement, the Joint Petitioners ask the Commission to approve both these agreements pursuant to 66 Pa.C.S. § 507.<sup>4</sup> Settlement ¶ 32.

37. As a condition of Closing on the Transaction and subject to 66 Pa.C.S. § 703(g), PAWC will require that Pottstown Borough Authority and the Borough of Pottstown (together, PBA/BP or Borough/Authority) assign the Sewage Treatment Service Agreement between Upper Pottsgrove Township, Borough of Pottsgrove and Pottstown Borough Authority (the STSA) to PAWC prior to Closing. Settlement ¶ 43.

## IV. DISCUSSION

The Settlement presented here is not a full settlement given that Protestants, the Authority and Borough, have objections to the Settlement.

### A. 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:

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

---

<sup>4</sup> The OCA does not join in this paragraph but does not oppose PAWC's request.

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 Petition 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.” Since PAWC is the party that filed the Application at issue in this proceeding, PAWC has the burden of proof to satisfy this particular legal standard.

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) (*City of York*); 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 Township. *Seaboard Tank Lines v. Pa. Pub. Util. Comm’n*, 502 A. 2d 762, 764 (Pa.Cmwlt. 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 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. Section 1329 also enables a public utility or other acquiring entity's post-acquisition improvement costs not recovered through a distribution system improvement charge 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 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.

PAWC also seeks approval of 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.

In this case, the Settling Parties submitted a non-unanimous settlement of all issues. The Authority and the Borough did not reach an agreement with the Settling Parties on the issues in this proceeding.

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 N., Inc.*, Docket No. C-00902815 (Opinion and Order entered April 1, 1996) (Warner); *Pa. Pub. Util. Comm’n v. CS Water & Sewer Assocs.*, 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 Elec. Inc.*, Docket No. M-2012-2201861 (Opinion and Order entered Dec. 5, 2013).

B. Settlement Terms

The terms of the Settlement are set forth below, verbatim, as submitted by the Settling Parties in the Joint Petition for Settlement filed on June 25, 2021. For ease of reference, the original paragraph numbering and headings are also retained.<sup>5</sup> The Joint Petitioners agree as follows:

a. Approval of Application

25. The Commission should approve PAWC's acquisition of Upper Pottsgrove's wastewater system assets and PAWC's right to begin to offer, render, furnish, or supply wastewater service in the areas served by Upper Pottsgrove, as well as any other necessary approvals or certificates for the Transaction, subject to approval of all of the following conditions and without modification.

b. Tariff

26. The *pro forma* tariff submitted with 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 (Closing).

c. Fair Market Value for Ratemaking Rate Base Purposes

27. Pursuant to 66 Pa.C.S. § 1329, PAWC shall be permitted to use \$13,750,000 for ratemaking rate base purposes for the acquired assets effective as of the Closing Date.

---

<sup>5</sup> These settlement terms can be found on pp. 5-12 of the Joint Petition.

d. Fair Market Value Appraisals

28. In future acquisitions by PAWC under 66 Pa.C.S. § 1329 filed subsequent to the Commission’s approval of this Settlement without modification, PAWC shall clearly document the date on which it engaged or otherwise authorized its utility valuation expert to perform the fair market value appraisal of the system so as to demonstrate compliance with 66 Pa.C.S. § 1329(a)(5).

e. Engineering Assessment

29. PAWC will act to ensure that, in any future Section 1329 applications it submits, the engineering assessment required under 66 Pa.C.S. § 1329(a)(4) will designate the condition of the inventory and assets appraised. Such designation of condition shall be limited to whether the categories of system assets appraised are in poor, fair, good, or very good condition.

f. Easements, Rights of Way, and Liens

30. PAWC and Upper Pottsgrove will continue to work to achieve the transfer of all real property rights, including all real estate, easement rights, access to public rights-of-way, and liens that must be transferred to PAWC in the Asset Purchase Agreement (“APA”) by Closing (collectively, the “Real Property Rights”). However, PAWC shall be permitted in its discretion to close without the transfer of all of the Real Property Rights, provided that an escrow is established from the Purchase Price to be used to obtain any post-Closing transfers of the Real Property Rights. PAWC will provide an update to I&E, OCA, and OSBA approximately 30 days in advance of the anticipated Closing Date and a final update before Closing regarding the status of the transfer of the Real Property Rights.

31. As a condition of Closing and subject to 66 Pa.C.S. § 703(g), PAWC will require that Upper Pottsgrove obtain clear title to the sewer line, of which Shadeland Development Corporation claims ownership in its Petition to Intervene, by dedication to Upper

Pottsgrove, determination of a court of competent jurisdiction that dedication is not necessary, or other evidence reasonably satisfactory to PAWC.

g. Inflow and Infiltration Study

32. PAWC shall complete an Inflow and Infiltration (I&I) study of the Upper Pottsgrove System following Closing and provide the results of that study to I&E, OCA and OSBA upon completion. The costs of the I&I study will be subject to prudence review when they are claimed for recovery in base rates.

h. Rates

33. Except as explicitly agreed upon in this Settlement, nothing contained herein or in the Commission's approval of the Application shall preclude any Joint Petitioner from asserting any position or raising any issue regarding Upper Pottsgrove's rates in a future PAWC proceeding.

34. In the first base rate case that includes Upper Pottsgrove's wastewater system assets:

- a. PAWC will submit a cost of service study that removes all costs and revenues associated with the operation of Upper Pottsgrove's system.
- b. PAWC will provide a separate cost of service study for the Upper Pottsgrove system.
- c. PAWC will propose to move the Township's system to its cost of service, based on a separate cost of service study for the Township's system; provided, however, that PAWC will not propose Upper Pottsgrove wastewater rates in excess of PAWC's proposed Rate Zone 1 system-average rates. The Joint Petitioners acknowledge, however, that PAWC may agree to rates other than those proposed for Township customers in the context of a settlement of the base rate case. OCA, I&E, OSBA and Upper Pottsgrove reserve their rights to fully address this proposal, and to make other rate proposals in the base rate case.

i. Distribution System Improvement Charge

35. Pursuant to 66 Pa.C.S. § 1329, PAWC shall be permitted to collect a distribution system improvement charge (DSIC) prior to the first base rate case in which the Upper Pottsgrove service area plant-in-service is incorporated into rate base; provided, however, that such permission shall be conditioned upon (i) PAWC's filing of an amended wastewater Long-Term Infrastructure Improvement Plan (Amended LTIIIP) which does not re-prioritize other existing commitments in other services areas, (ii) the Commission's approval of the Amended LTIIIP, as may be modified in the discretion of the Commission, and (iii) PAWC's filing of a compliance tariff supplement which incorporates Upper Pottsgrove into its existing DSIC tariff, including all customer safeguards applicable thereto, after Commission approval of the Amended LTIIIP.

j. Claims for Allowance for Funds Used During Construction and Deferred Depreciation

36. The Joint Petitioners acknowledge that the Application includes 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 Upper Pottsgrove's wastewater system assets. The Joint Petitioners reserve their rights to litigate their positions fully in future rate cases when these issues are ripe for review. The Joint Petitioners' assent to this term should not be construed to operate as their preapproval of PAWC's requests.

k. Transaction and Closing Costs

37. The Joint Petitioners acknowledge that the Application includes a request that PAWC be permitted to claim transaction and closing costs associated with the Transaction.

The Joint Petitioners 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 Joint Petitioners' assent to this term should not be construed to operate as their preapproval of PAWC's request.

38. If the Transaction does not close, and PAWC does not recoup all of its \$90,000 engineering fee/legal fee deposit from Upper Pottsgrove as referenced in Section 3.01 of the APA, then PAWC will not seek to recover any unrecouped portion of the deposit from its ratepayers in any proceeding.

39. The inclusion of outside legal fees, if any, in PAWC's transaction and closing costs under the APA between PAWC and Upper Pottsgrove shall be separately identified in PAWC's next base rate case and amounts expended by PAWC on behalf of Upper Pottsgrove will be separately identified. The OCA, I&E and OSBA reserve the right to challenge the reasonableness, prudence, and basis for such fees.

1. Low Income Program Outreach

40. Within the first billing cycle following Closing, PAWC shall include a bill insert to Upper Pottsgrove's customers regarding its low income programs and shall include such information in a welcome letter to Upper Pottsgrove's customers. The bill insert 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. PAWC also agrees to ongoing, targeted outreach to its Upper Pottsgrove-area customers regarding its low income program.

41. In the same welcome packet referenced above, PAWC will explicitly inform acquired customers that they are being converted to monthly billing. PAWC's letter should also direct acquired customers to contact PAWC with any questions about the conversion and/or to discuss low-income programming options that may be available.

m. Approval of Section 507 Agreements

42. 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: (1) the Sanitary Sewer Asset Purchase Agreement By and Between Upper Pottsgrove Township, Montgomery County as Seller and Pennsylvania-American Water Company as Buyer, dated as of April 28, 2020; (2) the Sewage Treatment Service Agreement between Upper Pottsgrove Township, Borough of Pottstown and Pottstown Borough Authority; and, (3) the Joint Sewage Transportation Agreement between Upper Pottsgrove Township and Lower Pottsgrove Township.<sup>6</sup>

43. The contracts listed in Schedule 4.13 of the APA including but not limited to the Sewage Treatment Service Agreement referenced in Paragraph 42, which are subject to approval by the Commission under 66 Pa.C.S. § 507, are material to the Commission's approval of the Transaction (singularly, a Material Agreement) and that PAWC will require, subject to 66 Pa.C.S. § 703(g), Upper Pottsgrove to obtain assignment of all Material Agreements as a condition of Closing.

n. Other Necessary Approvals

44. 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.

o. Public Input Hearing

45. The Parties cooperated in good faith with Commission staff to promptly schedule one telephonic public input hearing in this matter. The Parties agreed that, for purposes of this proceeding, the public input hearing did not require newspaper notice and that notice (1)

---

<sup>6</sup> The OCA does not join in this paragraph but does not oppose PAWC's request.

by joint PAWC and Upper Pottsgrove press release, (2) by PAWC's and Upper Pottsgrove's social media, and (3) by notice on PAWC's and Upper Pottsgrove's websites, was adequate.

p. Standard Settlement Conditions

46. The Settlement is conditioned upon the Commission's approval of the terms and conditions contained in the Settlement without modification. If the Commission modifies the Settlement, any Petitioner may elect to withdraw from the Settlement and may proceed with litigation and, in such event, the Settlement shall be void and of no effect. Such election to withdraw must be made in writing, filed with the Secretary of the Commission and served upon all Joint Petitioners within five (5) business days after the entry of an Order modifying the Settlement. The Joint Petitioners acknowledge and agree that the Settlement, if approved, shall have the same force and effect as if the Joint Petitioners had fully litigated this proceeding.

47. This Settlement is proposed by the Joint Petitioners to settle all issues in the instant proceeding. If the Commission does not approve the Settlement and the proceedings continue, the Joint Petitioners reserve their respective procedural rights, including the right to present additional testimony and to conduct full cross-examination, briefing and argument. 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 in any other proceeding.

48. The Joint Petitioners acknowledge that the Settlement reflects a compromise of competing positions and does not necessarily reflect any Petitioner's position with respect to any issues raised in this proceeding. This Settlement may not be cited as precedent in any future proceeding, except to the extent required to implement this Settlement.

49. The Joint Petitioners have jointly prepared, and are separately filing, a Joint Stipulation of Proposed Findings of Fact, Proposed Conclusions of Law, and Proposed Ordering Paragraphs. The Joint Petitioners further agree that the facts agreed to in that Joint Stipulation are sufficient to find that the Settlement is in the public interest.

50. Each Petitioner has prepared a Statement in Support of Settlement setting forth the bases upon which the Petitioner believes the Settlement to be in the public interest. Attachments A-F.

51. If the ALJ recommends approval of the Settlement without modification, the Joint Petitioners will waive their rights to file Exceptions.

*See, Joint Petition, at 5-12.*

C. Public Interest Analysis – Positions of the Settling Parties

i. PAWC's Position

a. Approval of the Application

Pursuant to Section 1103 of the Code, 66 Pa.C.S. § 1103, PAWC must demonstrate that it is technically, financially, and legally fit to own and operate the System.

PAWC concludes, as modified by the terms and conditions of the Settlement, the Transaction has affirmative public benefits of a substantial nature for every impacted group. These benefits clearly outweigh any alleged detriments.

b. Tariff

As required by Section 1329, PAWC included a *pro forma tariff* supplement in its Application. PAWC Exhibit SDF1 Appendix A-12. Upon closing the Transaction, PAWC will adopt Upper Pottsgrove Township's current metered and unmetered rates term in effect. PAWC St. No. 3, p. 16.

c. Fair Market Value for Ratemaking Rate Base Purposes

PAWC explains the Joint Petitioners agreed that \$13,750,000 (the purchase price) will go into PAWC's rate base in its next rate case due to the acquisition of the System. Settlement ¶ 27. PAWC asserts the evidence of record supports a conclusion that the Commission, using the various ratemaking tools available to it, can set rates for PAWC's customers prospectively that are "just and reasonable" under Section 1301 of the Code. PAWC notes the Transaction has numerous other affirmative public benefits of a substantial nature. *See, e.g.,* PAWC St. No. 1, pp. 13-15; PAWC St. No. 1-R, pp. 13-14; PAWC St. No. 2, pp. 7-17; Upper Pottsgrove St. No. 1, pp. 3-4, 7-9. PAWC asserts the Transaction should not be disapproved based on speculation about future impacts on rates, as the rate impacts of the Transaction were thoroughly evaluated by the Joint Petitioners.

d. Fair Market Value Appraisals

Section 1329(a)(5) of the Code, 66 Pa.C.S. § 1329(a)(5), requires each UVE to provide the completed appraisal to its client within ninety days of executing the service contract. PAWC explained its standard operating procedure is to execute an Agreement for Valuation Consulting Services (Agreement) before the Engineer's Assessment is completed, and therefore before the UVE can begin its appraisal. PAWC explains the Agreement therefore provides that the UVE will not begin performing services until the issuance of a notice to proceed.

The Settlement requires PAWC to clearly document the date on which it authorized its UVE to perform the fair market value appraisal of the system being appraised, so as to demonstrate compliance with 66 Pa.C.S. § 1329(a)(5).

e. Engineering Assessment

PAWC explains that the engineer's assessment completed in this case provides extensive information about the assets to be acquired by PAWC but does not indicate the condition of those assets. In the Settlement, the Joint Petitioners agreed that, in future Section

1329 acquisitions, the engineering assessment will designate the condition of the inventory and assets appraised, and all categories of system assets will be appraised in poor, fair, good or very good condition.

f. Easements, Rights of Ways and Liens

The Settlement requires PAWC and Upper Pottsgrove Township to continue to work to achieve the transfer of all real property rights, including all real estate, easement rights, access to public rights-of-way, and liens that the APA requires Upper Pottsgrove to transfer to PAWC by Closing (collectively, the Real Property Rights). PAWC explains that, subject to the commitments and Settlement provisions, the Settlement gives PAWC discretion to Close without the transfer of all of the Real Property Rights, provided that an escrow is established from the Purchase Price to be used to obtain any post-Closing transfers of the Real Property Rights. Settlement ¶ 30.

The Settlement also provides that, as a condition of Closing and subject to 66 Pa.C.S. § 703(g), PAWC will require that Upper Pottsgrove obtain clear title to the sewer line, of which Shadeland claims ownership in its Petition to Intervene, by (i) dedication to Upper Pottsgrove Township, (ii) determination of a court of competent jurisdiction that dedication is not necessary, or (iii) other evidence reasonably satisfactory to PAWC.<sup>7</sup> Settlement ¶ 31. According to PAWC, these provisions ensure that Upper Pottsgrove will not transfer a sewer line that it does not own, and that, after Closing, PAWC will be able to use the sewer line to provide service to customers in the service territory.

g. Inflow and Infiltration Study

To provide more information about the condition of the assets being acquired by PAWC in the Transaction, the Settlement requires PAWC to complete an inflow and infiltration study and provide the results to I&E, OCA and OSBA. The costs of the study will be subject to prudence review when they are claimed for recovery in base rates.

---

<sup>7</sup> This provision re-states the commitment made in PAWC St. No. 1-R, pp. 4-5.

h. Rates

PAWC agreed to submit two cost of service studies in the first base rate case that includes the Upper Pottsgrove System: (a) a cost of service study that removes all costs and revenues associated with the operation of the Upper Pottsgrove System; and (b) a cost of service study for the Upper Pottsgrove System. Settlement ¶¶ 34a. and 34b. Under the Settlement, PAWC’s obligation to prepare cost of service studies extends only to the first base rate case in which Upper Pottsgrove is included.

PAWC notes that the Settlement is consistent with 66 Pa.C.S. § 1329(d)(1)(v) in that it requires PAWC to charge rates after Closing that are equal to Upper Pottsgrove’s existing rates. The Settlement requires PAWC, in the first base rate case that includes Upper Pottsgrove, to propose moving Upper Pottsgrove’s customers’ rates to the cost of service, provided, however, that PAWC will not propose Upper Pottsgrove wastewater rates in excess of PAWC’s proposed Rate Zone 1 system-average rates, Settlement ¶ 34c. According to PAWC, this provision is in the public interest because it limits any potential subsidization of Upper Pottsgrove’s customers by PAWC’s existing water and wastewater customers.

The Settlement permits PAWC to agree to rates other than those proposed for Upper Pottsgrove customers in the context of a settlement of a base rate case. However, the Settlement does not preclude any Joint Petitioner from asserting any position or raising any issue in a future PAWC base rate proceeding. Settlement ¶ 34c. PAWC notes the Settlement contains no provision purporting to restrict the Commission’s ultimate ratemaking authority to set “just and reasonable” rates.

i. Distribution System Improvement Charge

PAWC notes it previously received Commission approval of a wastewater LTIP, and received Commission approval of a DSIC tariff, for other portions of its wastewater system. In its Application, PAWC requested conditional approval to implement a DSIC for the Upper Pottsgrove service territory. Application ¶¶ 2, 44; PAWC St. No. 1, p. 4. Pursuant to the

Settlement, PAWC may file an amended LTIP for the Upper Pottsgrove service territory that does not reprioritize other existing capital improvements that PAWC has already committed to undertake in other service areas. Following Commission approval of that amended LTIP, PAWC could make a tariff supplement compliance filing, which would include the Upper Pottsgrove service territory in PAWC's existing DSIC tariff. Settlement ¶ 35.

j. Claims for Allowance for Funds Used During Construction and Deferred Depreciation

Section 1329(f)(1) of the Code, 66 Pa.C.S. § 1329(f)(1), permits an acquiring public utility to accrue Allowance for Funds Used During Construction (AFUDC) on post-acquisition improvements that are not included in a DSIC, from the date the cost was incurred until the earlier of the following events: the asset has been in service for a period of four (4) years, or the asset is included in the acquiring utility's next base rate case. In the Application, PAWC requested permission to accrue AFUDC on post-acquisition improvements that are not included in a DSIC. PAWC St. No. 1, p. 4. The Settlement makes clear that the other Joint Petitioners do not oppose this request and they reserve their rights to litigate their positions fully in future rate cases. Settlement ¶ 36.

In addition, Section 1329(f)(2) of the Code, 66 Pa.C.S. § 1329(f)(2), permits an acquiring public utility to defer depreciation on its post-acquisition improvements that are not included in a DSIC. In the Application ¶¶ 2, 44, PAWC requested permission to defer depreciation on post-acquisition improvements that are not included in a DSIC. PAWC St. No. 1, p. 4. The Joint Petitioners do not oppose this request and they reserve their rights to litigate their positions fully in future rate cases. Settlement ¶ 36.

k. Transaction and Closing Costs

Consistent with 66 Pa.C.S. § 1329(d)(1)(iv), PAWC explains that the Settlement acknowledges that PAWC may, in the first base rate case that includes the Upper Pottsgrove System, include the Transaction and Closing Costs incurred in this proceeding.

PAWC notes that the Sanitary Sewer Asset Purchase Agreement By and Between Upper Pottsgrove Township, Montgomery County as Seller and Pennsylvania-American Water Company as Buyer, dated as of April 28, 2020, Section 3.01, required PAWC to pay a \$90,000 deposit on April 28, 2000 toward Upper Pottsgrove's engineering and legal fees related to the Transaction. That amount will be deducted from the amount to be paid at Closing, but if Closing does not occur, Upper Pottsgrove will only refund the amount (if any) that it has not spent on engineering and legal fees. The Settlement, ¶ 38, provides that, if the Transaction does not Close, and PAWC does not recoup of the \$90,000 deposit, PAWC will not seek to recover any unrecouped portion of the deposit from ratepayers.

The Settlement also requires PAWC to separately identify, in its next base rate case, the amount of outside legal fees included in PAWC's transaction and closing costs on the Transaction. The amounts expended by PAWC on behalf of Upper Pottsgrove must also be separately identified. The OCA, I&E and OSBA reserve the right to challenge the reasonableness, prudence, and basis for these fees.

l. Low Income Program Outreach

The Settlement requires PAWC to notify Upper Pottsgrove customers of its low income programs. The notice is to include a description of the available low income programs, participation eligibility requirements, and PAWC's contact information. This notice must be provided within the first billing cycle following Closing and in a welcome letter to Upper Pottsgrove's customers and inform Upper Pottsgrove customers that they are being converted to monthly billing.

m. Approval of Section 507 Agreements

In this proceeding, PAWC explains it seeks Commission approval, pursuant to Section 507, of: (i) the APA; (ii) the Sewage Treatment Service Agreement between Upper Pottsgrove Township, Pottstown Borough Authority and Borough of Pottstown; and (iii) the Joint Sewage Transportation Agreement between Upper Pottsgrove Township and Lower

Pottsgrove Township. PAWC asserts that approval of these agreements is necessary to allow PAWC to provide service to the service territory currently served by Upper Pottsgrove.

PAWC explains that the Settlement provides that the STSA (and the other contracts listed in Schedule 4.13 of the APA) are material to the Commission's approval of the Transaction. As a condition of Closing and subject to 66 Pa.C.S. § 703(g), PAWC will require Upper Pottsgrove to obtain the assignment of these material contracts. Settlement ¶ 43. PAWC notes this provision ensures that the STSA is assigned prior to Closing.

n. Other Necessary Approvals

The Settlement requests that the Commission issue any other approvals or certificates that might be necessary to carry out PAWC's acquisition of the Upper Pottsgrove System.

o. Miscellaneous

The Settlement is conditioned upon the Commission's approval of the terms and conditions contained in the Settlement without modification. If the Commission modifies the Settlement, any Petitioner may elect to withdraw from the Settlement and may proceed with litigation and, in such event, the Settlement shall be void and of no effect. The Joint Petitioners acknowledge and agree that the Settlement, if approved, shall have the same force and effect as if the Joint Petitioners had fully litigated this proceeding.

ii. OCA's Position

a. Approval of the Application

The OCA submits that the Settlement provides a reasonable resolution of the issues following the OCA's review of the Application.

b. Tariff

OCA notes that PAWC submitted a *pro forma* tariff with the application, which includes all rates, rules, and regulations regarding conditions of PAWC's wastewater service and requested that the tariff become immediately effective upon closing of the transaction.

c. Fair Market Value for Ratemaking Rate Base Purposes

OCA notes the Settlement adopts a \$13,750,000 ratemaking rate base for the Township's system. As the requested ratemaking rate base is less than the average of the UVE appraisals<sup>8</sup>, in furtherance of settlement, the OCA does not oppose PAWC's request.

d. Fair Market Value Appraisals

OCA notes, in Paragraph No. 28, PAWC agreed that in future acquisitions by PAWC under 66 Pa.C.S. § 1329, PAWC will clearly document the date on which it engaged or otherwise authorized its utility valuation expert to perform the fair market value appraisal of the system.

e. Engineering Assessment

PAWC agreed that in any future Section 1329 applications it submits, the engineering assessment required under 66 Pa.C.S. § 1329(a)(4) will designate the condition of the inventory and assets appraised, appraising categories of system assets in poor, fair, good, or very good condition. OCA submits this settlement provision helps to ensure that the engineering assessment required under the Code contains sufficiently detailed information regarding the acquired plant and is in the public interest.

---

<sup>8</sup> PAWC St. 3 at 7.

f. Easements, Rights of Ways and Liens

OCA notes that, as a condition of Closing, PAWC will require the Township to obtain clear title to the sewer line, of which Shadeland claims ownership in its Petition to Intervene, by dedication to the Township, determination of a court of competent jurisdiction that dedication is not necessary, or other evidence reasonably satisfactory to PAWC.

g. Inflow and Infiltration Study

OCA notes that PAWC has agreed to complete an Inflow and Infiltration study of the Upper Pottsgrove System following Closing and provide the results of that study to the parties upon completion. Additionally, the costs of the I&I study will be subject to prudent review when they are claimed for recovery in base rates, which protects ratepayers from excessive costs.

h. Rates

OCA confirms that PAWC will provide, in the first base rate case in which it includes the Township's assets in rate base, a cost of service study that removes all costs and revenues associated with the operations of Upper Pottsgrove wastewater system, as well as a separate cost of service study for the Upper Pottsgrove system. OCA notes these studies will provide information to establish rates that reflect the costs for the Upper Pottsgrove system.

OCA further notes that Paragraph 34(c) provides, in the first rate case in which PAWC includes the Township's assets in rate base, PAWC will propose to move the Township's system to its cost of service (based on the separate cost of service study) based on a separate cost of service study for Upper Pottsgrove's system; provided, that PAWC will not be obligated to propose Upper Pottsgrove wastewater rates in excess of PAWC's proposed Rate Zone 1 system-average rates.<sup>9</sup>

---

<sup>9</sup> The current average Upper Pottsgrove rate is \$65.00 per month based on 3,630 gallons of monthly usage. App. A-18-d. The current average PAWC rate for a residential wastewater customer using 3,360 gallons per month in Zone 1 is \$64.93. Application, App. A-18-d.

OCA submits these Settlement terms will provide a means for the parties to use the cost of service data to set rates for the Township's customers that reflect the cost of service, or movement towards the cost of service for the Township's customers and that may differ, as appropriate, from rates established for other wastewater customers. The terms will also apply the ratemaking principle of gradualism to rates set for customers in the Upper Pottsgrove's service area.

i. Distribution System Improvement Charge

OCA notes that the Settling Parties agreed that PAWC may apply the DSIC to customers in the Township's service area prior to the first base rate case in which the system's plant in service is incorporated into rate base pursuant to Section 1329(d)(4) if certain conditions are met. In particular, Paragraph 35 states that PAWC will revise its LTIP to include the Township of Upper Pottsgrove and related projects before it begins charging the DSIC to those customers. Paragraph 35 provides PAWC's commitment that it will not reprioritize other existing capital improvements that the Company already committed to undertake in other service areas. According to OCA, this provision helps to ensure that projects for the Township's customers should be in addition to, and not reprioritize, any capital improvements that PAWC was already committed to undertake for existing customers and for Township customers to begin contributing, up to 5% of their total wastewater bill, toward DSIC-eligible capital projects.

j. Allowance for Funds Used During Construction

Under the terms of the settlement, 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 Upper Pottsgrove's wastewater system assets, rather than an unspecified future case as proposed by PAWC. Further, the Joint Petitioners 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. OCA notes that its assent to Paragraph 36 should not be construed to operate as preapproval of PAWC's future requests. Settlement Paragraph 36

preserves all parties' positions in future rate cases, including the ability to challenge the reasonableness and prudence of the Company's claims.

k. Transaction and Closing Costs

OCA explains that the Settlement reflects the agreement that PAWC be permitted to claim transaction and closing costs associated with the Transaction but reserves the parties' rights to litigate their positions fully in future rate cases when this issue is ripe for review. OCA further notes that the Joint Petitioners' assent to this term should not be construed to operate as their preapproval of PAWC's request.

Paragraph 38 reflects PAWC's agreement that, if the transaction does not close, and PAWC does not recoup all its \$90,000 engineering fee/legal fee deposit from Upper Pottsgrove as referenced in Section 3.01 of the APA, then PAWC will not seek to recover any unrecouped portion of the deposit from its ratepayers in any proceeding, preventing PAWC from recovering any unrecouped portion of the engineering fee/legal deposit fee from ratepayers.

OCA further notes that Paragraph 39 reflects PAWC's agreement to separately identify any outside legal fees included in its transaction and closing costs pursuant to the APA between PAWC and Upper Pottsgrove and specify amounts expended by PAWC on behalf of the Township.

1. Low Income Program Outreach, Settlement

PAWC has agreed to provide information about PAWC's low income programs in a welcome letter to the Township of Upper Pottsgrove system customers and in a bill insert in the first billing cycle following Closing. OCA explains the information will describe the available programs, eligibility requirements and contact information for PAWC. PAWC further agreed to ongoing- targeted outreach to its Upper Pottsgrove-area customers regarding its low income program.

m. Approval of Section 507 Agreements

Under Paragraph 42 of the Settlement, PAWC's request for approval of Section 507 agreements is permitted. The OCA does not join in this provision but, in furtherance of settlement, does not oppose PAWC's request.

Under Paragraph 43 of the Settlement, PAWC will require Upper Pottsgrove to obtain assignments of the contracts listed in Schedule 4.13 of the APA including but not limited to the STSA between Upper Pottsgrove Township, Authority and Borough, as a condition of Closing. These provisions help to ensure that Closing will not occur until all conditions that would materially alter PAWC's Application are met.

n. Other Necessary Approvals

OCA notes the Settlement acknowledges that 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.

iii. I&E's Position

a. Approval of the Application

I&E notes the Upper Pottsgrove Township assets consist of a sanitary sewer collection only system that discharges all collection to the Pottstown Borough Authority collection system for final treatment.<sup>10</sup> In total, through this acquisition, PAWC is seeking to provide service to Upper Pottsgrove's approximately 1,447 wastewater customers.<sup>11</sup> According to I&E, the record supports the findings that PAWC is technically, legally, and financially fit to

---

<sup>10</sup> PAWC Application, App. A-14, St. No. 2, p. 2.

<sup>11</sup> PAWC Application, ¶ 8.

acquire the Upper Pottsgrove's wastewater services,<sup>12</sup> and no party has refuted those claims in the record.<sup>13</sup> Additionally, PAWC's Application will provide affirmative public benefits. The affirmative public benefits are fully set forth in PAWC's direct testimony, and include, *inter alia*, further the goal of regionalizing water systems, employing PAWC's resources and engineering expertise to address operational challenges and to provide environmental benefits to customers, and providing acquired customers with enhanced service.<sup>14</sup>

b. Tariff

I&E notes the Joint Petitioners have agreed that the *pro forma* tariff supplement, which is attached to PAWC's Application as Amended App. A-12, shall be permitted to become effective immediately upon Closing of the Transaction.

c. Fair Market Value For Ratemaking Rate Base Purposes

I&E did not propose any adjustments to the UVE fair market value appraisals offered in this proceeding, and I&E did not propose any adjustments to the recommended rate base value of \$13.75 million.

d. Fair Market Value Appraisals

I&E submits that PAWC's commitment to clearly document the date on which it engaged or otherwise authorized its UVE to perform the fair market value appraisal of the system is essential to ensuring PAWC's compliance with 66 Pa.C.S. § 1329 (a)(5) in a manner that is clearly demonstrable to parties and to the Commission. 66 Pa.C.S. § 1329 (a)(5) requires that each UVE provide the completed appraisal to the acquiring public utility or entity and

---

<sup>12</sup> PAWC Application, App. A-14, St. No. 1, pp. 17-18.

<sup>13</sup> Although neither PBA/BP nor Shadeland contested fitness, to the extent that their claims could be construed as a fitness challenge, I&E avers that this Settlement operates to address them as a condition precedent to Closing.

<sup>14</sup> PAWC, St. No. 1, pp. 13-15.

selling utility within 90 days of execution of the service contract. I&E notes its investigation was initially unable to confirm that PAWC's UVE, AUS Consultants, complied with the required timeline, because PAWC's Application contained an Agreement for Valuation Consulting Services entered on April 1, 2020 between AUS and PAWC,<sup>15</sup> but the AUS fair market value appraisal report it contained did not appear to be provided to PAWC until October 23, 2020.<sup>16</sup> Accordingly, I&E was concerned that the apparent 205 days between AUS's engagement and the provision of its appraisal placed it outside the scope of Section 1329's clear statutory requirement that the appraisal not be provided more than 90 days from the service contract date. During the course of its investigation, I&E asserted it was able to confirm that AUS Consultants had, in fact, submitted its appraisal to PAWC within the prescribed 90-day timeline. In order to prevent similar confusion, to remove uncertainty, and for ease of reference in the future, PAWC has agreed to begin clearly documenting the date on which it engages its UVEs to perform fair market value appraisals in Section 1329 cases.

e. Engineering Assessment

I&E explains that the engineering assessment study in this case, submitted by LTL Consultants and AUS Consultants,<sup>17</sup> did not provide a designation of the condition of the inventory and assets appraised, which has been available in other Section 1329 cases and relied upon by UVEs, and by I&E in its investigation. I&E avers that absent such designation, questions are raised about what assumptions each UVE made about asset conditions in his/her corresponding fair market value appraisal. I&E envisions the possibility that absent the engineering report designating assets' condition, each UVE may make independent and conflicting determinations about the condition that would result in incongruent valuation assumptions and results.

---

<sup>15</sup> PAWC Application, App. A-5.1 (pdf pages 592-600).

<sup>16</sup> PAWC Application, App. A-5.1 (pdf page 4).

<sup>17</sup> PAWC's Application, App. A-15(a).

f. Easements, Rights Of Ways And Liens

1. General Terms

I&E notes that the public interest would be harmed if PAWC paid a purchase price that assumed that all rights necessary to operate Upper Pottsgrove would be transferred, and at Upper Pottsgrove's cost, and such action did not occur. To protect against this possibility, I&E supports the protection measure of the escrow account that would be imposed upon Upper Pottsgrove to ensure that any right not transferred at Closing must be financially accounted for via payment to the escrow account. Additionally, the public interest is protected because this term provides an additional layer of accountability that would not exist if PAWC and Upper Pottsgrove would ever mutually decide to waive the applicable sections of the APA that bind it to deliver good and marketable title to all property necessary to use and access the acquired assets.<sup>18</sup>

Additionally, I&E explains that PAWC has committed to providing I&E, OCA, and OSBA with an update on the status of the transfer of real property rights related to the system within 30 days of advance of the anticipated Closing Date. I&E will have a mechanism in place to gauge Upper Pottsgrove Township's progress in meeting its property transfer obligations. Through these reporting mechanisms, I&E may take any action that may be warranted and available to ensure that PAWC's ratepayers are not paying for property rights that are not obtained or paying any costs associated with obtaining those rights while PAWC will be able to monitor any missing easements to either ensure that it does not encounter access issues and/or develop a plan to address access.

2. Shadelands Sewer Line Dispute

With respect to Paragraphs 7(a)-(b) of the Settlement, which memorializes PAWC's position regarding Upper Pottsgrove's need to obtain clear title to the sewer line that

---

<sup>18</sup> PAWC's Application (App. A-24-a), Section 4.16, pp. 25-26.

Shadeland purports to own, I&E submits that these terms are imperative for protection of the public interest and necessary to ensuring the integrity of the Section 1329 process that underlies PAWC's Application. I&E explains these terms of the Settlement indicate that PAWC will require, as a condition of Closing, that Upper Pottsgrove obtain clear title to the sewer line at issue, by dedication to Upper Pottsgrove, determination of a court of competent jurisdiction that dedication is not necessary, or other evidence reasonably satisfactory to PAWC. I&E notes that Upper Pottsgrove's obligation to convey all acquired assets, as defined in the APA,<sup>19</sup> appears to include the sewer line that Shadeland purports to now own because it includes all assets developed for use in the system, including collection system mains. Therefore, from I&E's perspective, ensuring that Upper Pottsgrove obtains clear title to the line at issue as a condition precedent to Closing is necessary and appropriate.

I&E notes that according to the Shadeland, it owns approximately 30 acres of land known as Sprogel's Run, where it constructed sanitary sewer lines at its own expense. Shadeland alleges that the costs for constructing the sewer lines, which it claims have never been dedicated to Upper Pottsgrove Township, are \$1,059,700, and that approximately 91 customers are currently connected to the private sanitary sewer pipe which is used to serve them as Upper Pottsgrove customers.<sup>20</sup> Although I&E's position is that any of Shadeland's monetary claims against Upper Pottsgrove are not jurisdictional, I&E notes that it is axiomatic that Upper Pottsgrove Township cannot sell to PAWC that which it does not own. I&E avers that as the seller, Upper Pottsgrove has the obligation to convey all system property that PAWC bargained to purchase so that ratepayers are not deprived of the benefit of PAWC's bargain. Here, PAWC admits that the UVEs' appraisals included the sewer line at issue,<sup>21</sup> but it alleges that the original cost of the sewer line, claimed to be \$283,000, even if excluded, would not impact the \$13.75 million ratemaking ratebase value proposed in this case.<sup>22</sup>

---

<sup>19</sup> PAWC's Application, App.-A-24-a, pp. 15-16, Section 2.01.

<sup>20</sup> Shadeland St. No. 1, pp. 1-4.

<sup>21</sup> PAWC St. No. 1-R, p. 6.

<sup>22</sup> *Id.*

Because I&E has not had an adequate opportunity to investigate PAWC's claim within the time available for this case, I&E takes no position on the valuation claim; however, in I&E's view, it is not determinative here. Instead, what I&E views as determinative, is that without obtaining clear title and ownership to the sewer line, PAWC may become obligated to serve customers in the Sprogel's Run development without having sufficient facilities or access to providing such service. Not only is such an outcome contrary to the public interest, but it may also compromise PAWC's ability to meet its obligation to provide safe, adequate, and reliable service.<sup>23</sup> This is an outcome that I&E could not support, and therefore, the Settlement terms that address this issue and prevent that outcome were critical terms for I&E.

I&E stresses, as established in its testimony,<sup>24</sup> that PAWC has committed to conditioning any Closing of its Transaction upon Upper Pottsgrove having clear title to the sewer line at issue. I&E submits that this commitment will place the onus of obtaining any missing property right upon the seller, Upper Pottsgrove Township. It is not in the public interest for PAWC's ratepayers to assume any risk of missing property rights, nor is it in their interest to fund litigation to obtain property rights that the seller purported to convey as part of the APA.

Because these Settlement terms will both protect captive ratepayers from getting less than they are paying for and prevent them from being subject to the monetary dispute of two non-jurisdictional entities, Shadeland and Upper Pottsgrove Township, I&E views them as comprehensively resolving Shadeland's dispute to the extent possible in this acquisition case. I&E agrees with Shadeland's apparent position that the Township cannot sell property it does not own. However, because the Settlement addresses that concern by ensuring that PAWC will not Close without Upper Pottsgrove providing title to the disputed sewer line, it is I&E's position that the only portion of Shadeland's opposition that survives the Settlement are those for monetary claims that are outside of the Commission's jurisdiction. Accordingly, I&E submits that the Settlement addressed and resolves Shadeland's opposition to the extent available in this proceeding.

---

<sup>23</sup> 66 Pa.C.S. § 1501.

<sup>24</sup> PAWC St. No. 1-R, p. 6.

g. Inflow and Infiltration Study

I&E explains that generally infiltration is groundwater entering sanitary sewers through defective pipe joints and broken pipes. Additionally, inflow is generally comprised of water entering sanitary sewers from inappropriate connections. Together, inflow and infiltration may directly impact both public health and the cost to serve. In this case, I&E's investigation revealed that a recent I&I study was not available for the Upper Pottsgrove system, and that PAWC had identified a need to perform one after the acquisition Closed. I&E notes that it fully supports PAWC's willingness to perform the I&I study, because there is no way of knowing the existence and extent of any I&I issue unless a study is performed. I&E explains that although ideally, the I&I study would have been performed prior to the acquisition, so that its results could inform the valuations in this case, there was no requirement that Upper Pottsgrove provide one as part of the Section 1329 process. Additionally, it would have been impracticable for PAWC to attempt to undertake the study without owning the assets. Regardless, PAWC's commitment to performing the study is important because depending on the results, it could trigger the need for remediation work that has not yet been identified.

h. Rates

I&E took no position regarding the rates of Upper Pottsgrove's customers as, for purposes of the acquisition, PAWC proposes to adopt the rates of Upper Pottsgrove at the time of Closing, and this is consistent with Section 1329 provisions.<sup>25</sup> However, I&E reserves the right to address Upper Pottsgrove's rates in future rate proceedings.

Additionally, at the time of its next base rate case that includes Upper Pottsgrove's wastewater system assets, PAWC has agreed to provide a cost-of-service study that removes all costs and revenues associated with the operations of the Upper Pottsgrove. At the same time, PAWC also agrees to provide a separate cost-of-service study for the Upper Pottsgrove system.

---

<sup>25</sup> 66 Pa.C.S. § 1329(d)(v).

I&E explains the information that Upper Pottsgrove provided about its rates triggered concerns from I&E about whether those rates were at all tied to the actual cost of serving customers. Upper Pottsgrove's Commission Chairman, Trace Slinkerd, testified that "rates have only been increased when necessary" and he also explained that rates have only been increased four times over the last twenty years.<sup>26</sup> The rates, which are approved through a township ordinance, were billed using a flat dollar amount.<sup>27</sup> I&E's investigation could not conclude with any determination that the Upper Pottsgrove Township rates were based on cost of service; accordingly, I&E's position was that the uncertainty triggered a need for PAWC to perform a cost-of-service study to inform future ratemaking.

I&E submits that the cost-of-service study will protect PAWC, its customers, the parties to this proceeding and the Commission. Specifically, because the record here cannot establish the basis for Upper Pottsgrove's existing rates, the results of the cost-of-service study that PAWC has committed to perform will provide it with information necessary to determine an appropriate level of rates in the future. The cost-of-service study will benefit PAWC's ratepayers as well, because if PAWC's Application is approved, PAWC's existing customers will bear the rate impact. However, without a cost-of-service study, the Commission's ability to evaluate the rate impact of the acquisition upon existing PAWC customers and its options of addressing that impact to provide any appropriate relief to existing customers, could be compromised. I&E further explains PAWC's cost-of service-study commitment will serve the public interest because a cost-of-service study can establish the existence and extent of subsidization (inter and intra-class) and assist in determining the appropriate amount of revenue requirement that is reasonable to be shifted from the wastewater customers to the water customers.

---

<sup>26</sup> Upper Pottsgrove St. No. 1, at 9-10.

<sup>27</sup> *Id.* at 9.

i. Distribution System Improvement Charge

I&E reserves the right to address these issues in future proceedings, including base rate, LTIP, and DSIC proceedings, when additional information and facts are available, and when these issues are ripe for review. While I&E still reserves its rights, I&E nevertheless opines that this term serves the public interest because PAWC has agreed that existing commitments will not be re-prioritized as a result of this term.

j. Claims For AFUDC And Deferred Depreciation

I&E explains that any claims that PAWC may make to accrue allowance for funds used during construction and deferred depreciation for 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 Upper Pottsgrove's wastewater system assets. I&E stresses that the Joint Petitioners agree that they reserve their rights to litigate their positions fully in future rate cases. I&E endorses this term because, while it recognizes the potential for PAWC to invoke portions of Section 1329 related to post-acquisition projects,<sup>28</sup> it also empowers parties to review PAWC's proposed treatment of those projects in a future base rate case. Preserving the ability to litigate any of PAWC's proposed AFUDC and deferred depreciation treatment protects the public interest by ensuring that interested parties are not hindered in developing a full and complete record for the Commission on this issue when additional information is available and ratemaking issues are ripe for determination.

k. Transaction and Closing Costs

I&E submits that the Transaction and Closing Cost terms are consistent with ensuring that PAWC will only be permitted to recover prudently incurred costs from ratepayers. Additionally, these terms also ensure that I&E will be able to challenge the basis of any claimed Upper Pottsgrove legal fees, meaning that I&E has not forfeited its position that Section 1329

---

<sup>28</sup> 66 Pa.C.S. § 1329(f).

does not permit the acquiring utility to recover the seller's transaction and closing costs. Through this term, the public interest is protected because although PAWC does not appear to now be incurring any legal fees on behalf of Upper Pottsgrove Township, I&E has preserved its ability to challenge the permissibility of any claims that PAWC may make for Upper Pottsgrove's legal fees in its next base rate case, which is consistent with I&E's obligation to enforce the Code.

I&E notes that PAWC agreed to pay a deposit of \$90,000 to Upper Pottsgrove Township as a deposit to be used for its legal and engineering fees.<sup>29</sup> Because I&E's position is that Section 1329 does not permit PAWC to assume and pass along Upper Pottsgrove's legal fees, it was essential to ensure that if the Transaction is not consummated, as would be necessary for PAWC to recoup its deposit in the form of a purchase price reduction,<sup>30</sup> that PAWC would never seek to recover any unrecouped portion of the deposit from its ratepayers. By way of the above term, PAWC has provided such assurance, and I&E avers that it is necessary and proper to protect ratepayers from unwarranted and imprudent costs, and that avoidance of such costs is in the public interest.

Furthermore, PAWC agreed that if it ever does make a claim for any Upper Pottsgrove legal fees in a future base rate case, it will separately identify those fees. I&E notes it is imperative that any claimed fees are readily identified to ease the administrative burden of uncovering this information when PAWC files its next rate case, which may be several years from now and be complicated by the complexity of the resulting rate investigation. Accordingly, these combined commitments will protect PAWC's ratepayers from bearing the burden of Upper Pottsgrove Township's legal fees.

---

<sup>29</sup> PAWC St. No. 3, at 16.

<sup>30</sup> PAWC's Application, App. A-24(a), Section 30.1(c).

1. Low Income Program Outreach

PAWC has agreed to send a Welcome Letter to the newly acquired Township customers, including information regarding its low-income programming, including a description of programming, eligibility guidelines, and PAWC's contact information., to be sent to Upper Pottsgrove customers within the first billing cycle following closing which will include information regarding the conversion from quarterly billing<sup>31</sup> to monthly billing for their sewer service. I&E fully supports this term, as its investigation identified a concern regarding whether Upper Pottsgrove's customers were explicitly informed of the timing change so that they understood and could anticipate the change to monthly billing.

m. Approval Of Section 507 Agreements

I&E notes that PAWC's Application clearly acknowledged that Upper Pottsgrove had not yet attained approval to assign its sewerage treatment contract with the Authority and Borough.<sup>32</sup> Because PAWC expressly disclosed that the assignment had not been granted, I&E's investigation in this case examined that failure of assignment and determined that it was a defect that would need to be cured before any closing of this Transaction should occur. I&E explains that the Authority owns a wastewater treatment facility and the Borough leases and operates that facility which Upper Pottsgrove depends upon for treatment of its wastewater.<sup>33</sup> I&E notes there can be no credible dispute that wastewater treatment is essential for the operation of the Upper Pottsgrove system, and PAWC concedes that if the acquisition proceeds to Closing, it will need treatment services from the Authority and Borough.<sup>34</sup> However, the Authority and Borough are unwilling to consent to assignment of its Upper Pottsgrove contract to PAWC unless and until certain terms are agreed upon and it receives payment of an outstanding obligation that Upper

---

<sup>31</sup> PAWC St. No. 3, at 16.

<sup>32</sup> PAWC Application, App. A-24-a, Schedule 4.13.

<sup>33</sup> PBA/BP St. No. 1, at 2.

<sup>34</sup> PAWC St. No. 1-R, at 11.

Pottsgrove has allegedly incurred, estimated to be \$470,184.22.<sup>35</sup> The Township disputes that it owes PBA/BP the amount alleged, and it initiated an injunctive action in the Court of Common Pleas of Montgomery County asking the Court to order the Authority and Borough to consent to the assignment.<sup>36</sup>

I&E asserts that as the seller, the Township has the obligation to convey all contracts necessary for PAWC's operation of the system, and all parties agree that treatment services are an essential component of sewer service. The Township committed to transferring to PAWC all contracts necessary to operate the system;<sup>37</sup> accordingly, I&E submits it is clear that this transaction was predicated, and negotiated, with the expectation that Upper Pottsgrove's treatment contract with the Authority and Borough would be assigned to PAWC. I&E concludes the Transaction should not Close without the assignment, because PAWC will not be able to meet its obligation to provide safe, adequate and reliable service to acquired customers absent use of Authority and Borough's treatment services.<sup>38</sup> This is an outcome that I&E could not support, and therefore, the Settlement terms that address this issue and prevent that outcome were critical terms for I&E.

I&E stresses that PAWC has committed to conditioning the Closing upon obtaining the assignment of the contract with the Authority and Borough. I&E submits this term will appropriately place the onus of obtaining the assignment upon the Township.

I&E notes that it agrees with the Authority and Borough's position that Upper Pottsgrove cannot assign its treatment contract to PAWC without the Authority and Borough's assent and that adequate service requires wastewater collection, treatment, and disposal services. However, I&E submits, because the Settlement addresses these concerns by ensuring that PAWC will not Close without the Township obtaining the ability to assign the Authority and Borough's

---

<sup>35</sup> PBA/BP St. No. 1, p. 6.

<sup>36</sup> Upper Pottsgrove St. No. 1, pp. 8-9.

<sup>37</sup> PAWC Application, App. A-24(a), pp. 15-16, Section 2.01.

<sup>38</sup> 66 Pa.C.S. § 1501.

contract to PAWC, the only portion of the Authority and Borough's opposition that survives the Settlement are those for monetary claims that are outside the Commission's jurisdiction. I&E submits that the Settlement addressed and resolves the Authority and Borough's position to the extent available in this proceeding.

n. Other Necessary Approvals

I&E supports the Settlement's provision that issuance of any necessary approvals or certificates necessary to carry out the transaction is appropriate and warranted.

iv. OSBA's Position

a. Approval of the Application

Following investigation, the OSBA is satisfied that PAWC has demonstrated compliance with 66 Pa.C.S. §§ 1102(a), 1103(a), and 1329 in its Application filed on November 24, 2020, as modified by the Settlement.

b. Tariff

As the OSBA supports the approval of PAWC's acquisition of Upper Pottsgrove's wastewater system, it also agrees as part of the Settlement that the *pro forma* tariff submitted with the Application shall be permitted to become effective immediately upon closing.

c. Fair Market Value for Ratemaking Rate Base Purposes

OSBA determined that the ratemaking rate base figure was appropriate pursuant to 66 Pa.C.S. § 1329(c)(2) as this figure, which is the purchase price, is less than the fair market value appraisal of the Upper Pottsgrove wastewater system.

d. Fair Market Value Appraisals

The Settlement requires PAWC, in future acquisitions under 66 Pa.C.S. § 1329, to clearly document the date on which it engaged or otherwise authorized its UVE to perform the fair market value appraisal of the system so as to demonstrate compliance with 66 Pa. C.S. § 1329(a)(5). The OSBA believes this provision benefits ratepayers as it is a forward-looking requirement that will simplify issues in future acquisitions by the Company under 66 Pa.C.S. 1329.

e. Engineering Assessment

OSBA determined that PAWC's commitment in the *Settlement* to ensure that, in its future Section 1329 applications, the engineering assessment required will designate the condition of the appraised inventory and assets will benefit ratepayers by simplifying issues in future cases.

f. Easements, Rights of Way, and Liens

OSBA supports the provisions pertaining to easements, rights of way, and liens. OSBA explains these provisions require PAWC to achieve transfer of all real property rights as required under the APA while simultaneously providing flexibility to PAWC to close without the transfer of all real property rights so long as an escrow is created to obtain post-closing real property transfers. PAWC must also provide updates at certain times to I&E, OCA, and OSBA regarding the status of the transfer of real property rights.

g. Inflow and Infiltration Study

OSBA believes that PAWC's commitment to complete an I&I study of the Upper Pottsgrove wastewater system following closing will provide OSBA with greater information regarding the operation of the wastewater system and will assist these offices in discharging their duties to the public.

h. Rates

With regard to the Rates section of the Settlement, OSBA accepts the terms enumerated thereunder because it preserves OSBA's right to "assert[ ] any position or rais[e] any issue regarding Upper Pottsgrove's rates in a future PAWC proceeding." Furthermore, this section requires PAWC to submit a separate cost-of-service study for Upper Pottsgrove's wastewater system in its next base rate proceeding, and to propose to move the Upper Pottsgrove wastewater system customers to cost-of-service or PAWC's proposed Zone 1 system-average rates, whichever is lower. The OSBA is satisfied that these provisions protect PAWC's current customers from subsidizing the newly acquired customers on the Upper Pottsgrove wastewater system.

i. Distribution System Improvement Charge

OSBA does not oppose the provisions in the Settlement related to PAWC's ability to collect a distribution system improvement charge prior to the first base rate case in which the Upper Pottsgrove service area plant-in-service is incorporated into rate base.

j. Claims for AFUDC and Deferred Depreciation

OSBA believes that the conditions in the Settlement related to AFUDC and Deferred Depreciation are reasonable as it creates a process to address claims for AFUDC and deferred depreciation related to post-acquisition improvements not recovered through the DSIC in PAWC's first base rate case that includes Upper Pottsgrove's wastewater system assets. Furthermore, under this section, OSBA reserves its right to litigate its positions fully in future rate cases when these issues are ripe for review.

k. Transaction and Closing Costs

OSBA supports the provisions in the Settlement under this section as these provisions preserve important rights for OSBA and the customers it is charged with protecting.

This section provides that OSBA reserves its rights to litigate its position fully in future rate cases when the issue of Transaction and Closing Costs associated with this transaction is ripe for review; and reserves the right to challenge the reasonableness, prudence, and basis for the inclusion of outside legal fees, if any, in PAWC's Transaction and Closing Costs.

l. Low Income Program Outreach

OSBA does not oppose these provisions. These provisions relate to residential customers, and therefore do not address the class of customers that OSBA is charged with representing.

m. Approval of Section 507 Agreements

OSBA supports this provision that the Commission shall issue Certificates of Filing or approvals for the enumerated agreements in the Settlement pursuant to 66 Pa.C.S. § 507.

n. Other Necessary Approvals

OSBA supports this provision that the Commission shall issue any other necessary approvals to complete the acquisition of the Upper Pottsgrove wastewater system by PAWC.

o. Miscellaneous

There are no remaining provisions or miscellaneous issues that OSBA wishes to address in support of the Settlement.

v. Township's Position

a. Approval of the Application

The Township asserts that PAWC has demonstrated that it has the managerial, technical and financial resources to continue to operate, maintain and improve the Upper Pottsgrove System in a safe, reliable and efficient manner now and in the future. PAWC Statement No.1, p.14. The Township also contends that Upper Pottsgrove customers will benefit from PAWC's technical experience and fitness in deploying resources towards capital improvements. PAWC plans to make many capital improvements during the five years after Closing and committed to contribute millions of dollars to improve the System. PAWC Statement No. 2, p. 7. The Township explains that PAWC is in a better position than Upper Pottsgrove to maintain environmental compliance for the System and can draw upon a much broader range of engineering and operational experience, as well as deeper financial resources, to address the environmental compliance challenges of the System. PAWC Statement No. 1, p. 14.

The Township submits that its customers will benefit from PAWC's proven and enhanced customer service including its customer assistance program, PAWC Statement No. 1, p. 15, as well as access to PAWC's team of experienced water and wastewater professionals. PAWC Statement No. 2, p. 8. Upper Pottsgrove Statement No. 1, pp. 4, 9. The Township further asserts the Transaction will greatly improve the Township's financial condition and outlook by providing the Township with funds to pay down debt and fund unfunded pension liabilities which will in turn provide the Township with budgetary relief. Upper Pottsgrove Statement No. 1, p 3. Finally, the Township submits the Transaction could permit the Township administration to reallocate administration time to focus on other initiatives in Upper Pottsgrove, and increase the Upper Pottsgrove tax base through increased development opportunities. Upper Pottsgrove Statement No. 1, pp. 4 and 8-9.

b. Tariff

The Township did not specifically address the Tariff in this section of its statement in support of the settlement.

c. Fair Market Value for Ratemaking Rate Base Purposes

The Township explains that PAWC and Upper Pottsgrove agreed to use the procedure set forth in Section 1329 for the Transaction, with an agreed-upon ratemaking rate base of \$13,750,000. The Township concludes that, approving the Settlement is in the public interest because the Settlement furthers the legislative intent behind Section 1329.

d. Fair Market Value Appraisals

The Township did not specifically address this issue.

e. Engineering Assessment

The Township did not specifically address this issue.

f. Easements, Rights of Ways and Liens

The Township explains that the Settlement requires PAWC and Upper Pottsgrove Township to continue to work to achieve the transfer of all real property rights, including all real estate, easement rights, access to public rights-of-way, and liens required under the APA to be transferred to PAWC from Upper Pottsgrove by Closing. However, subject to the commitments and Settlement provisions discussed below, the Settlement gives PAWC discretion to Close without the transfer of all of the Real Property Rights, provided that an escrow is established from the Purchase Price to be used to obtain any post-Closing transfers of the Real Property Rights. Settlement ¶ 30.

The Township concludes that the resolution will also ensure that, after Closing, PAWC will be able to use the Shadeland line to provide continuity of service to customers in the service territory.

g. Inflow and Infiltration.

The Township did not specifically address this issue.

h. Rates

The Township concludes that the Settlement requires PAWC to charge rates after Closing that are equal to Upper Pottsgrove Township's existing rates until the PAWC's first base rate case during which PAWC has agreed to propose moving Upper Pottsgrove's customers' rates to the cost of service, provided however that such proposed rates will not be in excess of PAWC's proposed Rate Zone 1 system-average rates. Settlement ¶ 34(c). According to the Township, this protects PAWC's existing water and wastewater clients from potentially subsidizing Upper Pottsgrove's customers.

i. Distribution System Improvement Charge

The Township did not specifically address this issue.

j. Claims for AFUDC and Deferred Depreciation

The Township did not specifically address this issue.

k. Transaction and Closing Costs

The Township did not specifically address this issue.

1. Low Income Program Outreach

The Township notes that PAWC has agreed in the Settlement to send a notice to Upper Pottsgrove's wastewater customers within the first billing cycle following the Closing, to include, at a minimum a description of the available low income programs, eligibility requirements for participation in the programs, and PAWC's contact information, and informing Upper Pottsgrove customers that they are being converted to monthly billing. *Id.* ¶ 41. d 42.

m. Approval of Section 507 Agreements

According to the Township, the Settlement provides that the contracts listed in Section 4.13 of the APA (the Material Contracts), including but not limited to the STSA, are material to the approval of the Transaction by the Commission; and that PAWC will require, subject to 66 Pa.C.S. § 703(g), Upper Pottsgrove to obtain assignment of all Material Agreements as a condition of Closing. Settlement ¶ 43.

n. Other Necessary Approvals

The Township explains, although the Joint Petitioners do not believe any other approvals are necessary, this standard provision is included in the Settlement in case the Joint Petitioners inadvertently overlooked a required approval.

o. Miscellaneous

The Township notes that the Settlement is conditioned upon the Commission's approval of the terms and conditions contained in the Settlement without modification. If the Commission modifies the Settlement, any Petitioner may elect to withdraw from the Settlement and may proceed with litigation and, in such event, the Settlement shall be void and of no effect. The Joint Petitioners acknowledge and agree that the Settlement, if approved, shall have the same force and effect as if the Joint Petitioners had fully litigated this proceeding.

vi. Shadeland's Position

Shadeland did not submit a Statement in Support of Settlement utilizing common issues to be considered in this proceeding, but instead, provided a brief statement explaining that it agrees that approval of the Settlement Agreement is in the best interest of the public and parties involved and that it agrees to the condition described in Paragraph 31 of the Settlement Agreement and believes it is in the public interest since the condition will require the resolution of the Sewer Line ownership prior to PAWC's acquisition of Upper Pottsgrove Township's public sewer system. Shadeland explained that it has no objection to the remaining portions of the Settlement Agreement.

D. Discussion of Settlement Terms

i. Approval of the Application

Pursuant to Section 1103 of the Code, 66 Pa.C.S. § 1103, PAWC must demonstrate that it is technically, financially, and legally fit to own and operate the System. *Seaboard Tank Lines, Inc. 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, PAWC enjoys a rebuttable presumption that it possesses the requisite fitness. *South Hills Movers, Inc. v. Pa. Pub. Util. Comm'n*, 601 A.2d 1308, 1310 (Pa. Cmwlth. 1992). Although no party challenged PAWC's fitness, PAWC introduced extensive evidence demonstrating its technical, legal and financial fitness.

With respect to technical fitness, PAWC is the Commonwealth's largest water and wastewater provider, serving a combined population in excess of 2,400,000 and employing approximately 1,100 professionals with expertise in all areas of water and wastewater utility operations. PAWC St. No. 2, p. 8.

With respect to legal fitness, PAWC has a record of environmental compliance, a commitment to invest in necessary capital improvements and resources, and the experienced

managerial and operating personnel necessary to provide safe and reliable wastewater service to the existing customers of Upper Pottsgrove. PAWC St. No. 1, pp. 12, 15.

With respect to financial fitness, PAWC had total assets of approximately \$5.3 billion as of December 31, 2019, and a net income of approximately \$187 million for the 12 months ending December 31, 2019. PAWC St. No. 3, p. 5. In addition to positive operating cash flows, PAWC may obtain financing through a \$400 million line of credit, long term debt financing, and equity investments. PAWC St. No. 3, p. 6.

In addition to demonstrating fitness, PAWC must demonstrate that the Transaction and PAWC's ownership/operation of the Upper Pottsgrove System will "affirmatively promote the service, accommodation, convenience, or safety of the public in some substantial way." *City of York v. Pa. Pub. Util. Comm'n*, 449 Pa. 136, 151, 295 A.2d 825, 828 (1972). An acquisition provides an affirmative benefit if the benefits of the transaction outweigh the adverse impacts of the transaction. *Application of CMV Sewage Co., Inc.*, 2008 Pa. PUC LEXIS 950. When looking at the benefits and detriments of a transaction, the focus of the analysis must be on all affected parties, not merely a particular group or a particular geographic area. *Middletown Twp. v. Pa. Pub. Util. Comm'n*, 85 Pa. Cmwlth. 191, 482 A.2d 674 (1984).

As the Company explained, the Transaction, with the conditions described in the Settlement, as described in this Discussion Section, benefits all of the stakeholder groups impacted by the Transaction: the public-at large; the Township of Upper Pottsgrove (as seller of the System); the existing customers of Upper Pottsgrove's System; and the existing customers of PAWC. The Transaction benefits members of the public-at-large in that the Transaction promotes the Commission's policy favoring regionalization and consolidation of water and wastewater systems. 52 Pa.Code § 69.721(a); PAWC St. No. 1 p. 13. In addition, the Transaction benefits members of the public-at-large by promoting the Legislature's policy goals when it enacted Section 1329. PAWC St. No. 1, p. 15.

In addition to benefiting the public-at-large, the Transaction, as PAWC explained, benefits Upper Pottsgrove Township (as seller of the System). Among other things, the

Transaction will improve Upper Pottsgrove's financial condition and outlook, may enable it to reallocate its administrative time to focus on other initiatives and may increase Upper Pottsgrove's tax base through increased development opportunities. Upper Pottsgrove St. No. 1, p. 8-9.

As PAWC points out, the Transaction benefits Upper Pottsgrove's existing customers in the same way that it benefits all other members of the public-at-large. The Settlement also contains additional public benefits for Upper Pottsgrove Township's existing customers, and requires PAWC to provide information to Upper Pottsgrove's customers regarding PAWC's low-income programs within the first billing cycle following Closing and in a welcome letter to Upper Pottsgrove's customers. Settlement ¶¶ 40-41.

As the Company explained, The Transaction benefits PAWC's existing wastewater customers in the same way that it benefits all other members of the public-at-large, the Transaction will have no immediate rate impact on PAWC's existing wastewater customers, and any impacts on the rates of PAWC's existing customers would occur only upon Commission approval as part of a base rate proceeding. PAWC St. No. 3, p. 10.

b. Tariff

PAWC submitted a *pro forma* tariff with the application, which includes all rates, rules, and regulations regarding conditions of PAWC's wastewater service and requested that the tariff become immediately effective upon Closing of the Transaction. See Application at App. A-12.

c. Fair Market Value for Ratemaking Rate Base Purposes

PAWC and Upper Pottsgrove Township agreed to use the procedure set forth in Section 1329 for the Transaction. Section 1329 created a voluntary procedure for valuing a water or wastewater system being sold by a municipality or municipal authority to a public utility or other entity. In that procedure, the buyer and the seller each obtain an appraisal of the

system by a Commission-approved UVE. The ratemaking rate base of the selling utility is the lesser of: (1) the purchase price agreed-to by the parties, or (2) the fair market value of the selling utility (defined as the average of the two UVEs' appraisals). The ratemaking rate base of the selling utility is then incorporated into the rate base of the acquiring public utility during the acquiring public utility's next base rate case.

In the Settlement, the Joint Petitioners agreed that \$13,750,000 (the purchase price) will go into PAWC's rate base in its next rate case due to the acquisition of the System. Settlement ¶ 27. The agreed-upon ratemaking rate base of \$13,750,000 is supported by substantial record evidence.

Approving the Settlement is in the public interest because the Settlement furthers the legislative intent behind Section 1329. The Settlement allows a municipality desiring to monetize an asset for fair market value to do so. Second, by establishing a rate base for the System that is greater than what would have been allowed using traditional ratemaking principles, PAWC is willing to enter into the Transaction. Section 1329 would be ineffective if a willing seller would be unable to find a willing buyer. Finally, the Settlement allows the parties to the Transaction to obtain the necessary Commission approval in a timely manner, while protecting the existing customers of the acquiring public utility.

As the \$13,750,000 ratemaking rate base for the Township's system is less than the average of the UVE appraisals<sup>39</sup>, the proposal is appropriate.

d. Fair Market Value Appraisals

Section 1329(a)(5) of the Code, 66 Pa.C.S. § 1329(a)(5), requires each UVE to provide the completed appraisal to its client within ninety (90) days of executing the service contract. PAWC asserts its standard operating procedure is to execute an Agreement for Valuation Consulting Services before the Engineer's Assessment is completed (and therefore

---

<sup>39</sup> PAWC St. 3 at 7.

before the UVE can begin its appraisal). This Agreement with PAWC provides that the UVE will not begin performing services until the issuance of a notice to proceed.

The Settlement requires PAWC to clearly document the date on which it authorized its UVE to perform the fair market value appraisal of the system being appraised, so as to demonstrate compliance with 66 Pa.C.S. § 1329(a)(5).

Based on appraisals presented by PAWC and the Township (\$17,023,691 and \$17,617,000, respectively), PAWC sought a ratemaking rate base of \$13,750,000, which was the price PAWC agreed to pay for the Township's system.<sup>40</sup> The ratemaking rate base proposed by PAWC and adopted in this Settlement is less than the average of the UVE fair market value appraisals.

In addition, in Paragraph No. 28, PAWC agreed that in future acquisitions by PAWC under 66 Pa.C.S. § 1329, PAWC will clearly document the date on which it engaged or otherwise authorized its UVE to perform the fair market value appraisal of the system. This provision, as identified by OCA, will help to ensure that PAWC is in compliance with the requirements of 66 Pa.C.S. § 1329(a)(5) and therefore is in the public interest.

In addition, I&E pointed out that PAWC's Application did not initially demonstrate compliance with the statutorily prescribed timeline. In order to prevent similar confusion, to remove uncertainty, and for ease of reference in the future, in Paragraph No. 28 of the Settlement, PAWC has agreed to begin clearly documenting the date on which it engages its UVEs to perform fair market value appraisals in Section 1329 cases. This provision, as identified by OCA, will help to ensure that PAWC is in compliance with the requirements of 66 Pa.C.S. § 1329(a)(5). Because it ensures PAWC's compliance with Section 1329's statutory requirements and, at the same time, preserves the resources of the parties and the Commission in future proceedings when confirmation of compliance is more readily available, this term is in the public interest.

---

<sup>40</sup> Application, App. A-11.

e. Engineering Assessment

The engineer's assessment completed in this case provides information about the assets to be acquired by PAWC but does not indicate the condition of those assets. The Joint Petitioners have agreed that, in future Section 1329 acquisitions, the engineering assessment under 66 Pa.C.S. § 1329(a)(4) will designate the condition of the inventory and assets appraised, and all categories of system assets will be appraised in poor, fair, good or very good condition. This provision will assist the UVEs in completing their appraisal of the system being acquired.

This settlement provision helps to ensure that the engineering assessment required under the Public Utility Code contains sufficiently detailed information regarding the acquired plant and is in the public interest.

f. Easements, Rights of Ways and Liens

The Settlement requires PAWC and Upper Pottsgrove Township to continue to work to achieve the transfer of all real property rights, including all real estate, easement rights, access to public rights-of-way, and liens that the APA requires Upper Pottsgrove Township to transfer to PAWC by Closing (collectively, the Real Property Rights). However, subject to the commitments and Settlement provisions, the Settlement gives PAWC discretion to Close without the transfer of all of the Real Property Rights, provided that an escrow is established from the Purchase Price to be used to obtain any post-Closing transfers of the Real Property Rights. *See* Settlement ¶ 30.

The Settlement also provides that, as a condition of Closing and subject to 66 Pa.C.S. § 703(g), PAWC will require that Upper Pottsgrove obtain clear title to the sewer line, of which Shadeland claims ownership in its Petition to Intervene, by (i) dedication to Upper Pottsgrove Township, (ii) determination of a court of competent jurisdiction that dedication is not necessary, or (iii) other evidence reasonably satisfactory to PAWC.<sup>41</sup> Settlement ¶ 31. These

---

<sup>41</sup> This provision re-states the commitment made in PAWC St. No. 1-R, pp. 4-5.

provisions ensure that Upper Pottsgrove will not transfer a sewer line that it does not own and will ensure that, after Closing, PAWC will be able to use the sewer line to provide service to customers in the service territory.

These Settlement provisions address the primary issue that Shadeland raised in this proceeding. As I&E explained, these terms are necessary to protect the public interest in two (2) ways. First, it is important to note that the public interest would be harmed if PAWC paid a purchase price that assumed that all rights necessary to operate Upper Pottsgrove would be transferred, and at Upper Pottsgrove Township's cost, and such action did not occur. To protect against this possibility, the protection measure of the escrow account imposed upon Upper Pottsgrove will ensure that any right not transferred at Closing must be financially accounted for via payment to the escrow account. Additionally, the public interest is protected because this term provides an additional layer of accountability that would not exist if PAWC and Upper Pottsgrove Township would ever mutually decide to waive the applicable sections of the APA that bind it to deliver good and marketable title to all property necessary to use and access the acquired assets.<sup>42</sup>

Additionally, PAWC has committed to providing I&E, OCA, and OSBA with an update on the status of the transfer of the Real Property Rights related to the system within 30 days of advance of the anticipated Closing Date, providing the parties with a mechanism in place to gauge Upper Pottsgrove's progress in meeting its property transfer obligations. Through this reporting mechanism, the public interest is further protected because by being informed of the status of any missing property rights, enabling the statutory parties to take any action that may be warranted and available to ensure that PAWC's ratepayers are not paying for property rights that are not obtained or paying any costs associated with obtaining those rights. At the same time, PAWC will be able to monitor any missing easements to either ensure that it does not encounter access issues, or, if such issues are identified, that it can immediately address such issues.

---

<sup>42</sup>

PAWC's Application (App. A-24-a), Section 4.16, pp. 25-26.

## 1. Shadeland's Sewer Line Dispute

Paragraphs 7(a)-(b) of the Settlement, addressing Upper Pottsgrove Township's need to obtain clear title to the sewer line that Shadeland and the Township purport to own, are imperative for protection of the public interest and necessary to ensuring the integrity of the Section 1329 process that underlies PAWC's Application. Specifically, the Settlement, as explained by I&E, provides that PAWC will require, as a condition of Closing, that Upper Pottsgrove obtain clear title to the sewer line at issue by dedication to Upper Pottsgrove, determination of a court of competent jurisdiction that dedication is not necessary, or other evidence reasonably satisfactory to PAWC. I&E notes that Upper Pottsgrove's obligation to convey all acquired assets, as defined in Section 2.01 of the APA,<sup>43</sup> appears to include the sewer line that Shadeland and the Township purport to now own because it includes all assets developed for use in the system, including collection system mains. As I&E expresses, ensuring that Upper Pottsgrove obtains clear title to the line at issue as a condition precedent to Closing is necessary and appropriate.

Shadeland alleges that the costs for constructing sewer lines in the Sprogel's Run development, which it claims have never been dedicated to Upper Pottsgrove Township, is \$1,059,700, and that approximately 91 customers are currently connected to the private sanitary sewer pipe which is used to serve them as Upper Pottsgrove customers.<sup>44</sup> I&E explained any of Shadeland's monetary claims against Upper Pottsgrove are not jurisdictional, and I&E notes that it is axiomatic that Upper Pottsgrove cannot sell to PAWC that which it does not own.

As the seller, Upper Pottsgrove Township has the obligation to convey all system property that PAWC bargained to purchase so that ratepayers are not deprived of the benefit of PAWC's bargain. PAWC admits that the UVEs' appraisals included the sewer line at issue,<sup>45</sup> but it alleges that the original cost of the sewer line, claimed to be \$283,000, even if excluded,

---

<sup>43</sup> PAWC's Application, App.-A-24-a, pp. 15-16, Section 2.01.

<sup>44</sup> Shadeland St. No. 1, pp. 1-4.

<sup>45</sup> PAWC St. No. 1-R, p. 6.

would not impact the \$13.75 million ratemaking rate base value proposed in this case.<sup>46</sup> In addition, no clear value was established in this proceeding. More importantly, as explained by I&E, is that without obtaining clear title and ownership to the sewer line, PAWC may become obligated to serve customers in the Sprogel's Run development without having sufficient facilities or access to providing such service. Not only is such an outcome contrary to the public interest, but it may also compromise PAWC's ability to meet its obligation to provide safe, adequate, and reliable service.<sup>47</sup>

Accordingly, the Settlement terms address this issue. As I&E established in its testimony,<sup>48</sup> PAWC has committed to conditioning any Closing of this Transaction upon Upper Pottsgrove Township having clear title to the sewer line at issue. It is not in the public interest for PAWC's ratepayers to assume any risk of missing property rights, nor is it in their interest to fund litigation to obtain property rights that the seller purported to convey as part of the APA. By conditioning the Closing upon Upper Pottsgrove's obligation to convey the sewer line, the Joint Petitioners can avoid these outcomes; accordingly, the term is in the public interest.

Because these Settlement terms will both protect captive ratepayers from getting less than they are paying for and prevent them from being subject to the monetary dispute of two non-jurisdictional entities, Shadeland and Upper Pottsgrove, the Shadeland dispute is resolved to the extent possible in this acquisition case. Consequently, the only portion of Shadeland's opposition that survives the Settlement are those for monetary claims that are outside of the Commission's jurisdiction.

g. Inflow and Infiltration Study

As I&E explained, together I&I may directly impact both public health and the cost to serve. In this case, I&E's investigation revealed that a recent I&I study was not available

---

<sup>46</sup> *Id.*

<sup>47</sup> 66 Pa.C.S. § 1501.

<sup>48</sup> PAWC St. No. 1-R, p. 6.

for the Upper Pottsgrove system, and that PAWC had identified a need to perform one after the acquisition closed. I&E notes that it fully supports PAWC's willingness to perform the I&I study, because, unfortunately, there is no way of knowing the existence and extent of any I&I issue unless a study is performed. I&E correctly notes that ideally, the I&I study would have been performed prior to the acquisition, so that its results could inform the valuations in this case, but there was no requirement that Upper Pottsgrove provide one as part of the Section 1329 process. Regardless, PAWC's commitment to performing the study is important because depending on the results, it could trigger the need for remediation work that has not yet been identified.

The Settlement requires PAWC to complete an I&I study and provide the results to I&E, OCA and OSBA. The costs of the study will be subject to prudence review when they are claimed for recovery in base rates.

The above terms protect the public interest by ensuring that PAWC will complete the I&I study of the Upper Pottsgrove system after Closing, to ensure that the system's condition is known and any issues addressed in a manner consistent with PAWC's obligation to provide safe and effective service.<sup>49</sup> Additionally, the public interest is further protected in that I&E, OCA, OSBA, and the Commission will be able to address the reasonableness and prudence of the cost of the necessary studies in a future PAWC base rate proceeding when these costs are known and identified, thereby protecting ratepayers from paying unwarranted or unreasonable costs.

#### h. Rates

PAWC has agreed to submit two cost-of-service studies in the first base rate case that includes the Upper Pottsgrove System: (a) a cost-of-service study that removes all costs and revenues associated with the operation of the Upper Pottsgrove System; and (b) a cost-of-service study for the Upper Pottsgrove System. Settlement ¶¶ 34a. and 34b. Under the Settlement,

---

<sup>49</sup> 66 Pa.C.S. § 1501.

PAWC's obligation to prepare cost-of-service studies extends only to the first base rate case in which Upper Pottsgrove is included.

In terms of the rates to be charged to Upper Pottsgrove customers, the Settlement is consistent with 66 Pa.C.S. § 1329(d)(1)(v) in that it requires PAWC to charge rates after Closing that are equal to Upper Pottsgrove's existing rates. The Settlement requires PAWC, in the first base rate case that includes Upper Pottsgrove, to propose moving Upper Pottsgrove's customers' rates to the cost of service, provided, however, that PAWC will not propose Upper Pottsgrove wastewater rates in excess of PAWC's proposed Rate Zone 1 system-average rates, Settlement ¶ 34c. PAWC explains that this provision is in the public interest because it limits any potential subsidization of Upper Pottsgrove's customers by PAWC's existing water and wastewater customers.

The Settlement permits PAWC to agree to rates other than those proposed for Upper Pottsgrove customers in the context of a settlement of a base rate case, but does not preclude any Joint Petitioner from asserting any position or raising any issue in a future PAWC base rate proceeding. Settlement ¶ 34c. Further, the Settlement contains no provision purporting to restrict the Commission's ultimate ratemaking authority to set "just and reasonable" rates.

i. Distribution System Improvement Charge

Section 1329(d)(4) of the Code, 66 Pa.C.S. § 1329(d)(4), permits an acquiring public utility to collect a DSIC from the date of Closing on the Transaction until new rates are approved in the utility's next base rate case. In order to qualify for DSIC recovery, a utility must submit a LTIIP to, and receive approval from, the Commission.

PAWC previously received Commission approval of a wastewater LTIIP, and received Commission approval of a DSIC tariff, for other portions of its wastewater system. In its Application, PAWC requested conditional approval to implement a DSIC for the Upper Pottsgrove service territory. Application ¶¶ 2, 44; PAWC St. No. 1 p. 4. Pursuant to the Settlement, PAWC may file an amended LTIIP for the Upper Pottsgrove service territory that

does not reprioritize other existing capital improvements that PAWC has already committed to undertake in other service areas. Following Commission approval of that amended LTIP, PAWC could make a tariff supplement compliance filing, which would include the Upper Pottsgrove service territory in PAWC's existing DSIC tariff. Settlement ¶ 35.

The Settlement recognizes the Commission's authority to modify PAWC's LTIP submission, and the Settlement is consistent with the Code and *Implementation of Act 11 of 2012*, Docket No. M-2012-2293611 (Final Implementation Order entered August 2, 2012).

The Settling Parties agreed that PAWC may apply the DSIC to customers in the Township's service area prior to the first base rate case in which the system's plant-in-service is incorporated into rate base pursuant to Section 1329(d)(4) if certain conditions are met. In particular, Paragraph 35 states that PAWC will revise its LTIP to include the Township of Upper Pottsgrove and related projects before it begins charging the DSIC to those customers. Further, Paragraph 35 provides PAWC's commitment that it will not reprioritize other existing capital improvements that the Company already committed to undertake in other service areas. This provision, as identified by OCA, helps to ensure that projects for the Township's customers should be in addition to, and not reprioritize, any capital improvements that PAWC was already committed to undertake for existing customers. This settlement term also allows for Township of Upper Pottsgrove customers to begin contributing, up to 5% of their total wastewater bill, toward DSIC-eligible capital projects.

j. Claims for AFUDC and Deferred Depreciation

Section 1329(f)(1) of the Code, 66 Pa.C.S. § 1329(f)(1), permits an acquiring public utility to accrue AFUDC on post-acquisition improvements that are not included in a DSIC, from the date the cost was incurred until the earlier of the following events: the asset has been in service for a period of four years, or the asset is included in the acquiring utility's next base rate case. In the Application ¶ 2, 44, PAWC requested permission to accrue AFUDC on post-acquisition improvements that are not included in a DSIC. PAWC St. No. 1, p. 4. The

Settlement makes clear that the other Joint Petitioners do not oppose this request and they reserve their rights to litigate their positions fully in future rate cases. Settlement ¶ 36.

Similarly, Section 1329(f)(2) of the Code, 66 Pa.C.S. § 1329(f)(2), permits an acquiring public utility to defer depreciation on its post-acquisition improvements that are not included in a DSIC. In the Application ¶¶ 2, 44, PAWC requested permission to defer depreciation on post-acquisition improvements that are not included in a DSIC. PAWC St. No. 1, p. 4. The Settlement makes clear that the other Joint Petitioners do not oppose this request and they reserve their rights to litigate their positions fully in future rate cases. Settlement ¶ 36.

Under the terms of the Settlement, 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 Upper Pottsgrove's wastewater system assets, rather than an unspecified future case as proposed by PAWC. Further, the Joint Petitioners 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. OCA explained, in its Statement in Support of Settlement, that its assent to Paragraph 36 should not be construed to operate as preapproval of PAWC's future requests and notes it's the Company's claims.

k. Transaction and Closing Costs

Section 1329(d)(1)(iv) of the Code, 66 Pa.C.S. § 1329(d)(1)(iv), permits an acquiring public utility to include, in its next base rate case, a claim for the transaction and closing costs incurred for the acquisition. In the *Final Implementation Order* p. 14, the Commission stated that there will be no Commission preapproval of the reasonableness of recovery of these costs in a Section 1329 proceeding. The Settlement acknowledges that PAWC may, in the first base rate case that includes the Upper Pottsgrove System, include the Transaction and Closing Costs incurred in this proceeding. The Commission may adjudicate the ratemaking treatment of PAWC's claimed Transaction and Closing Costs at that time. The

Settlement notes that the Joint Petitioners do not oppose this request and they reserve their rights to litigate their positions fully in future rate cases. Settlement ¶ 37.

In addition, the Sanitary Sewer Asset Purchase Agreement By and Between Upper Pottsgrove Township, as Seller and Pennsylvania-American Water Company as Buyer, dated as of April 28, 2020, Section 3.01, required PAWC to pay a \$90,000 deposit on April 28, 2000 toward Upper Pottsgrove's engineering and legal fees related to the Transaction. That amount will be deducted from the amount to be paid at Closing, but if Closing does not occur, Upper Pottsgrove will only refund the amount (if any) that it has not spent on engineering and legal fees. The Settlement, at ¶ 38, provides that, if the Transaction does not Close, and PAWC does not recoup the \$90,000 deposit, PAWC will not seek to recover any unrecouped portion of the deposit from ratepayers.

The Settlement also requires PAWC to separately identify, in its next base rate case, the amount of outside legal fees included in PAWC's Transaction and Closing Costs on the Transaction. The amounts expended by PAWC on behalf of Upper Pottsgrove must also be separately identified. OCA, I&E and OSBA reserve the right to challenge the reasonableness, prudence, and basis for these fees.

As noted by the Settling Parties, the Settlement reflects the agreement that PAWC be permitted to claim Transaction and Closing Costs associated with the Transaction, but reserves the parties' rights to litigate their positions fully in future rate cases when this issue is ripe for review. As OCA explained, the Joint Petitioners' assent to this term should not be construed to operate as their preapproval of PAWC's request.

Paragraph 38 reflects PAWC's agreement that, if the Transaction does not Close, and PAWC does not recoup all of its \$90,000 engineering fee/legal fee deposit from Upper Pottsgrove as referenced in Section 3.01 of the APA, then PAWC will not seek to recover any unrecouped portion of the deposit from its ratepayers in any proceeding. This provision appears to serve the public interest as it prevents PAWC from recovering any unrecouped portion of the engineering fee/legal deposit fee from ratepayers.

Paragraph 39 reflects PAWC's agreement to separately identify any outside legal fees included in its Transaction and Closing Costs pursuant to the APA between PAWC and Upper Pottsgrove and specify amounts expended by PAWC on behalf of the Township. This provision also appears to serve the public interest as it provides for a full review of any outside legal fees included in Transaction and Closing Costs pursuant to the APA in future rate cases.

l. Low Income Program Outreach

The Settlement requires PAWC to notify Upper Pottsgrove customers of its low income programs, including a description of the available low income programs, participation eligibility requirements, and PAWC's contact information, which must be provided within the first billing cycle following Closing and in a welcome letter to Upper Pottsgrove's customers. The welcome packet must also inform Upper Pottsgrove customers that they are being converted to monthly billing. These provisions of the Settlement are reasonable and in the public interest.

m. Approval of Section 507 Agreements

Section 507 of the Code, 66 Pa.C.S. § 507, requires that contracts between a public utility and a municipal corporation (except for contracts to furnish service at regular tariffed rates) be filed with the Commission at least thirty days before the effective date of the contract in order to be valid. The Commission may allow the contract to become valid and issue a certificate of filing, unless prior to the effective date of the contract, 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.

PAWC seeks Commission approval, pursuant to Section 507 of: (i) the APA; (ii) the STSA between Upper Pottsgrove Township, Pottstown Borough Authority and Borough of Pottstown; and (iii) the Joint Sewage Transportation Agreement between Upper Pottsgrove Township and Lower Pottsgrove Township. According to the Settlement, the issuance of certificates of filing or approvals of these agreements is necessary to allow PAWC to provide service to the service territory currently served by Upper Pottsgrove Township.

The Settlement provides that the STSA (and the other contracts listed in Schedule 4.13 of the APA) are material to the Commission's approval of the Transaction. As a condition of Closing and subject to 66 Pa.C.S. § 703(g), PAWC will require Upper Pottsgrove to obtain the assignment of these material contracts. Settlement ¶ 43.

Pursuant to Paragraph 42 of the Settlement, PAWC's request for certificates of filing or approvals of Section 507 agreements is permitted. OCA explained that it does not join in this provision but, in furtherance of settlement, does not oppose PAWC's request.

Under Paragraph 43 of the Settlement, PAWC will require Upper Pottsgrove Township to obtain assignments of the contracts listed in Schedule 4.13 of the APA including but not limited to the STSA between Upper Pottsgrove, the Borough and the Authority, as a condition of Closing. The Settling Parties here explain that these provisions ensure that that Closing will not occur until all conditions that would materially alter PAWC's Application are met, as discussed at length herein.

n. Other Necessary Approvals

The Settlement includes a provision requesting that the Commission issue any other approvals or certificates that might be necessary to carry out PAWC's acquisition of the Upper Pottsgrove System.

o. Miscellaneous

The Settlement is conditioned upon the Commission's approval of the terms and conditions contained in the Settlement without modification. If the Commission modifies the Settlement, any Petitioner may elect to withdraw from the Settlement and may proceed with litigation and, in such event, the Settlement shall be void and of no effect. The Joint Petitioners acknowledge and agree that the Settlement, if approved, shall have the same force and effect as if the Joint Petitioners had fully litigated this proceeding.

1. Testimony From Public Input Hearing

Attorney Joan E. London testified at the public input hearing on behalf of Artisan Construction, LLC to raise issues to be considered by the Commission, including maintenance of the system, potential rate increases, the existing Corrective Action Plan with Upper Pottsgrove Township, the pending Act 537 Plan Amendment, and project timelines.

i. Maintenance of System

One concern expressed by Ms. London related to the condition of the Township's System is that some owners of utility systems decrease their maintenance activities after signing an agreement to sell the system. Ms. London did not allege that Upper Pottsgrove had in fact decreased its maintenance activities after signing the APA, but asked the Commission to consider the issue when deciding whether to approve the Application.

PAWC introduced rebuttal testimony indicating that it has no reason to believe that Upper Pottsgrove Township ceased to maintain the System after executing the APA. PAWC St. No. 1-R. However, the Settlement does address the condition of the System, in part, by requiring PAWC to complete an I&I study after Closing. Settlement ¶ 32.

I&E asserts that the I&I study that PAWC has committed to perform under the Settlement will produce a more informed picture of the condition of the Upper Pottsgrove's collection system. Additionally, I&E agrees with PAWC's position that considering PAWC's record of environmental compliance and engineering and operational experience, PAWC is well-equipped to address existing system issues.<sup>50</sup>

---

<sup>50</sup> PAWC St. No. 1-R, p. 12-13.

ii. Potential Rate Increases After the Closing

Attorney London's second concern related to possible rate increases that may occur under PAWC's ownership. Attorney London testified that it "has been common experience that when a system is sold to a private entity, that there are rate increases over and above what they have been when the system has been run by a municipality or a municipal authority."<sup>51</sup> I&E explained that Attorney London's testimony highlights the importance of the Rate terms in the Settlement because parties reserve the right to investigate the basis for whatever future rate proposals PAWC may make for acquired customers. Therefore, I&E concluded that the Settlement ensures that any rate proposals that PAWC may make will be scrutinized and must meet the "just and reasonable" rate requirement of the Code.

Attorney London also expressed concern that the sale of the System could cause project delays and future rate increases. The Township notes that PAWC introduced rebuttal testimony denying that the sale will cause delays in projects. PAWC Statement No. 1-R, p. 14. For example, there are five (5) remaining line extension projects under Upper Pottsgrove's latest Act 537 Plan, and according to the Township, Upper Pottsgrove and PAWC are committed to completing them. *Id.*

The Settlement requires PAWC to submit a cost-of-service study for the Upper Pottsgrove System as part of the first base rate case that includes the Upper Pottsgrove System and to propose moving Upper Pottsgrove's rates to its cost of service, provided that PAWC will not propose rates in excess of PAWC's proposed Rate Zone 1 system-average rates. All parties to this proceeding reserve their rights to assert any position in that future rate case and PAWC reserves the right to settle that case using different rates than it proposed for Upper Pottsgrove's customers. Settlement ¶ 34.

---

<sup>51</sup> Public Input Hearing Tr. at pp. 24-25, lines 21-2.

iii. Corrective Action Plan

Attorney London testified regarding concerns she had about whether the Corrective Action Plan (CAP) obligations would be met under PAWC's ownership of the Upper Pottsgrove system.<sup>52</sup> PAWC indicated that it understood the CAP to be complete.<sup>53</sup> Upper Pottsgrove Township indicated that parts of the CAP-related projects at issue are outside of the sewage treatment service area, and that the CAP has been essentially completed.<sup>54</sup>

I&E explained that if PAWC's Application is granted, PAWC's obligation to provide safe, adequate, and reasonable service in the acquired Upper Pottsgrove service territory will attach.<sup>55</sup> Accordingly, I&E took the position that if CAP-related projects within the acquired service territory remain outstanding after closing, PAWC will have an obligation to ensure that they are addressed to the extent that they, in fact, impact the provision of service. The statutory parties have the ability to address these issues and the obligation of the Company to provide safe and reliable service after the closing and during any investigation of the subsequent rate increase requests.

Attorney London articulated relevant and legitimate concerns that were addressed by the Company and Settling Parties, in order to reach a non-unanimous agreement in this Application proceeding.

E. Opposition to the Proposed Settlement

i. Borough and Authority Objections to Settlement

The first objection presented by the Authority and Borough is that the STSA is drafted as an agreement between municipal entities, and as such, there are certain provisions that

---

<sup>52</sup> *Id* at 26.

<sup>53</sup> PAWC St. No. 1-R, p. 15.

<sup>54</sup> Upper Pottsgrove St. No. 1-R, p. 11.

<sup>55</sup> 66 Pa.C.S. § 1501.

only municipal entities are able to perform and PAWC does not have the legal ability to assume and perform these significant obligations. The Authority and Borough assert that, in order for Upper Pottsgrove to assign this contract to PAWC, the parties need to agree to certain terms and conditions in order to resolve these issues. The Authority and Borough assert that PAWC, as a regulated public utility, does not have the legal ability to simply “step into the shoes” of the Township in assuming all of its rights, title, interest, duties and obligations of the Township under the STSA. Accordingly, even if the Authority and Borough were to consent to an assignment of the STSA, according to the Authority and Borough, the Township, PAWC, the Borough, and the Authority would nonetheless need to reach acceptable terms and conditions in order to resolve these issues. Therefore, the Authority and Borough assert that the Settlement, which fails to recognize and account for this requirement, should be denied.

Next, the Authority and Borough stress the need for a final and unappealable order as Upper Pottsgrove Township initiated the Injunction Litigation in the Court of Common Pleas of Montgomery County in an effort to force the consent of assignment of the STSA. Recognizing that the Commission does not have jurisdiction to resolve the Injunction Litigation, the Authority and Borough object to the failure of the Settlement to require a final and unappealable order in the Injunction Litigation before allowing a Closing on the Transaction to occur.

The Authority and Borough assert that the decision in the Injunction Litigation must be unappealable, not just “unstayed,” before a closing can occur. If a decision is merely “unstayed,” there is still a possibility that it could be reversed upon appeal. If the Authority and Borough would obtain a ruling adverse to their position and were unable to obtain an immediate stay of that decision, PAWC and Upper Pottsgrove would be able to Close the Transaction that very day. Even if the Authority and Borough were to later have the decision overturned on appeal, the Authority and Borough assert that it would be virtually impossible to undo the Transaction. In those circumstances, the Authority and Borough assert that PAWC would be operating a wastewater system without an agreement for the treatment of the wastewater. According to the Authority and Borough this is an impossible result and one that is entirely avoidable by requiring a final, unappealable order in the Injunction Litigation prior to Closing

(if, of course, the parties are not able to amicably resolve this dispute prior to obtaining a final, unappealable order).

Accordingly, the Authority and Borough request that the Commission deny the Joint Petition for Approval of Non-Unanimous Settlement of All Issues.

ii. PAWC Reply to Objections.

On June 29, 2021 Pennsylvania-American Water Company filed its Main Brief and on July 1, 2021 it filed its Reply to Objections filed by the Authority and Borough. In its Reply to Objections, PAWC asserts the following.

a. PAWC reply to “Need for Acceptable Terms and Conditions”

PAWC argues the claim that the Authority and Borough cannot simply consent to the assignment of the STSA as significant portions of the STSA must be renegotiated because those provisions contain obligations that can only be performed by a municipality, fails because there is no evidentiary support for it and because the Authority and Borough surprised the other Parties by not raising the issue in its Direct Testimony or prior pleadings.

PAWC notes that the Settlement requires assignment of the STSA prior to Closing. However, once assigned either by consent or court order, PAWC argues, the renegotiation of terms and conditions, while preferable, is not a necessity. PAWC asserts the Commission has the statutory authority to modify the terms and conditions of the STSA under Section 508 of the Code, 66 Pa.C.S. § 508, if such terms are adverse to the public interest and the general well-being of the Commonwealth. As such, the Company argues, the resolution of the terms and conditions of the STSA is not required now and should not delay Commission approval of the Settlement.

b. Reply to “Need for a Final Unappealable Order”

PAWC asserts there is no evidence regarding the risk to which the Settlement actually exposes the Authority and Borough and that the potential harm to the Authority and Borough in this situation is unclear. PAWC argues that assignment of the STSA and Closing on the Transaction simply have no impact on the civil dispute between the Authority, Borough and Upper Pottsgrove Township.

PAWC argues that many events would need to happen for the Authority and Borough to have any exposure to risk, and there is no record evidence concerning the probability of any of those events happening. The Company concludes that this objection from the Authority and Borough is too speculative to support a Commission decision.

iii. Township Response to Objections

Upper Pottsgrove Township filed its Response to the Objection filed by the Pottstown Borough Authority and the Borough of Pottstown on July 1, 2021. According to the Township, an essential element of the proposed transaction is the assignment of the existing STSA between the Authority and Borough and Upper Pottsgrove Township to PAWC so that PAWC will have continuing access to the facilities of the Authority and Borough for the handling of wastewater from the existing Township system.

The Township asserts that the issue about a need to modify terms and conditions was not raised in the Pottstown Parties’ Protest of the application or in testimony, and it would be unfair to consider it at this time. Moreover, the Township asserts that the Commission has adequate powers under Sections 507 and 508 of the Code to approve or require changes to such agreements as may be required in the public interest.

F. Disposition

Having reviewed the various statements made in support of the Settlement, statements made in opposition to the Settlement, and all other relevant filings, and record

evidence in this proceeding, I conclude that the Settlement is in the public interest and should be approved by the Commission without modification. Initially, I note that, although the Borough and Authority have challenged the fitness of PAWC to operate the Township System, without an assignment of the STSA, no party to this proceeding has otherwise challenged PAWC's financial, legal or technical fitness to own and operate the Township's system. I also note that PAWC has introduced substantial record evidence to demonstrate that it possesses the necessary fitness standards to own and operate the System and the Settlement provides that the transfer is contingent upon assignment of the STSA from the Township to PAWC.

Given the foregoing, I conclude that the Settlement should be approved by the Commission without modification, because the Settlement is in the public interest. The Settlement will ensure that the Township residents will receive high quality wastewater service from PAWC, a certificated public utility with the necessary financial, technical and legal resources to provide that service into the foreseeable future. Bringing the Township's existing customers into PAWC's customer base will also ensure that Township residents will have access to the Commission's procedures for investigating and enforcing any complaints that the residents may have regarding the Township's wastewater service. Additionally, although the parties in this proceeding acknowledge that PAWC may apply for a rate increase in the near future, any such rate increase application will be subject to the Commission's jurisdiction. PAWC would be required to apply for any increase, following which interested parties, including existing customers, may intervene in any such proceeding. Any requested increase would ultimately be subject to approval by the Commission, and the Commission would have the authority to approve, deny or modify any such requested increase.

In reaching the conclusion that the Settlement should be approved by the Commission without modification, concerns regarding the existing Township System were considered.

Pursuant to Section 1103 of the Code, 66 Pa.C.S. § 1103, PAWC must demonstrate that it is technically, financially, and legally fit to own and operate the System. With respect to technical fitness, PAWC is the Commonwealth's largest water and wastewater

provider, serving a combined population in excess of 2,400,000 and employing approximately 1,100 professionals with expertise in all areas of water and wastewater utility operations. PAWC St. No. 2 p. 8.

With respect to legal fitness, PAWC has a record of environmental compliance, a commitment to invest in necessary capital improvements and resources, and the experienced managerial and operating personnel necessary to provide safe and reliable wastewater service to the existing customers of Upper Pottsgrove. PAWC St. No. 1 pp. 12, 15.

With respect to financial fitness, PAWC had total assets of approximately \$5.3 billion as of December 31, 2019, and a net income of approximately \$187 million for the 12 months ending December 31, 2019. PAWC St. No. 3, p. 5. In addition to positive operating cash flows, PAWC may obtain financing through a \$400 million line of credit, long term debt financing, and equity investments. PAWC St. No. 3, p. 6.

In addition to demonstrating fitness, PAWC must demonstrate that the Transaction and PAWC's ownership/operation of the Upper Pottsgrove System will "affirmatively promote the service, accommodation, convenience, or safety of the public in some substantial way."

The Transaction benefits members of the public-at-large in that the Transaction promotes the Commission's policy favoring regionalization and consolidation of water and wastewater systems. 52 Pa. Code § 69.721(a); PAWC St. No. 1, p. 13. In addition, the Transaction benefits members of the public-at-large by promoting the Legislature's policy goals when it enacted Section 1329. PAWC St. No. 1, p. 15. The Settlement also contains additional public benefits for Upper Pottsgrove Township's existing customers, and requires PAWC to provide information to Upper Pottsgrove's customers regarding PAWC's low-income programs within the first billing cycle following Closing and in a welcome letter to Upper Pottsgrove's customers. Settlement ¶¶ 40-41. The Transaction benefits PAWC's existing wastewater customers in the same way that it benefits all other members of the public-at-large, the Transaction will have no immediate rate impact on PAWC's existing wastewater customers, and

any impacts on the rates of PAWC's existing customers would occur only upon Commission approval as part of a base rate proceeding. PAWC St. No. 3, p. 10.

PAWC and the Township agreed to use the procedure set forth in Section 1329 for the Transaction. In the Settlement, the Joint Petitioners agreed that \$13,750,000 (the purchase price) will go into PAWC's rate base in its next rate case due to the acquisition of the System. Settlement ¶ 27. The agreed-upon ratemaking rate base of \$13,750,000 is supported by substantial record evidence.

Section 1329(a)(5) of the Code, 66 Pa.C.S. § 1329(a)(5), requires each UVE to provide the completed appraisal to its client within ninety days of executing the service contract. The Settlement requires PAWC to clearly document the date on which it authorized its UVE to perform the fair market value appraisal of the system being appraised, so as to demonstrate compliance with 66 Pa.C.S. § 1329(a)(5).

In addition, in Paragraph No. 28, PAWC agreed that in future acquisitions by PAWC under 66 Pa.C.S. § 1329, PAWC will clearly document the date on which it engaged or otherwise authorized its utility valuation expert to perform the fair market value appraisal of the system. This provision, as identified by OCA, will help to ensure that PAWC is in compliance with the requirements of 66 Pa.C.S. § 1329(a)(5) and is in the public interest.

The Joint Petitioners have also agreed that, in future Section 1329 acquisitions, the engineering assessment under 66 Pa.C.S. § 1329(a)(4) will designate the condition of the inventory and assets appraised, and all categories of system assets will be appraised in poor, fair, good or very good condition.

Regarding rights of ways, and liens, the Settlement gives PAWC discretion to Close without the transfer of all of the Real Property Rights, provided that an escrow is established from the Purchase Price to be used to obtain any post-Closing transfers of the Real Property Rights. Settlement ¶ 30. The Settlement also provides that PAWC will require that Upper Pottsgrove obtain clear title to the sewer line, of which Shadeland claims ownership in its

Petition to Intervene. Settlement ¶ 31. These provisions ensure that Upper Pottsgrove will not transfer a sewer line that it does not own and will ensure that, after Closing, PAWC will be able to use the sewer line to provide service to customers in the service territory.

As an I&I study was not available for the Upper Pottsgrove system, and PAWC had identified a need to perform one after the acquisition closes, the Settlement requires PAWC to complete an inflow and infiltration study and provide the results to I&E, OCA and OSBA. This term will protect the public interest by ensuring that PAWC will complete an I&I study of the Upper Pottsgrove system after Closing, to ensure that the system's condition is known and addressed in a manner consistent with PAWC's obligation to provide safe and effective service.<sup>56</sup>

With regard to approval of Section 507 Agreements, Section 507 of the Code, 66 Pa.C.S. § 507, requires that contracts between a public utility and a municipal corporation (except for contracts to furnish service at regular tariffed rates) be filed with the Commission at least thirty days before the effective date of the contract in order to be valid. The Commission may allow the contract to become valid and issue a certificate of filing, unless prior to the effective date of the contract, 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.

PAWC seeks certificates of filing or Commission approvals of various agreements including the STSA between Upper Pottsgrove Township, Pottstown Borough Authority and Borough of Pottstown. The Settlement provides that the STSA is material to the Commission's approval of the Transaction and as a condition of Closing and subject to 66 Pa.C.S. § 703(g), PAWC will require Upper Pottsgrove to obtain the assignment of these material contracts. Settlement ¶ 43.

For the reasons discussed above, I recommend that the Commission approve the Settlement without modification. Since I am recommending approval of the Settlement without modification, I am, by necessity, denying the request of the Joint Protestants, the Authority and

---

<sup>56</sup> 66 Pa.C.S. § 1501.

Borough, in this proceeding, to delay the proceeding or to reject the Settlement and Application. That discussion follows below.

G. Authority and Borough Objections to the Settlement and Opposition to the Application Objections To Settlement

PAWC must demonstrate that it is technically, financially, and legally fit to own and operate the System. *Seaboard Tank Lines, Inc. v. Pa. Pub. Util. Comm'n*, 502 A.2d 762, 764 (Pa. Cmwlth. 1985); *Warminster Tw Mun. Auth. v. Pa. Pub. Util. Comm'n*, 138 A.2d 240, 243 (Pa. Super. 1958). As a certificated public utility, PAWC enjoys a rebuttable presumption that it possesses the requisite fitness.<sup>57</sup> *South Hills Movers, Inc. v. Pa. Pub. Util. Comm'n*, 601 A.2d 1308, 1310 (Pa. Cmwlth. 1992).

The Settlement includes the following provisions:

42. 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: (1) the Sanitary Sewer Asset Purchase Agreement By and Between Upper Pottsgrove Township, Montgomery County as Seller and Pennsylvania-American Water Company as Buyer, dated as of April 28, 2020; (2) the Sewage Treatment Service Agreement between Upper Pottsgrove Township, Borough of Pottstown and Pottstown Borough Authority; and, (3) the Joint Sewage Transportation Agreement between Upper Pottsgrove Township and Lower Pottsgrove Township.

Settlement at p. 10, paragraph No. 42.

43. The contracts listed in Schedule 4.13 of the APA including, but not limited to, the Sewage Treatment Service Agreement referenced in Paragraph 42, which are subject to approval by the Commission under 66 Pa. C.S. § 507, are material to the Commission's approval of the Transaction (singularly, a "Material Agreement") and that PAWC will require, subject to 66 Pa. C.S. § 703(g), Upper Pottsgrove to obtain assignment of all Material Agreements as a condition of Closing.

Settlement at p. 11, paragraph No. 42 (Emphasis added).

---

<sup>57</sup> Similarly, PAWC enjoys a presumption of a continuing public need for service because public utility service is already being provided in the service territory. *Re Glenn Yeager et al.*, 49 Pa. P.U.C. 138 (1975). No party has contested the continued need for wastewater collection and treatment service in the Upper Pottsgrove service territory.

Section 703(g), referenced in Settlement Paragraph No. 43 above, provides that the Commission may, at any time, after notice and after opportunity to be heard as provided in this chapter, rescind or amend any order made by it. 66 Pa.C.S. §703(g). Any order rescinding or amending a prior order shall, when served upon the person, corporation, or municipal corporation affected, and after notice thereof is given to the other parties to the proceedings, have the same effect as is herein provided for original orders.

A footnote at the end of Paragraph No. 42 provides that the OCA does not join in this paragraph but does not oppose PAWC's request. OCA's position is not explained further in the Settlement.

The Settling Parties also filed a Joint Stipulation of Proposed Findings of Fact, Proposed Conclusions of Law, and Proposed Ordering Paragraphs. The proposed findings of fact Nos. 6 and 37 provide, in pertinent part, that:

6. The Township System is a wastewater collection and conveyance system. Upper Pottsgrove St. No. 1 p. 5. It is not a combined sewer system, nor is it a municipal separate storm sewer system ("MS4 System"). PAWC St. No. 2 p. 4.

37. As a condition of Closing on the Transaction and subject to 66 Pa.C.S. § 703(g), PAWC will require that Pottstown Borough Authority and the Borough of Pottstown . . . assign the Sewage Treatment Service Agreement between Upper Pottsgrove Township, Borough of Pottsgrove and Pottstown Borough Authority (the "STSA") to Upper Pottsgrove prior to Closing. Settlement ¶ 43.

Joint Stipulation, Appendix A, pp. 2, 10.

In addition, the Joint Petitioners each filed a Statement in Support of Settlement, which are attached to the Settlement Petition. In its Statement in Support of Settlement, PAWC, under the heading "Approval of Section 507 Agreements" notes that Section 507 of the Code, 66 Pa.C.S. § 507, requires that contracts between a public utility and a municipal corporation (except for contracts to furnish service at regular tariffed rates) be filed with the Commission at least thirty days before the effective date of the contract. PAWC contends that 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.

PAWC seeks Commission approval, pursuant to Section 507, of: (i) the APA; (ii) the STSA between Upper Pottsgrove Township, the Authority and the Borough; and (iii) the Joint Sewage Transportation Agreement between Upper Pottsgrove Township and Lower Pottsgrove Township. PAWC states that “Approval of these agreements is necessary to allow PAWC to provide service to the service territory currently served by Upper Pottsgrove.” PAWC St. in Support, p. 16.

PAWC further points out that, in the Rebuttal Testimony of Scott Fogelsanger, PAWC made a significant commitment to address PBA/BP’s sole issue in this proceeding. PAWC St. No. 1-R, p. 11. PAWC states, “[t]he Settlement provides that the STSA (and the other contracts listed in Schedule 4.13 of the APA) are material to the Commission’s approval of the Transaction.” “As a condition of Closing and subject to 66 Pa.C.S. § 703(g), PAWC will require Upper Pottsgrove to obtain the assignment of these material contracts.” Settlement ¶ 43. “This provision ensures that the STSA is assigned prior to Closing.” PAWC St. in Support, p.p. 16-17. PAWC concluded, “[t]hese Settlement provisions effectively address the only issue that PBA/BP raised in this proceeding – ensuring that the STSA is assigned to PAWC prior to Closing.” “Moreover, by including these provisions in the Settlement (which the Commission must approve by an enforceable order), the Commission will have considerable power to enforce those provisions in the future.” PAWC St. in Support, p. 17.

In its Statement in Support of Settlement, Regarding the approval of Section 507 Agreements and ¶¶ 42-43 of the Settlement, OCA stated, “[u]nder Paragraph 42 of the Settlement, PAWC’s request for approval of Section 507 agreements is permitted. The OCA does not join in this provision but, in furtherance of settlement, does not oppose PAWC’s request.” OCA St. in Support, p. 8. “Under Paragraph 43 of the Settlement, PAWC will require Upper Pottsgrove to obtain assignments of the contracts listed in Schedule 4.13 of the APA including but not limited to the Sewage Treatment Service Agreement between Upper

Pottsgrove, BP and PBA, as a condition of Closing.” OCA St. in Support, p.p. 8-9. “These provisions help to ensure that that closing will not occur until all conditions that would materially alter PAWC’s Application are met.” OCAS St. in Support, p. 9. No further discussion of this issue is provided by OCA in its Statement in Support of Settlement.

In its Statement in Support of Settlement, I&E explained the legal standard for Section 507 approval, noting that PAWC’s request to assume enumerated municipal contracts currently held by Upper Pottsgrove is subject to review under Section 507 of the Code. Under Section 507, other than contracts to furnish service at tariffed rates, any contract between a public utility and a municipal corporation must be filed with the Commission at least 30 days prior to its effective date to be valid. Upon receipt of the filing, and prior to the effective date of the contracts, the Commission may institute proceedings to determine whether there are any issues with the reasonableness, legality, or any other matter affecting the validity of the contract. If the Commission decides to institute such proceedings, the contracts at issue will not become effective until the Commission grants its approval.

I&E explained that, at the outset of this case, PAWC’s Application acknowledged that Upper Pottsgrove had not yet attained approval to assign its sewerage treatment contract with PBA/BP.<sup>58</sup> Because PAWC expressly disclosed that the assignment had not been granted, I&E’s notes that its investigation in this case examined that failure of assignment and determined that it was a defect that would need to be cured before any Closing of this Transaction should occur. The Authority owns a wastewater treatment facility that the Borough leases and operates which the Township depends upon for treatment of its wastewater.<sup>59</sup> I&E points out that there can be no credible dispute that wastewater treatment is essential for the operation of the Upper Pottsgrove system, and PAWC concedes that if the acquisition proceeds to Closing, it will need treatment services from PBA/BP.<sup>60</sup> I&E St. in Support, p. 25.

---

<sup>58</sup> PAWC Application, App. A-24-a, Schedule 4.13.

<sup>59</sup> PBA/BP St. No. 1, p. 2.

<sup>60</sup> PAWC St. No. 1-R, p. 11.

With regard to the dispute that exists concerning the alleged debt owed by Upper Pottsgrove Township to the Authority and Borough, the Township has initiated an action in the Court of Common Pleas of Montgomery County asking the Court to order PBA/BP to consent to the assignment,<sup>61</sup> which is not yet resolved. Regardless, the Seller, Upper Pottsgrove Township, has the obligation to convey all contracts necessary for PAWC's operation of the system, and all parties agree that treatment services are an essential component of sewer service. I&E St. in Support, p. 26.

Upper Pottsgrove Township committed to transferring to PAWC all contracts necessary to operate the system;<sup>62</sup> and the transaction was predicated, and negotiated, with the expectation that Upper Pottsgrove's treatment contract with the Authority and Borough would be assigned to PAWC. The Transaction should not Close without the assignment, because PAWC will not be able to meet its obligation to provide safe, adequate and reliable service to acquired customers absent use of PBA/BP's treatment services.<sup>63</sup> As I&E explains, this is an outcome that I&E could not support, and therefore, the Settlement terms that address this issue and prevent that outcome were critical terms for I&E. I&E St. in Support, pp. 26-27.

I&E submits that, through the Settlement,<sup>64</sup> and as established in its testimony,<sup>65</sup> PAWC has committed to conditioning any Closing of its Transaction upon obtaining the assignment of the contract with PBA/BP. I&E submits that this commitment will appropriately place the onus of obtaining the assignment upon Upper Pottsgrove Township. I&E St. in Support, p. 27. I&E recognizes it is not in the public interest for PAWC's ratepayers to assume any risk of obtaining the assignment that Upper Pottsgrove is obligated to convey, nor is it in their interest to fund litigation to obtain contract rights that the seller purported to convey as part of the APA. By conditioning the Closing upon Upper Pottsgrove's obligation to obtain the

---

<sup>61</sup> Upper Pottsgrove St. No. 1, pp. 8-9.

<sup>62</sup> PAWC Application, App. A-24(a), pp. 15-16, Section 2.01.

<sup>63</sup> 66 Pa.C.S. § 1501.

<sup>64</sup> Joint Petition, ¶ M.

<sup>65</sup> PAWC St. No. 1-R, p. 11.

assignment, I&E explains, the Joint Petitioners can avoid these outcomes. I agree with the analysis of I&E and conclude these terms, as set forth in the Settlement, are in the public interest.

Without taking a position on the Authority and Borough's alleged monetary dispute, the Township cannot assign its treatment contract to PAWC without the Authority and Borough's consent, and PAWC requires adequate service regarding wastewater collection, treatment, and disposal services. The Settlement addresses these concerns by ensuring that PAWC will not Close without Upper Pottsgrove Township obtaining the ability to assign the PBA/BP contract to PAWC, leaving the Authority and Borough's opposition to the Settlement of monetary claims, outside of the Commission's jurisdiction. Accordingly, considering all of the record evidence, the Settlement addresses and resolves the Authority and Borough's position to the extent available in this proceeding.

#### Borough and Authority Objections to Application

On May 14, 2021, the Authority and the Borough filed a Joint Protest averring that Section 10.10 of the STSA prohibits the assignment of the STSA to PAWC-WB without the consent of the Authority and the Borough, thus leaving PAWC without an agreement to treat its collected wastewater absent the consent of the Authority and the Borough.<sup>66</sup> The Joint Protestants aver that the Authority undertook a project for sewer conveyance upgrades within the Borough in 2013 to replace existing pipe and install new siphon boxes and pipe (Project), which was necessary to increase the conveyancing capacity of the Upper Pottsgrove wastewater system to the STP for a residential development located within Upper Pottsgrove known as Coddington View and to meet other future customer demands for wastewater treatment services within the Township.<sup>67</sup> The Joint Protestants further allege that the Township, Authority and the Borough entered into a Settlement Agreement & Release dated July 2, 2013 (Settlement Agreement), in which the Township agreed to make a \$259,000 payment to the Authority, which would be ultimately expended for the Project. The Borough and Authority aver that the Settlement

---

<sup>66</sup> Borough/Authority Protest ¶ 5-6.

<sup>67</sup> Borough/Authority Protest ¶ 7-8.

Agreement provides that the Authority “shall not be required to contribute any additional funds to and/or for the Project”; that the Authority would be entitled to reimbursement, as permitted by the Authority’s Act, for any funds expended by the Authority to construct the Project for which the parties contemplate the execution of a mutually acceptable reimbursement agreement,” and that, as a result of cost overruns, the Authority was caused to advance \$473,539.00 in additional Authority funds on the Project beyond the funds contributed for the Project by Upper Pottsgrove and by the developer.<sup>68</sup>

The Joint Protestants further averred that only as a direct result of the Project, and the consent of the Authority and the Borough to the assignment of the STSA to PAWC, can PAWC demonstrate its ability to provide adequate wastewater collection, treatment or disposal capacity to meet present and future customer demands.<sup>69</sup> The Joint Protestants further averred the present and future ratepayers of the Upper Pottsgrove wastewater system should assume the unreimbursed Authority costs of the Project, and the ratepayers of the Borough and the Authority should not be left to assume the unreimbursed Authority costs of the Project.<sup>70</sup>

Protestants also asserted they have an interest in the Application in order to assure that their ratepayers do not assume the unreimbursed Authority costs of the Project, and instead that the present and future ratepayers of the Upper Pottsgrove wastewater system assume the unreimbursed Authority costs of the Project.<sup>71</sup> The Joint Protestants further requested that the Commission accept their Protest for filing, permit Pottstown Borough Authority and the Borough of Pottstown to become parties to this proceeding, and condition any approval of the Application on the full reimbursement of the \$470,184.22 in Authority costs advanced towards the Siphon Project, plus interest and costs.

---

<sup>68</sup> Borough/Authority Protest ¶ 9-11, 13.

<sup>69</sup> Borough/Authority Protest ¶ 20.

<sup>70</sup> Borough/Authority Protest ¶ 21-22.

<sup>71</sup> Borough/Authority Protest ¶ 23.

After considering the Preliminary objections of PAWC and the Township and the response by the Joint Protestants, and answer, I determined that the Joint Protestants averred that the Transaction cannot Close, and PAWC cannot serve its potential customers, without the assignment of the STSA to PAWC, based in part, on the averment that PAWC cannot demonstrate to the Commission that it has the ability to provide adequate wastewater collection, treatment or disposal capacity to meet present and future customer demands without obtaining the assignment of the STSA. Accordingly, I entered an Order granting in part and denying in part, the joint preliminary objections of Pennsylvania-American Water Company and Upper Pottsgrove Township. The request to dismiss the claim for money damages set forth in the joint protest of Pottstown Borough Authority and the Borough of Pottstown was granted, as the Commission lacks the authority to award money damages in this proceeding. The preliminary objections requesting dismissal of the joint protest as legally insufficient, and the remaining preliminary objections of Pennsylvania-American Water Company and Upper Pottsgrove Township, were denied.

At the prehearing conference, the Parties were advised that they were permitted to submit briefs and reply briefs in this proceeding and were provided a schedule in which to present written testimony and evidence.

i. Authority and Borough's Position

a. Assignment of STSA to PAWC

In their Main Brief, the Authority and Borough argue that the Application, if approved, could extinguish Upper Pottsgrove Township's obligation to reimburse the Authority and the Borough for the subject Project costs. The Authority and Borough argue if the Township is absolved of its contractual and financial obligations, the ratepayers of the Borough and the Authority would be substantially harmed as those ratepayers would be forced to satisfy the financial obligations of the Upper Pottsgrove Township. Furthermore, until Upper Pottsgrove Township satisfies its contractual and financial obligations pursuant to the Settlement Agreement, the Authority and the Borough assert they will not consent to the assignment of the

STSA to PAWC, therefore rendering PAWC unable to provide adequate wastewater collection, treatment or disposal capacity to meet present and future customer demands.

b. Section 1102 Approvals

Fitness

PAWC must prove, by a preponderance of the evidence, that is it legally, financially, and technically fit. Technical fitness means that PAWC must have “sufficient technical and operating knowledge, staff and facilities to provide the proposed service.” *Yellow Cab Co. of Pittsburgh v. Pa. P.U.C.*, 673 A.2d 1015, 1019 (Pa. Cmwlth. 1996). Critical to the fitness analysis in the instant matter according to the Authority and Borough, is the question of whether PAWC has sufficient facilities to provide the proposed service.

PAWC seeks approval to purchase Upper Pottsgrove Township’s sanitary sewer collection system. The sewer collection system does not treat or dispose of the wastewater collected from Upper Pottsgrove Township’s customers. The STSA executed by the Authority, the Borough, and Upper Pottsgrove Township permits the Township to convey all of its wastewater to the Authority for treatment at the Authority’s plant. Without assignment of the STSA, the Authority and Borough submit, PAWC will not be permitted to utilize the Authority’s sewage treatment plant and will have no means to treat and dispose of the wastewater collected from Upper Pottsgrove Township’s customers.

The Authority and the Borough assert they will not agree to an assignment of the STSA unless and until Upper Pottsgrove Township satisfies its obligations under the Settlement Agreement. The Authority and the Borough contend that without the assignment of the STSA they have met their burden of proof to rebut any presumption of fitness. The Authority and Borough asserts PAWC is not technically fit to furnish wastewater service to the public in Upper Pottsgrove Township, Montgomery County, Pennsylvania and portions of Douglass Township, Berks County, Pennsylvania. Therefore, the Authority and Borough argue PAWC fails to

demonstrate that it is technically fit to service Upper Pottsgrove Township’s wastewater customers.

In addition, the Authority and Borough argue PAWC does not have the legal ability to assume and perform certain significant obligations under the STSA, which only Upper Pottsgrove Township, a municipal corporation, has the legal ability to perform, as more fully set forth in their joint Main Brief.

The Authority and Borough argue, that PAWC, as a regulated public utility, does not have the legal ability to simply “step into the shoes” of Upper Pottsgrove Township in assuming all of its rights, title, interest, duties and obligations of the Township under the STSA. Accordingly, even with the consent of the Authority and Borough to an assignment of the STSA, a new agreement would have to be drafted; without it, PAWC has failed to prove that it is legally fit to provide the proposed service.

#### Public Benefits

“A certificate of public convenience shall be granted ... only if the [C]ommission shall find or determine 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). To grant a certificate of public convenience for this purpose, the Commission must find that the proposed transaction will “affirmatively promote the service, accommodation, convenience, or safety of the public in some substantial way.” *City of York*, 295 A.2d at 828. The standard used to determine whether a transaction is in the public interest is the “affirmative public benefits” test. *Popowsky* 937 A.2d at 1052-53, 1055. This standard does not require, as our Supreme Court has explained, the Commission “to secure legally binding commitments or to quantify benefits where this may be impractical, burdensome, or impossible;” rather, the Commission will “make factually-based determinations” applying the preponderance of the evidence standard. *Id.* at 1057.

The Authority and Borough also argue in their Main Brief that PAWC has failed to present substantial evidence that the transaction is in the public's interest with respect to the impact caused to the ratepayers of the Borough. Notwithstanding the Authority and Borough's argument above that PAWC is not technically or legally fit to service the wastewater customers in Upper Pottsgrove Township (i.e. residents of Upper Pottsgrove Township will not be able to treat and dispose of their wastewater without the assignment of the STSA), the Authority and Borough assert the ratepayers residing in the Borough of Pottstown will suffer significant financial hardship if the Commission approves the transaction.

#### Section 507 Approvals

66 Pa.C.S.A. § 507 requires the filing of all contracts between a public utility and a municipality, other than contracts to furnish service at tariff rates, in order for such contracts to be valid. Section 507 also applies for the assignment of contracts, originally executed between municipalities (i.e. the Authority, the Borough, and the Township) to a public utility (i.e. PAWC).

Assignment of the STSA to PAWC is material to the Commission's approval of the Application. The Authority and the Borough refuse to consent to the assignment of the STSA to PAWC unless and until Upper Pottsgrove Township reimburses the Authority and the Borough for the outstanding Project costs. The Authority and Borough argue the Commission lacks the power to force the Authority and the Borough to consent to the assignment to PAWC. *Susquehanna Area Regl. Airport Auth. v. Pa. P.U.C.*, 911 A.2d 612, 617 (Pa. Cmwlth. 2006) The Authority and Borough conclude since PAWC has no rights under the STSA without the Authority and the Borough's consent, PAWC cannot obtain the necessary Section 507 approvals and the Application must be denied.

#### Conditions Precedent to Closing

The Authority and Borough stress, without the Authority and the Borough's consent to the assignment of the STSA to PAWC, PAWC cannot demonstrate its ability to

provide adequate wastewater collection, treatment and disposal capacity to meet present and future customer demand. In their Main Brief, the Authority and Borough argue that PAWC will not be able to Close on the Transaction, nor meet current and future customer needs, without the Authority and the Borough's consent to assign the STSA to PAWC.

In their Reply Brief, the Authority and Borough stress that the Settlement, as currently framed, would allow the Township and PAWC to Close on the Transaction based on an order from a single judge from the Court of Common Pleas of Montgomery County directing the Authority and Borough to consent, notwithstanding that the trial judge's decision could be overturned on appeal. Thus, the Authority and Borough argue their concerns that the rights of the Authority and Borough's ratepayers and residents remain unprotected absent settlement language requiring a final, unappealable order from a court, are reasonable, real and legitimate.

The Authority and Borough further argue that PAWC and the Township ignore that the Authority and Borough's consent to an assignment alone does not allow PAWC to "legally" own or operate the system. Rather, they assert, assignment of rights is only *one aspect* of what PAWC needs to lawfully utilize the wastewater system, since, as a non-municipal party, PAWC cannot simply assume a municipality's rights and obligations. The Authority and Borough assert PAWC must execute a new or modified agreement with the Authority, and because the terms of this new agreement have not been negotiated or finally determined, the Authority and Borough argue the Commission should either deny the Application or defer the Application until these issues are resolved.

ii. PAWC's Position

In its Main Brief, PAWC notes that it does not seek Commission approval to Close on the Transaction before the Authority and Borough consent to the assignment of the STSA or assignment is directed by a court of competent jurisdiction. PAWC, Upper Pottsgrove and PBA/BP have always agreed on the necessity for the STSA to be assigned to PAWC at or before Closing. Joint Preliminary Objections of Pennsylvania-American Water Company and Upper Pottsgrove Township to the Protest of Pottstown Borough Authority and Borough of

Pottstown, Montgomery County, pp. 1-2 and 5; Joint Reply of Pennsylvania-American Water Company and Upper Pottsgrove Township to the Answer of Pottstown Borough Authority and Borough of Pottstown, Montgomery County to the Joint Preliminary Objections of Pennsylvania-American Water Company and Upper Pottsgrove Township, pp. 2-3.

PAWC asserts the APA, PAWC's rebuttal testimony, and the Settlement contain safeguards to ensure that PAWC and Upper Pottsgrove will not Close on the Transaction until BPA/BP consent to the assignment of the STSA or assignment is directed by a court of competent jurisdiction. In the APA, the Township agreed to obtain assignment of the STSA before Closing. Appendix A-24-a § 13.02(d); Schedule 4.05. The APA gives PAWC the contractual right to refuse to Close until Upper Pottsgrove has obtained assignment of the STSA. *Id.* § 12.01(a). PAWC notes that the APA allows PAWC to waive the requirement that Upper Pottsgrove obtain assignment before Closing, *Id.* Article XII (introduction), but PAWC made a commitment in its Rebuttal Testimony that it would not waive this requirement.

PAWC asserts it currently will need bulk treatment services from the Authority and Borough for the Upper Pottsgrove System, and if it seeks to waive this condition of Closing, it will file a petition with the Commission setting forth the proposed waiver and permitting the Parties and the Commission an opportunity to evaluate whether the waiver would materially alter PAWC's Application as approved by the Commission. In the event that such a petition is filed, PAWC agrees that Closing cannot occur until the Commission has finally resolved the petition. Consequently, PAWC asserts, the public interest will not be adversely affected by the fact that PBA/BP have not yet consented to the assignment of the STSA. PAWC further asserts that the Settlement further addresses the Contested Issue and removes PAWC's ability to waive assignment of the STSA as a condition precedent of Closing. Settlement, at ¶¶ 42-43.

PAWC explains that if the Commission would approve the Settlement, PAWC could only Close on the Transaction if (a) Upper Pottsgrove obtains PBA/BP's consent at, or prior to, Closing, (b) a court of competent jurisdiction directs assignment of the STSA at, or prior to, Closing, or (c) PAWC files a petition pursuant to 66 Pa.C.S. § 703(g) (Rescission and amendment of orders) specifically asking the Commission to revise its order approving the

Application to allow PAWC to Close on the Transaction without assignment of the STSA. Under these circumstances, PAWC asserts there is simply no danger that PAWC will Close on the Transaction and leave itself and its customers without a source of wastewater treatment services. PAWC asserts that it is confident that Upper Pottsgrove and PBA/BP can and will resolve their differences; at which point, the Transaction can move forward to Closing.

In its Reply Brief, PAWC asserts that Section 1329(d)(2) of the Code states: “The commission shall issue a final order on an application submitted under this section within six months of the filing date of an application meeting the requirements of subsection(d)(1).” As the Application was accepted for filing on April 14, 2021, the deadline for the Commission to issue a final order is October 14, 2021. PAWC has not waived, and arguably cannot waive, this deadline for Commission action. PAWC further argues that the Commission lacks authority to stay this case past the six-month statutory deadline.

PAWC asserts “If statutory language is plain and unambiguous and conveys a clear and definite meaning, there is no occasion to resort to the rules of statutory construction; the language must be given its plain and obvious meaning.” *Davis v. Sulcove*, 205 A.2d 89, 92 (Pa. 1964). PAWC submits there is no ambiguity in Section 1329(d)(2); the statute uses mandatory language in requiring the Commission to make a final decision within six months (the Commission “shall” issue a final order on an application within six months). The plain language therefore controls, and the Commission lacks authority to issue an indefinite stay in this proceeding.

PAWC also objects to the question posed by the Authority and Borough as to whether the Commission should reject and deny the Application because approval of the Application would absolve Upper Pottsgrove Township of its contractual obligation to reimburse the Authority and the Borough for the Project Costs, thus, requiring the ratepayers in the Borough to bear Upper Pottsgrove Township’s financial obligation. PAWC objects to the consideration of this question on two grounds. First, the Authority and Borough’s Main Brief takes a position that is directly contrary to the testimony of PBA/BP’s own witness. PAWC submits that this is improper and should not be condoned by the Commission. PAWC argues

that the brief filed by the Authority and Borough is directly contrary to their own witness's testimony from Justin Keller, the Borough Manager for Borough and the Manager of the Authority who testified that the Closing would not absolve the Township of its obligation to repay the Authority for advance costs paid for the project.

Second, PAWC objects to the consideration of this question because the relief requested, for the Commission to reject and deny the Application, as modified by the Settlement. PAWC argues, is contrary to the relief requested in all of the Authority and Borough's prior pleadings in this proceeding. By not requesting this relief before the briefing stage, PAWC argues the Authority and Borough waived the right to do so. *Red Lion Mun. Auth. v. Pa. Pub. Util. Comm'n*, 2019 WL 5561416 (Pa. Cmwlth. 2019) at 10.<sup>72</sup> Therefore, PAWC requests the Commission disregard this question in its entirety, as PAWC argues that surprising PAWC by asking for relief contrary to what was requested in its previous filings violates PAWC's due process rights. PAWC argues if it had realized that PBA/BP intended to oppose the Application, rather than requesting that the Commission attach conditions to its approval of the Application, PAWC would have introduced additional evidence and would not have waived hearings and the opportunity to cross-examine PBA/BP's witness.

If considered on its merits, however, PAWC argues that the Authority and Borough's Main Brief cites no record evidence in support of its version of the facts; it simply asks the Commission to assume that approval of the Application would absolve Upper Pottsgrove of its contractual obligations. PAWC notes that any finding of fact necessary to support the Commission's decision must be supported by substantial evidence that a reasonable mind might accept as adequate to support a conclusion; more is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & W. Ry. Co. v. Pa. Pub. Util. Comm'n*, 489 Pa 109, 413 A.2d 1037 (1980); *Murphy v. Dept. of Pub. Welfare*, 480 A.2d 382 (Pa. Cmwlth. 1984); *Mill v. Pa. Pub. Util. Comm'n*, 447 A.2d 1100 (Pa. Cmwlth. 1982).

---

<sup>72</sup> This is an unreported panel decision which may be cited for its persuasive value. 210 Pa.Code § 69.414(a).

PAWC asserts the relevant question for the Commission is whether the Transaction affirmatively promotes the service, accommodation, convenience or safety of the public in some substantial way. *City of York v. Pa. Pub. Util. Comm'n*, 295 A.2d 825 (Pa. 1972). PAWC asserts that is established a *prima facie* case that the Transaction, as modified by the Settlement, benefits a wide range of stakeholders: the public-at-large, Upper Pottsgrove Township, Upper Pottsgrove's customers and PAWC's water and wastewater customers. PAWC argues that the Authority and Borough failed to rebut that *prima facie* case by presenting evidence of co-equal weight; and merely introduced evidence of a dispute that, depending on how that dispute is resolved, might possibly have an adverse financial impact on the ratepayers of the Authority and the residents of Borough.

PAWC argues an acquisition provides an affirmative public benefit if the benefits of the transaction outweigh the adverse impacts of the transaction. *Application of CMV Sewage Co., Inc.*, 2008 Pa. PUC LEXIS 950. When looking at the benefits and detriments of a transaction, the focus of the analysis must be on all affected parties, not merely a particular group or a particular geographic area. *Middletown Twsp. v. Pa. Pub. Util. Comm'n*, 482 A.2d 674 (Pa. Cmwlth. 1984). PAWC contends the Authority and Borough's argument focus exclusively on the potential impact of the Transaction on one group: themselves, and their ratepayers and residents.<sup>73</sup> Further, PAWC argues, this is exactly the kind of analysis *Middletown* rejects. Considering all the benefits and detriments, to all affected parties, PAWC argues the preponderance of the evidence clearly demonstrates that the Transaction, as modified by the Settlement, promotes the service, accommodation, convenience or safety of the public in some substantial way.

The Authority and Borough question whether the Commission should deny the Application because PAWC failed to meet its burden in showing that it is able to provide adequate wastewater collection, treatment or disposal capacity to meet present and future

---

<sup>73</sup> In their Objections, PBA/BP focus their analysis even more narrowly. They contend that the Settlement should be rejected because they would be exposed to risk under one particular scenario (*i.e.*, where: a court issues an unfavorable decision on their dispute with Upper Pottsgrove, PBA/BP appeals that decision but does not obtain a stay, PAWC and Upper Pottsgrove Close on the Transaction, and then the appellate court issues a ruling favorable on PBA/BP's dispute with Upper Pottsgrove). Such a narrow analysis is inconsistent with *Middletown*.

customer demand. PAWC objects to the consideration of this question because of the relief requested, arguing the Authority and Borough completely changed their position on the relief it is requesting from the Commission. After the evidence was stipulated into the record and the hearing cancelled, at the request of all parties, PAWC argues that the Authority and Borough for the first time asked the Commission to “reject and deny” the Application, rather than asking the Commission to approve it subject to a condition or to defer consideration of the matter. PAWC argues, this is improper, constitutes waiver, and the Commission should not consider Question 3. *See Red Lion Mun. Auth., supra.*

PAWC argues if the Commission considers this question, it should find the position of the Authority and Borough lacks merit.

The Authority and Borough argue PAWC cannot Close on the Transaction until the Authority and Borough consent to the assignment of the STSA because the Upper Pottsgrove System is a collection and conveyance system; in the absence of an assignment of the STSA, PAWC will not be able to treat the System’s wastewater. PBA/BP Statement No. 1, p. 6.

In its Main Brief, the Authority and Borough claim that assignment of the STSA requires more than just a simple consent to the assignment; it also requires the renegotiation of portions of the STSA because those provisions contain obligations that can only be performed by a municipality. According to the Authority and Borough’s Main Brief, these provisions must be re-drafted if the STSA is assigned to a public utility like PAWC. PBA Main Brief pp. 15-19.

PAWC asserts that the Authority and Borough’s argument should be rejected because there is no record support for it. The STSA is in the record, but the Authority and Borough’s Direct Testimony contains no explanation of why any particular provision must be renegotiated prior to assignment although the Main Brief quotes the contract provisions that the Authority and Borough believe need to be renegotiated. PAWC argues the Commission should reject the Authority and Borough’s position due to the lack of any evidentiary support for it.

PAWC further argues, by failing to introduce testimony regarding the alleged need to renegotiate portions of the STSA in order to assign it from a municipality to a public utility, the Authority and Borough are again surprising the other Parties and prejudicing their rights. PAWC argues had it been aware of this issue, it would have introduced testimony regarding discussions its staff had with Authority and Borough staff regarding this issue and it would have introduced into the record copies of e-mails and draft documents exchanged by the parties. In addition, PAWC would have introduced evidence of numerous similar contracts that PAWC has assumed from municipalities, submitted to the Commission for approval pursuant to Section 507, and for which PAWC claims it received Commission approval. Finally, if the Authority and Borough would have introduced evidence raising this issue before briefs were filed, PAWC argues it could have amended its Application to include a petition requesting that, upon assignment of the STSA to PAWC, the Commission modify the relevant portions of the STSA pursuant to Section 508 of the Code.

PAWC asserts that it is asking the Commission to approve, pursuant to Section 507, the STSA in its present form (after the Authority and Borough consent to the assignment or a court of competent jurisdiction directs assignment of the STSA). If the STSA is renegotiated in the future, PAWC asserts it will submit that new version of the STSA to the Commission for a Section 507 certificate of filing or approval. If the Parties conclude that the STSA needs to be revised but are unable to reach an agreement on the revised agreement, PAWC reserves the right to file a Section 508 Petition in the future asking that the Commission establish just, reasonable and equitable terms in the agreement upon assignment to PAWC.

iii. Township's Position

In addition to the arguments raised by PAWC, the Township argues that the Commission frequently approves applications in acquisition and other Commission proceedings, recognizing that many events will need to occur before Closing can occur on the Transaction under consideration (*e.g.*, obtaining other necessary governmental approvals, obtaining the transfer of relevant permits, and negotiating additional transaction documents). These other

events may take time, yet the Commission frequently approves applications despite these post-Commission approval requirements.

In its Reply Brief filed on July 1, 2021, the Township notes that all parties agree that essential to the proposed Transaction is the assignment of the existing STSA from Upper Pottsgrove to PAWC to provide continuing access to the Authority treatment facilities for treating wastewater from the existing Township system, and that the APA expressly makes assignment of the STSA a condition of Closing on the Transaction.

The Township also averred that the Protest filed by the Authority and Borough did not request denial of the Application, and raised no argument implicating the public interest other than noting the need for the STSA to be assigned by the Township to PAWC.

The Township further argues it is unfair and improper for the Authority and Borough to raise this “terms and conditions” argument after the parties had filed the nonunanimous Settlement, and without proffering the support of any record evidence, depriving PAWC and the Township of the opportunity to offer their own evidence to rebut this argument.

The second issue addressed by the Township, is that the Commission lacks the power to “absolve” Upper Pottsgrove of a contractual obligation, and the Township asserts the approval of the Application will not have such an effect. The Township asserts that, if the Authority and Borough are correct, they have a contract-based right to payment from Upper Pottsgrove which can be enforced in litigation in the Court of Common Pleas,

iv. I&E’s Position

a. Upper Pottsgrove’s Unassigned Contract with the Authority and Borough

I&E explains that there can be no credible dispute that wastewater treatment is essential for the operation of the Upper Pottsgrove Township system, and PAWC concedes that if the acquisition proceeds to Closing, it will need treatment services from the Authority and

Borough.<sup>74</sup> Although the Township's dispute with the Authority and Borough remains unresolved, I&E avers that Upper Pottsgrove Township committed to transferring to PAWC all contracts necessary to operate the system;<sup>75</sup> accordingly, I&E explains, it is clear that this transaction was predicated, and negotiated, with the expectation that Upper Pottsgrove's treatment contract with the Authority and Borough would be assigned to PAWC. Furthermore, I&E points out that, through the Settlement,<sup>76</sup> and as established in its testimony,<sup>77</sup> PAWC has voluntarily committed to conditioning any Closing of its Transaction upon obtaining the assignment of the contract with the Authority and Borough. To that end, I&E submits, that the only portion of the Authority and Borough's opposition that survives the Settlement are those for monetary and other contractually based claims that are outside of the Commission's jurisdiction.<sup>78</sup>

b. The Authority and Borough failed to support their position that PAWC's Application Should be Denied

I&E explains that the Authority's and Borough's position that PAWC's Application should be denied was articulated to I&E for the first time in the Main Brief filed by the Authority/Borough.<sup>79</sup> I&E submits the only divivable relief that the Authority's/Borough's lone piece of direct testimony appears to request is for PAWC to assume the financial obligation that Upper Pottsgrove allegedly owes to the Authority/Borough.<sup>80</sup> To that end, I&E rejects the notion that PAWC's ratepayers should be compelled to pay Upper Pottsgrove's alleged debt to the Authority and Borough in order to Close this Transaction. I&E supports PAWC's

---

<sup>74</sup> PAWC St. No. 1-R, p. 11.

<sup>75</sup> PAWC Application, App. A-24(a), pp. 15-16, Section 2.01.

<sup>76</sup> Joint Pet., ¶ M.

<sup>77</sup> PAWC St. No. 1-R, p. 11.

<sup>78</sup> Interim Order Denying the Preliminary Objections of PAWC and Upper Pottsgrove to the PBA/BP Protest, p. 12 (entered on May 27, 2021).

<sup>79</sup> PBA/BP Main Br., p. 13.

<sup>80</sup> PBA/BP St. No. 1, pp. 6-7.

commitment to agree to permit the Authority, Borough and Upper Pottsgrove Township to resolve their monetary dispute outside of this case, where ratepayers are not held subject to funding protracted litigation, and to condition any Closing of the Transaction upon the Authority/Borough's assignment of the contract to PAWC.<sup>81</sup>

I&E submits that the Authority and Borough's initial recommendation to deny PAWC's Application based upon the allegation that PAWC is not legally and technically fit to service Upper Pottsgrove's customers, is set forth in their Main Brief.<sup>82</sup> But no such claims are raised in testimony submitted by the Authority and Borough. In fact, I&E asserts that, during the entire evidentiary phase of this case, the Authority and Borough did not attempt to rebut PAWC's of-record claims that it is legally, technically, and financially fit to acquire the Upper Pottsgrove system and to serve its customers.<sup>83</sup> I&E submits this is a clear violation of Commission regulations which prohibit the introduction of evidence in the rebuttal phase that should have been included in the party's case-in-chief.<sup>84</sup> "The clear purpose of it is to avoid trial by ambush and the prevention of surprise can only be achieved if the parties are confined to the scope of their direct case."<sup>85</sup> I&E contends that the Authority and Borough failed to present testimony to support these claims and waited to make extra-record fitness arguments for the first time in its Main Brief served on June 29, 2021,<sup>86</sup> which hinge on PAWC's inability to meet fitness requirements absent assignment of the contract. I&E further submits it is unable to discern why the Authority and Borough attempt to make this untimely fitness argument, which is wholly premised upon PAWC Closing the Transaction without obtaining assignment of the STSA, when, I&E stresses, the Settlement and PAWC's testimony make it clear that PAWC will

---

<sup>81</sup> Joint Pet., pp. 16-17, Section M, Approval of Section 507 Agreements.

<sup>82</sup> PBA/BP Main Br., pp. 14-15.

<sup>83</sup> PAWC St. No. 2, pp. 6-8; PAWC St. No. 1, pp. 8-9, 12-14.

<sup>84</sup> 52 Pa.Code § 5.243(e).

<sup>85</sup> *Pa. Pub. Util. Comm'n v. UGI Utilities, Inc.*, 1994 Pa. PUC LEXIS 138.

<sup>86</sup> Evidentiary hearings were set to conclude in this matter on June 11, 2021. Like all other parties, PBA/BP waived cross-examination of any witnesses and supported cancellation of the hearings.

not and cannot Close this Transaction absent such assignment.<sup>87</sup> I&E explains that its initial position in this case mirrored PBA/BP's, specifically that the Transaction should not Close without the assignment because PAWC will not be able to meet its obligation to provide safe, adequate and reliable service to acquired customers absent use of Authority and Borough treatment services.<sup>88</sup> However, I&E asserts this position has been expressly resolved.

c. Approval of PAWC's Application, under the terms of the Settlement, will not absolve Upper Pottsgrove of any contractual reimbursement it may have with the Authority and Borough.

I&E submits that the Settlement addresses the Authority and Boroughs' concerns to the extent available in this forum. Here, I&E asserts, the Commission is empowered to enforce the Settlement commitment of PAWC, a jurisdictional entity, to secure assignment of the PBA/BP as a condition precedent to closing. Accordingly, I&E asserts, that is the only relief available here, and it is already accounted for in the Settlement.<sup>89</sup>

I&E further asserts that the Authority and Borough failed to demonstrate that anything in PAWC's Application, as modified by the Settlement, constrains it from taking any legal action it may choose to enforce any Upper Pottsgrove's contractual obligations.

I&E submits that no basis exists to stay this proceeding since the Settlement requires PAWC to attain assignment of the Authority/Borough contract as a condition of Closing.

I&E submits that the Authority and Borough failed to identify any of-record or valid basis for its new position that this proceeding should be stayed pending final disposition of the Montgomery County Court of Common Pleas action,<sup>90</sup> initiated by the Township, asking the

---

<sup>87</sup> Joint Pet., ¶ M; PAWC St. No. 1-R, p. 11.

<sup>88</sup> I&E St. in Support of Joint Pet., pp. 26-27, referencing PAWC's obligation pursuant to 66 Pa. C. S. § 1501.

<sup>89</sup> Joint Pet., ¶ M.

<sup>90</sup> PBA/BP Main Br., p. 22.

Court to order the Authority and Borough to consent to the assignment.<sup>91</sup> I&E notes that dispute currently is unresolved. I&E submits that, if PAWC had not voluntarily agreed to condition any Closing of the Transaction upon assignment of the STSA, I&E would wholeheartedly agree with the Authority and Borough's position, as I&E's position since the outset of its investigation has always been, and remains, that this Transaction should not and cannot Close without the Authority and Borough treatment service.

Importantly, I&E stresses that PAWC is not attempting to Close the Transaction without securing the assignment, and it has voluntarily agreed to the requirement that obtaining the assignment be a condition precedent to Closing the Transaction. In this vein, I&E submits that the Settlement already imposes a de facto stay because it is structured so that no Closing can occur without assignment of the STSA.<sup>92</sup> Because of this, I&E asserts it can see no reason for, or merit in, staying this proceeding where Closing *already* cannot occur absent resolution of the STSA dispute with Upper Pottsgrove Township. I&E further submits that a resolution of the pending litigation is not necessary to ensure that PAWC will not attempt to Close the Transaction without assignment of the STSA contract. Accordingly, I&E concludes the Authority and Borough's request for this proceeding to be stay is unsupported, without merit, and it should be denied.

#### H. Disposition of Unresolved Issue

##### Burden of Proof and Applicable Standards

PAWC, as the proponent of the Application, bears the burden of proof to establish that it is entitled to receive the approvals being sought in the Application.<sup>93</sup> PAWC must establish this burden, by a preponderance of evidence which is substantial and legally credible.<sup>94</sup>

---

<sup>91</sup> Upper Pottsgrove St. No. 1, pp. 8-9; PBA/BP Main Br., p. 22.

<sup>92</sup> Joint Pet., ¶ M.

<sup>93</sup> 66 Pa.C.S. § 332(a).

<sup>94</sup> *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 578 A.2d 600 (Pa. Cmwlth. 1990).

In order to meet its burden of proof, PAWC must “present evidence more convincing, by even the smallest amount, than that presented by any opposing party.”<sup>95</sup> To satisfy its burden, PAWC must demonstrate, by a preponderance of the evidence, that its proposed transaction complies with Pennsylvania law and should be approved.<sup>96</sup> Specific to this case, PAWC has the burden of proving that the proposed transaction is in compliance with Sections 507, 1102, 1103, and 1329 of the Code.<sup>97</sup>

It is well-settled that in order to ensure that a transaction is in the public interest, the Commission may impose conditions on granting a certificate of public convenience as it may deem to be just and reasonable.<sup>98</sup> In this case, as a result of PAWC’s willingness to agree to the terms and conditions of the Settlement, the Application Transaction will not proceed to Closing unless and until PAWC complies with the applicable sections of the Code.

As stated in detail above, PAWC has established that it has the financial, legal and technical fitness to own and operate the system under the circumstances. PAWC and the other Settling Parties have also introduced substantial record evidence to demonstrate that the transaction proposed in the Settlement will provide affirmative public benefits. The main benefit noted is that PAWC will ensure that Township customers will receive high quality wastewater service meeting all applicable regulatory requirements and customer service standards pursuant to the Code. Given the foregoing, I conclude that the Settlement should be approved by the Commission without modification, because the Settlement is in the public interest.

The Settlement will ensure that, upon closing, the Township residents will receive high quality wastewater service from PAWC, a certificated public utility with the necessary financial, technical, and legal resources to provide that service into the foreseeable

---

<sup>95</sup> *Se-Ling Hosiery v. Margulies*, 70 A.2d 854 (Pa. 1950).

<sup>96</sup> *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm’n*, 578 A.2d 600 (Pa. Cmwlth. 1990).

<sup>97</sup> I&E notes that each of these applicable standards are fully articulated in the Joint Stipulation of Proposed Findings of Fact, Proposed Conclusions of Law and Proposed Ordering Paragraphs.

<sup>98</sup> I&E Main Br., p. 18, citing to 66 Pa.C.S. § 1103(a).

future. Bringing the Township's existing customers into PAWC's customer base will also ensure that Township residents will have access to the Commission's procedures for investigating and enforcing any complaints that the residents may have regarding the Township's wastewater service. Additionally, although the parties in this proceeding acknowledge that PAWC may apply for a rate increase in the future, any such rate increase application will be subject to the Commission's jurisdiction. PAWC would be required to apply for any increase, following which other parties in interest, including existing customers, may intervene in any such proceeding. Any requested increase would ultimately be subject to approval by the Commission, and the Commission would have the authority to approve, deny or modify any such requested increase.

In reaching the conclusion that the Settlement should be approved by the Commission without modification, the testimony from the public input hearing was also considered, as noted above. As noted by the Parties in this proceeding, Section 1329 of the Public Utility Code explicitly provides for the acquisition of municipal water systems by existing public utilities. Also, as noted by PAWC and the Township, the legislative intent behind Section 1329 of the Code is to encourage the sale of municipal water systems so that those systems will be operated by public utilities with the resources and expertise to ensure those systems' viability into the future. Additionally, the Township noted that the proceeds of the sale of its wastewater system may provide immediate and substantial benefits to its residents. For the reasons discussed above, it is my recommendation that the Commission approve the Settlement without modification.

With regard to the request of the Joint Protestants, the Authority and Borough, to reject the Settlement or to deny or delay the Application, with respect to the assignment of the STSA and the alleged money due to the Authority and Borough from the Township, the claims of the Authority and Borough will be denied.

The Authority owns a wastewater treatment facility that the Borough leases and which Upper Pottsgrove Township depends upon for treatment of its wastewater.<sup>99</sup> The

---

<sup>99</sup> PBA/BP St. No. 1, p. 2.

wastewater treatment is essential for the operation of the Township system, and PAWC concedes that if the acquisition proceeds to Closing, it will need treatment services from the Authority and Borough.<sup>100</sup> The Township committed to transferring to PAWC all contracts necessary to operate the system;<sup>101</sup> and accordingly, it is clear that this Transaction was negotiated with the expectation that Upper Pottsgrove's treatment contract with the Authority and Borough would be assigned to PAWC.

Through the Settlement,<sup>102</sup> and as established in its testimony,<sup>103</sup> PAWC has committed to conditioning any Closing of its Transaction upon obtaining the assignment of the contract with the Authority and Borough. To that end, the only portion of the Authority and Borough's opposition that survives the Settlement are those for monetary and other contractually-based claims that are outside of the Commission's jurisdiction.<sup>104</sup>

Although the Authority and Borough's position that PAWC's Application should be denied was articulated for the first time in the Main Brief filed by the Authority/Borough,<sup>105</sup> the relief articulated in the Authority and Borough's testimony appears to request PAWC assume the financial obligation that Upper Pottsgrove allegedly owes to the Authority/Borough.<sup>106</sup> It is appropriate for the Authority, Borough and Upper Pottsgrove Township to resolve their monetary dispute outside of this case, where ratepayers are not subject to funding protracted litigation, and to condition any closing of the transaction upon the Authority/Borough's assignment of the contract to PAWC.<sup>107</sup>

---

<sup>100</sup> PAWC St. No. 1-R, p. 11.

<sup>101</sup> PAWC Application, App. A-24(a), pp. 15-16, Section 2.01.

<sup>102</sup> Joint Pet., ¶ M.

<sup>103</sup> PAWC St. No. 1-R, p. 11.

<sup>104</sup> Interim Order Denying the Preliminary Objections of PAWC and Upper Pottsgrove to the PBA/BP Protest, p. 12 (entered on May 27, 2021).

<sup>105</sup> PBA/BP Main Br., p. 13.

<sup>106</sup> PBA/BP St. No. 1, pp. 6-7.

<sup>107</sup> Joint Pet., pp. 16-17, Section M, Approval of Section 507 Agreements.

The Authority and Borough's request to stay or deny PAWC's Application based upon the allegation that PAWC is not legally and technically fit to service Upper Pottsgrove's customers, is set forth in their Main Brief,<sup>108</sup> but no such corresponding claims are raised in testimony submitted by the Authority and Borough. Moreover, during the evidentiary phase of this case, the Authority and Borough did not attempt to rebut PAWC's of-record claims that it is legally, technically, and financially fit to acquire the Upper Pottsgrove system and to serve its customers.<sup>109</sup> Commission regulations prohibit the introduction of evidence in the rebuttal phase that should have been included in the party's case-in-chief,<sup>110</sup> and the Authority and Borough failed to present testimony to support these claims and waited to make extra-record fitness arguments for the first time in its Main Brief served on June 29, 2021.<sup>111</sup> However, even if timely asserted, the fitness argument, which is wholly premised upon PAWC Closing the Transaction without obtaining assignment of the Authority and Borough must fail, where the Settlement and PAWC's testimony make it clear that PAWC will not and cannot Close this Transaction absent such assignment.<sup>112</sup> The Settlement is clear and provides the Transaction will not Close without the assignment or appropriate Court Order because otherwise, PAWC will not be able to meet its obligation to provide safe, adequate and reliable service to acquired customers absent use of the Authority and Borough's services.<sup>113</sup> However, based upon the Settlement and the record evidence, this issue has been expressly resolved.

In addition, the Settlement addresses the Joint Protestants' concerns to the extent available in this forum. The Commission is empowered to enforce the Settlement commitment of PAWC, a jurisdictional entity, to secure assignment of the Authority and Borough as a

---

<sup>108</sup> PBA/BP Main Br., pp. 14-15.

<sup>109</sup> PAWC St. No. 2, pp. 6-8; PAWC St. No. 1, pp. 8-9, 12-14.

<sup>110</sup> 52 Pa.Code § 5.243(e).

<sup>111</sup> Evidentiary hearings were set to conclude in this matter on June 11, 2021. Like all other parties, PBA/BP waived cross-examination of any witnesses and supported cancellation of the hearings.

<sup>112</sup> Joint Pet., ¶ M; PAWC St. No. 1-R, p. 11.

<sup>113</sup> I&E St. in Support of Joint Pet., pp. 26-27, referencing PAWC's obligation pursuant to 66 Pa.C.S. § 1501.

condition precedent to Closing. Accordingly, that is the only relief available here, and it is already accounted for in the Settlement.<sup>114</sup> On the other hand, the Authority and Borough's argument regarding enforcement of a settlement agreement or a contract between itself and Upper Pottsgrove, two non-jurisdictional entities, is not properly within the scope of the Commission's jurisdiction.<sup>115</sup>

The Authority and Borough failed to demonstrate that anything in PAWC's Application, as modified by the Settlement, constrains it from taking any legal action it may choose to enforce any Upper Pottsgrove's contractual obligations. A proceeding regarding the contract between the Authority, Borough and Township has already been initiated in Montgomery County Court, and the Authority and Borough may have an opportunity to pursue its claims in that forum where the monetary and contractual relief it is seeking<sup>116</sup> may be available. However, those types of relief are not available before the Commission, and any assertion that PAWC can act to unilaterally deprive the Authority and Borough of contractual rights by way of this case is unsupported and clearly dispelled by explicit Settlement terms.

Finally, the Authority and Borough failed to identify any of-record or valid basis for its position that this proceeding should be stayed pending final disposition of the Montgomery County Court of Common Pleas action,<sup>117</sup> initiated by the Township, asking the Court to order the Authority and Borough to consent to the assignment.<sup>118</sup> If PAWC had not voluntarily agreed to condition any Closing of the Transaction upon assignment of the Authority and Borough contract, this Transaction could not Close without the Authority/Borough's treatment service.

---

<sup>114</sup> Joint Pet., ¶ M.

<sup>115</sup> Interim Order Denying the Preliminary Objections of PAWC and Upper Pottsgrove to the PBA/BP Protest, p. 12 (entered on May 27, 2021), citing *Allport Water Auth. v. Winburne Water Co.*, 258 Pa. Super. 555, 393 A.2d 673 (Pa. Super. 1978) et al.

<sup>116</sup> PBA/BP St. No. 1.

<sup>117</sup> PBA/BP Main Br., p. 22.

<sup>118</sup> Upper Pottsgrove St. No. 1, pp. 8-9; PBA/BP Main Br., p. 22.

The Settlement, by its very terms, imposes a *de facto* stay because it is structured so that no Closing can occur without assignment of the STSA contract by the Authority or Borough or an order requiring the assignment.<sup>119</sup> Because of this, there is no reason for staying this proceeding where the Closing, based upon the Settlement terms, cannot occur absent resolution of the Authority and Borough assignment dispute with the Township. The pending litigation is not necessary to ensure that PAWC will not attempt to Close the Transaction without assignment of the STSA contract. By way of the Settlement and through its testimony,<sup>120</sup> PAWC has already made this commitment, and therefore, the request to stay would only further prolong this matter without any benefit or need. Accordingly, the request for this proceeding to be stayed is unsupported, without merit, and will be denied.

### Conclusion

For the reasons discussed above, it is recommended that the Commission approve the Settlement without modification, as the Settlement is in the public interest. It is further recommended that the Commission dismiss the remaining outstanding claims asserted by the Authority and Borough, as more fully set forth above.

## V. 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. Pennsylvania-American Water Company has the burden of proof in this proceeding. 66 Pa.C.S § 332(a).
3. Commission policy promotes settlement. 52 Pa.Code § 5.231.

---

<sup>119</sup> Joint Pet., ¶ M.

<sup>120</sup> Joint Pet., ¶ M; PAWC St. No. 1-R, p. 11.

4. 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. 52 Pa.Code § 69.401.

5. 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 & Sewer Assocs.*, 74 Pa. PUC 767 (1991). The instant settlement is in the public interest.

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) (Procedure to obtain certificates of public convenience).

7. 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).

8. 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).

9. 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 (Pa. Cmwlth. 1985); *Warminster Twp. Mun. Auth. v. Pa. Pub. Util. Comm'n*, 138 A.2d 240 (Pa. Super. 1958). PAWC has demonstrated that it is technically, financially and legally fit.

10. 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 (Pa. Cmwlth. 1992).

11. 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).

12. 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).

13. For an acquisition in which a municipal corporation and the acquiring public utility agree to use the valuation procedure delineated in 66 Pa.C.S. § 1329, the ratemaking rate base of the selling utility shall be the lesser of the purchase price negotiated by the parties or the fair market value of the selling utility. 66 Pa.C.S. § 1329(c)(2). The purchase price of \$13,750,000 is the lesser amount.

14. “Fair market value” is defined as “the average of the two utility valuation expert appraisals conducted under subsection (a)(2).” 66 Pa.C.S. § 1329(g).

15. For an acquisition in which a municipal corporation and the acquiring public utility agree to use the valuation procedure delineated in 66 Pa.C.S. § 1329, the application is to contain a tariff equal to the existing rates of the selling utility at the time of the acquisition and a rate stabilization plan, if applicable to the acquisition. 66 Pa.C.S. § 1329(d)(1)(v).

16. During the period that the *pro forma* tariff supplement is in effect, an acquiring public utility may collect a DSIC, as approved by the Commission. 66 Pa.C.S. § 1329(d)(4).

17. A wastewater utility must submit a long-term infrastructure improvement plan to, and receive approval from, the Commission prior to collecting a DSIC. *Implementation of Act 11 of 2012*, Docket No. M-2012-2293611 (Final Implementation Order entered August 2, 2012).

18. Section 1329 permits an acquiring public utility's post-acquisition improvements, which are not included in a DSIC, to accrue allowance for funds used during construction after the date the cost was incurred until the asset has been in service for a period of four years or until the asset is included in the acquiring public utility's next base rate case, whichever is earlier. 66 Pa.C.S. § 1329(f)(1).

19. Section 1329 permits an acquiring public utility to defer depreciation on post-acquisition improvements, which are not included in a DSIC. 66 Pa.C.S. § 1329(f)(2).

20. Section 1329 permits an acquiring public utility to include transaction and closing costs in its rate base, during its next base rate proceeding. 66 Pa.C.S. § 1329(d)(2). The Commission will not approve these costs during the 1329 proceeding. *Implementation of Section 1329 of the Public Utility Code*, Docket No. M-2016-2543193 (Final Implementation Order entered October 27, 2016).

21. 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 thirty (30) days before the effective date of the contract in order to be valid. The Commission may allow the contract to become valid and issue 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.

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

## VI. ORDER

THEREFORE,

IT IS RECOMMENDED:

1. That the Joint Petition for Approval of Non-Unanimous Settlement of All Issues filed by Pennsylvania-American Water Company, the Office of Consumer Advocate, the Pennsylvania Public Utility Commission's Bureau of Investigation and Enforcement, the Office of Small Business Advocate, Upper Pottsgrove Township, and Shadeland Development Corporation, on June 25, 2021 at Docket No. A-2020-3021460, including all terms and conditions thereof, is approved, without modification.

2. That the Application filed by Pennsylvania-American Water Company on November 24, 2020, as amended, be granted, subject to the conditions set forth in the Joint Petition for Approval of Non-Unanimous Settlement of All Issues filed on June 25, 2021 and the terms set forth in this Order.

3. That the Commission 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 Upper Pottsgrove Township's assets, properties and rights related to its wastewater collection and treatment system to Pennsylvania-American Water Company as provided in the Application, and (ii) Pennsylvania-American Water Company's right to begin to offer, render, furnish and supply wastewater collection and treatment service in the areas served by Upper Pottsgrove as indicated in the Application.

4. That, upon the day of Closing of the Transaction, Pennsylvania-American Water Company be permitted to issue a compliance tariff supplement, consistent with the *pro forma* tariff supplement submitted with the Application as Appendix A-12, to be effective upon the day of Closing of the Transaction.

5. That the Commission approve, under 66 Pa.C.S. § 1329(c), a rate base addition of \$13,750,000 associated with the acquisition of the System.

6. That, in future acquisitions by Pennsylvania-American Water Company under 66 Pa.C.S. § 1329, filed subsequent to the Commission's approval of this Settlement without modification, Pennsylvania-American Water Company shall clearly document the date on which it engaged or otherwise authorized its utility valuation expert to perform the fair market value appraisal of the system so as to demonstrate compliance with 66 Pa.C.S. § 1329(a)(5).

7. That Pennsylvania-American Water Company be directed to ensure that, in any future Section 1329 applications it submits, the engineering assessment required under 66 Pa.C.S. § 1329(a)(4) will designate the condition of the inventory and assets appraised. Such designation of condition shall be limited to whether the categories of system assets appraised are in poor, fair, good, or very good condition

8. That Pennsylvania-American Water Company and Upper Pottsgrove Township be directed to continue to work to achieve the transfer of the Real Property Rights. However, PAWC shall be permitted, in its discretion, to Close without the transfer of all of the Real Property Rights, provided that an escrow is established from the Purchase Price to be used to obtain any post-Closing transfers of the Real Property Rights. Pennsylvania-American Water Company will provide an update to the Pennsylvania Public Utility Commission's Bureau of Investigation and Enforcement, the Office of Consumer Advocate and the Office of Small Business Advocate approximately thirty (30) days in advance of the anticipated Closing Date and a final update before Closing regarding the status of the transfer of the Real Property Rights.

9. That Pennsylvania-American Water Company be directed to require, as a condition of Closing and subject to 66 Pa.C.S. § 703(g), that Upper Pottsgrove obtain clear title to the sewer line of which Shadeland Development Corporation claims ownership in its Petition to Intervene, by dedication to Upper Pottsgrove, determination of a court of competent jurisdiction that dedication is not necessary, or other evidence reasonably satisfactory to Pennsylvania-American Water Company.

10. That PAWC be directed to complete an Inflow and Infiltration study of the Upper Pottsgrove System following Closing and provide the results of that study to I&E, OCA and OSBA upon completion. The costs of the I&I study will be subject to prudence review when they are claimed for recovery in base rates.

11. That, in the first base rate case that includes Upper Pottsgrove's wastewater system assets:

a. Pennsylvania-American Water Company will submit a cost-of-service study that removes all costs and revenues associated with the operation of Upper Pottsgrove's system.

b. Pennsylvania-American Water Company will provide a separate cost-of-service study for the Upper Pottsgrove System.

c. Pennsylvania-American Water Company will propose to move the Township's system to its cost of service, based on a separate cost-of-service study for the Township's system; provided, however, that Pennsylvania-American Water Company will not propose Upper Pottsgrove wastewater rates in excess of Pennsylvania-American Water Company's proposed Rate Zone 1 system-average rates. The Joint Petitioners acknowledge, however, that Pennsylvania-American Water Company may agree to rates other than those proposed for Township customers in the context of a settlement of the base rate case. OCA, I&E, OSBA and Upper Pottsgrove reserve their rights to fully address this proposal, and to make other rate proposals in the base rate case.

12. That, pursuant to 66 Pa.C.S. § 1329, Pennsylvania-American Water Company shall be permitted to collect a DSIC prior to the first base rate case in which the Upper Pottsgrove service area plant-in-service is incorporated into rate base; provided, however, that such permission shall be conditioned upon (i) Pennsylvania-American Water Company's filing of an amended wastewater Amended LTIP which does not re-prioritize other existing commitments in other services areas, (ii) the Commission's approval of the Amended LTIP, as

may be modified in the discretion of the Commission, and (iii) Pennsylvania-American Water Company's filing of a compliance tariff supplement which incorporates Upper Pottsgrove into its existing DSIC tariff, including all customer safeguards applicable thereto, after Commission approval of the Amended LTIP.

13. That Pennsylvania-American Water Company shall be permitted to (i) accrue AFUDC for post-acquisition improvements not recovered through the DSIC for book and ratemaking purposes and (ii) 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 Pennsylvania-American Water Company's first base rate case which includes Upper Pottsgrove's wastewater System assets. The Joint Petitioners reserve their rights to litigate their positions fully in future rate cases when these issues are ripe for review. The Joint Petitioners' assent to this term should not be construed to operate as their preapproval of Pennsylvania-American Water Company's requests.

14. That Pennsylvania-American Water Company shall be permitted to claim Transaction and Closing Costs associated with the Transaction. The Joint Petitioners reserve their rights to litigate their positions fully in future rate cases when this issue is ripe for review. The Joint Petitioners' assent to this term should not be construed to operate as their preapproval of Pennsylvania-American Water Company's request.

15. That, if the transaction does not close, and Pennsylvania-American Water Company does not recoup all of its \$90,000 engineering fee/legal fee deposit from Upper Pottsgrove as referenced in Section 3.01 of the APA, then Pennsylvania-American Water Company will not seek to recover any unrecouped portion of the deposit from its ratepayers in any proceeding.

16. That the inclusion of outside legal fees, if any, in Pennsylvania-American Water Company's transaction and closing costs under the APA between Pennsylvania-American Water Company and Upper Pottsgrove shall be separately identified in Pennsylvania-American

Water Company 's next base rate case and amounts expended by Pennsylvania-American Water Company on behalf of Upper Pottsgrove will be separately identified. The OCA, I&E and OSBA reserve the right to challenge the reasonableness, prudence, and basis for such fees.

17. That, within the first billing cycle following Closing, Pennsylvania-American Water Company shall include a bill insert to Upper Pottsgrove's customers regarding its low income programs and shall include such information in a welcome letter to Upper Pottsgrove's customers. The bill insert 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. Pennsylvania-American Water Company will also provide ongoing, targeted outreach to its Upper Pottsgrove-area customers regarding its low income program.

18. That, in the same welcome packet referenced in the above paragraph, Pennsylvania-American Water Company will explicitly inform acquired customers that they are being converted to monthly billing. Pennsylvania-American Water Company's letter should also direct acquired customers to contact Pennsylvania-American Water Company with any questions about the conversion and/or to discuss low-income programming options that may be available.

19. That, pursuant to 66 Pa.C.S. § 507, the Commission issue Certificates of Filing or approvals for the following agreements between Pennsylvania-American Water Company and a municipal corporation: (1) the Sanitary Sewer Asset Purchase Agreement By and Between Upper Pottsgrove Township, Montgomery County as Seller and Pennsylvania-American Water Company as Buyer, dated as of April 28, 2020; (2) the Sewage Treatment Service Agreement between Upper Pottsgrove Township, Borough of Pottsgrove and Pottstown Borough Authority; and, (3) the Joint Sewage Transportation Agreement between Upper Pottsgrove Township and Lower Pottsgrove Township.<sup>121</sup>

20. That the contracts listed in Schedule 4.13 of the APA, including but not limited to, the Sewage Treatment Service Agreement referenced in Paragraph No. 42 of the

---

<sup>121</sup> The OCA does not join in this paragraph but does not oppose PAWC's request.

