

**PENNSYLVANIA  
PUBLIC UTILITY COMMISSION  
Harrisburg, PA 17120**

**Application of Pennsylvania-American Water Company, pursuant to 66 Pa. C.S. §§ 1102 and 1329 for: (1) approval of the acquisition by Pennsylvania-American Water Company of substantially all of the assets, properties and rights related to the wastewater collection and treatment system owned by the Butler Area Sewer Authority (BASA or Authority); (2) approval of the right of Pennsylvania-American Water Company to begin to offer, render, furnish and supply wastewater service in the City of Butler, portions of the Borough of East Butler, and portions of the Townships of Butler, Center, Connoquenessing, Oakland, and Summit, in Butler County, Pennsylvania; and (3) an order approving the acquisition that includes the ratemaking rate base of the Authority wastewater system assets pursuant to Section 1329(c)(2) of the Public Utility Code.**

**Public Meeting held November 9, 2023  
3037047-OSA  
Docket No. A-2022-3037047**

**Request for Approval of Contracts, between Pennsylvania-American Water Company, BASA and municipal corporations to be assumed by Pennsylvania-American Water Company upon the closing of the requested acquisition, Pursuant to Section 507 of the Public Utility Code.**

**STATEMENT OF COMMISSIONER KATHRYN L. ZERFUSS**

The Commission is making a determination today on Pennsylvania-American Water Company's (PAWC) application requesting Commission approval to acquire the Butler Area Sewer Authority's (BASA) wastewater system and the Joint Petition for Approval of Unanimous Settlement of All Issues (Settlement) filed by PAWC, the Commission's Bureau of Investigation and Enforcement (I&E), the Office of Consumer Advocate (OCA), the Office of Small Business Advocate (OSBA), BASA, the Township of Butler, and the City of Butler.

First, I take this opportunity to express my gratitude to the Office of Administrative Law Judge and Office of Special Assistants for their thorough review of the evidence in this matter, careful consideration of the parties' positions, and diligent application of the relevant case law.

Second, I want to highlight that our obligation here is to apply a balancing test and weigh all the factors for and against the transaction, including the impact on rates of PAWC's and BASA's existing customers. Our task is to determine if PAWC has established its burden of proof that there are substantial affirmative public benefits of the proposed acquisition that outweigh the harms resulting from it. The task is to assign weight to the benefits and harms and, in doing so, determine how the scale tips on PAWC's burden of proof under the law. It is not the mere existence of or even the number of proven benefits that matters, but rather the weight assigned to any proven benefits and a determination whether they outweigh the resulting harms – including both immediate and long-term.

Recently, in *Cicero v. Pa. PUC*, 910 C.D. 2022 (Pa. Cmwlth. 2023) (*Cicero*), the Commonwealth Court reversed a Commission Order that had approved the acquisition of a municipality's wastewater assets by a large public utility because the Commonwealth Court determined that the benefits did not outweigh the acknowledged harms of the acquisition. The Commonwealth Court upheld prior precedent that the substantial affirmative public benefits of a proposed acquisition must outweigh the acknowledged harms resulting from the acquisition. The Court further explained that where harms result from the transaction, the acquisition must also provide benefits that differ substantially from those already being provided by the existing system operator, and providing the same services that are already being provided, or providing for upgrades that the existing system operator is capable of providing, are not substantial affirmative benefits meeting the legal test established in the case law. *Id.* at 20-21.

I contend, with a few minor, inconsequential differences, the benefits offered by the parties in the instant case are similar to the benefits offered in *Cicero* – benefits that the Commonwealth Court found did not outweigh the harms of the acquisition. Based on the evidence in this particular case, I agree with the ALJ that the benefits to be realized from the proposed acquisition do not outweigh the harms to current PAWC customers and existing BASA customers. For this reason, I support the staff recommendation to deny PAWC's application because PAWC failed to meet its burden of proof to show that its ownership of BASA's wastewater system would affirmatively promote the service, accommodation, convenience, or safety of the public.

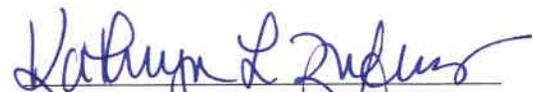
PAWC identified as a benefit that it will assume BASA's responsibilities under a 2019 Corrective Action Plan (CAP) with the Pennsylvania Department of Environmental Protection (DEP) and implement a five-year capital improvement plan totaling \$75.8 million. While this appears to be a benefit that should weigh heavily on the scale, the ALJ found that BASA has been, and is continuing to provide, sufficient service to its customers and has made continued progress with its CAP. R.D. at 65. Additionally, while BASA may have had previous compliance issues, there is no evidence to support that BASA is not complying with the CAP deadline set forth by DEP or is otherwise in current noncompliance with environmental statutes, regulations, orders or permits. The ALJ found that both BASA and PAWC have similar abilities to obtain the necessary financing to complete the capital improvement program, so PAWC does not provide a uniquely different advantage to BASA's ratepayers than already existing in BASA as a municipal authority. R.D. at 66. Again, I agree. While PAWC has committed to spending \$75 million for capital improvements, which it can guarantee due to its size and financial fitness,

BASA is likewise capable of completing the needed improvements and upgrades without the proposed acquisition. As the Commonwealth Court found in *Cicero*, providing the same services already being provided, or providing for upgrades that the existing system operator is capable of providing, do not constitute substantial affirmative public benefits. *Cicero*, at 19.

While PAWC has technical, managerial, and financial ability, this does not necessarily mean that every acquisition it seeks will further the public interest. Based on the evidence in this case, the ALJ properly determined that “[t]he service being provided by BASA does not appear to be inadequate, and the other relevant evidence does not substantiate that the impact the transaction will have on rates outweighs the marginal benefits that would be provided by PAWC.” R.D. at 64. PAWC needed to establish that other types of benefits would result from the transaction and that those benefits are substantial enough to outweigh the harms. I would find that the ALJ properly determined that PAWC did not do so here.

While, in many cases, regionalization, and the acquisition of smaller systems by larger systems may improve the long-term viability of the water and wastewater industry, I contend that it is critical to carefully evaluate each one of these cases because there is a direct connection here to the ability of low and moderate income families to afford life-sustaining water and wastewater services. Water and wastewater services are increasingly unaffordable because the rates are ever increasing. I emphasize that this reality is not solely because of these acquisitions, but acquisition costs can be a substantial contributing factor that must be addressed. That said, I do not believe that municipal systems should be discouraged from considering the sale of their water or wastewater assets, and I do not believe that the applicable law requires imminent financial distress or a failure to adequately service customers to satisfy the requirements for approval; however, the applicable legal requirements of substantial affirmative public benefits outweighing harms must be met.

**DATE: November 9, 2023**

  
**Kathryn L. Zarfuss, Commissioner**