

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

Public Meeting held November 9, 2023

Commissioners Present:

Stephen M. DeFrank, Chairman, Statement  
Kimberly Barrow, Vice Chair, Statement, Dissenting  
Ralph V. Yanora  
Kathryn L. Zerfuss, Statement, Dissenting  
John F. Coleman, Jr.

A-2022-3037047

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.

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.

**OPINION AND ORDER**

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## **BY THE COMMISSION:**

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition are the Exceptions of Pennsylvania-American Water Company (PAWC, the Company, or the Applicant), and the Exceptions of the Butler Area Sewer Authority (BASA or Authority), the Township of Butler (the Township), and the City of Butler (the City) (collectively, the Butler Parties), each filed on September 21, 2023, in the above-captioned proceeding. The Exceptions were filed in response to the Recommended Decision (R.D.) of Administrative Law Judge (ALJ) Marta Guhl issued on September 14, 2023.<sup>1</sup> Also, before the Commission is the Joint Petition for Approval of Unanimous Settlement of All Issues (Joint Petition or Settlement) filed by PAWC, the Commission's Bureau of Investigation and Enforcement (I&E), the OCA, the Office of Small Business Advocate (OSBA), BASA, the Township, and the City (collectively, Joint Petitioners) on August 14, 2023. Finally, before the Commission is PAWC's and the Butler Parties' Joint Motion to Strike the Reply Exceptions filed jointly by the Joint Protestants (Motion to Strike), which was filed on September 27, 2023.<sup>2</sup> For the reasons below, we shall: (1) grant the Motion to Strike; (2) grant the Exceptions of PAWC and the Butler Parties to the extent they argue that the benefits of the acquisition outweigh any potential harms; (3) modify the Recommended Decision; (4) approve the Settlement without modification; and (5) grant the Application, consistent with this Opinion and Order.

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<sup>1</sup> Reply Exceptions were filed by the Office of Consumer Advocate (OCA) and Protestants, Center Township (Center) and Summit Township (Summit) (collectively, the Joint Protestants) on September 26, 2023.

<sup>2</sup> The Joint Protestants filed a response to the Motion to Strike on October 16, 2023.

## I. History of the Proceeding

This matter concerns the Application filed with the Commission by PAWC on February 14, 2023,<sup>3</sup> pursuant to Sections 507, 1102, and 1329 of the Public Utility Code (Code), 66 Pa. C.S. §§ 507, 1102, and 1329 (as amended, the Application). In its Application, PAWC requested Commission approval of the acquisition of substantially all the assets, properties and rights related to the wastewater collection and treatment system (the System) owned by BASA, and the right of the Company to provide wastewater service in the areas served by BASA. The Application also requested, pursuant to Section 1329(c)(2), the Commission's approval to utilize fair market value (FMV) for the ratemaking rate base of the System.<sup>4</sup> Application at ¶ 1. PAWC also sought the accrual and deferral of certain post-acquisition improvement costs. Specifically, PAWC sought the accrual of Allowance for Funds Used During Construction (AFUDC) for post-acquisition improvements (which will not be recovered

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<sup>3</sup> PAWC submitted an Amended Application on February 17, 2023, due to PAWC determining that one of the municipal agreements for which the Company initially requested approval of (Appendix A-25.4 – December 14, 2005 Service Agreement between Township of Connoquenessing and BASA for Winterwood Drive Service Area), pursuant to Section 507 of the Code, is unnecessary and will not be assumed by PAWC at closing. This necessitated amendments to the following: (1) Application; (2) Appendix A-14 – PAWC St. 1; and (3) Appendix A-25. It was also discovered that the Mayor of the City of Butler, Robert A. Dandoy's name was misspelled, and those references were corrected by the Amended Application as well (Application, Appendix A-13 (response only), and Appendix A-14 – PAWC St. 1).

<sup>4</sup> Under 66 Pa. C.S. § 1329, FMV is the lesser of the negotiated purchase price in the Asset Purchase Agreement (APA) or the average of the appraisal of BASA's Utility Valuation Expert (UVE) and the appraisal of PAWC's UVE. In this proceeding PAWC is seeking to establish a ratemaking rate base of \$231,500,000 for BASA's System assets based on the negotiated purchase price, as the negotiated purchase price of \$231,500,000 is less than the average of the fair market value appraisals, which is \$239,303,632 (determined by \$246,178,265 presented in the appraisal of Weinert Appraisal and Depreciation Services, LLC (Weinert Consultants) and \$232,429,000 presented in the appraisal of Gannett Fleming Valuation and Rate Consultants, LLC (Gannett Fleming). PAWC St. 4 at 1-3; BASA St. 3 at 1, 4, 12-13; Appendix A-11.

through its Distribution System Improvement Charge (DSIC)) for book and ratemaking purposes, as well as the deferral of depreciation related to post-acquisition improvements (which will not be recovered through the DSIC) for book and ratemaking purposes. Lastly, PAWC requested approval of the APA and certain municipal agreements to be assumed by PAWC as a result of the transaction, pursuant to Section 507 of the Code, 66 Pa. C.S. § 507. Application at 2-4.

On February 17, 2023, the OSBA filed a Notice of Appearance, Notice of Intervention, and Public Statement. On February 22, 2023, I&E filed a Notice of Appearance. The OCA filed a Notice of Appearance, Protest, and Public Statement on April 11, 2023.

In accordance with the Commission's Bureau of Technical Utility Services' (TUS) request during its completeness review of the Application, PAWC filed the requested missing information on March 27, 2023, and filed a Second Amended Appendix A-12 on April 6, 2023.

On April 10, 2023, the Commission notified PAWC that the Application had been conditionally accepted for filing, contingent upon certain service and notice requirements. On May 22, 2023, PAWC filed a verification stating that it had complied with all service and notice requirements of the Secretarial Letter of April 10, 2023.

On May 23, 2023, by way of Secretarial Letter, the Commission accepted the Application for filing. The Secretarial Letter stated that the Commission would publish notice of the Application in the June 10, 2023, edition of the *Pennsylvania Bulletin*, with a protest deadline of July 10, 2023.

John J. Dolan filed a Petition to Intervene on May 20, 2023, which was granted. Cynthia L. Spigelmyer filed a Protest on May 22, 2023. On May 26, 2023,

BASA, the Township, and the City filed Petitions to Intervene, which were granted. On June 9, 2023, PAWC filed a Petition for Leave to File Supplemental Direct Testimony, which was granted by the ALJ's Interim Order #1, issued on July 3, 2023. William Rissmiller filed a Protest on June 15, 2023. On June 30, 2023, Center and Summit<sup>5</sup> filed Protests. On July 3, 2023, Cleveland-Cliffs Steel (Cleveland-Cliffs) filed a Petition to Intervene, which was subsequently granted. On July 5, 2023, PAWC filed Supplemental Direct Testimony pursuant to Interim Order #1.

On July 12, 2023, Direct Testimony was filed by I&E, the OCA, the OSBA, Center, and Summit.<sup>6</sup> PAWC, the Butler Parties, Center, and Summit filed Rebuttal Testimony on July 18, 2023.<sup>7</sup> PAWC, the Butler Parties, the OCA, the OSBA, Center, and Summit filed Surrebuttal Testimony on July 21, 2023.

Telephonic public input hearings were held on the evenings of July 18, 2023, and July 19, 2023, during which a total of twenty-four individuals offered testimony.

An Order granting the Petition for a Protective Order filed by PAWC was issued on July 19, 2023.

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<sup>5</sup> Center and Summit residents receive wastewater service from BASA.

<sup>6</sup> On July 14, 2023, the Butler Parties filed Motions to Strike portions of the Direct Testimony of Center and Summit. Center and Summit filed Answers on July 21, 2023. At the evidentiary hearing on July 28, 2023, the Butler Parties withdrew these motions.

<sup>7</sup> On July 20, 2023, the Butler Parties filed a Motion to Strike the Rebuttal Testimony of Center and Summit. On July 26, 2023, Center and Summit filed an Answer to this Motion. At the evidentiary hearing on July 28, 2023, the Butler Parties withdrew this Motion.

The evidentiary hearing was held as scheduled on July 28, 2023. At the evidentiary hearing, PAWC advised the ALJ that the majority of the Parties (PAWC, the Butler Parties, I&E, the OCA, and the OSBA) had achieved an agreement in principle to settle all issues in the proceeding.<sup>8</sup> PAWC, BASA, I&E, the OCA, the OSBA, Center, and Summit moved their statements and exhibits into the record at the hearing, and they were entered into the record at that time.

On August 6, 2023, a Post Hearing Order was entered which provided, in part, a deadline to file a Settlement Petition and Statements in Support of Settlement no later than August 14, 2023.

On August 14, 2023, the Joint Petitioners filed the Settlement requesting approval of the Application and disposing of all the issues in this proceeding consistent with the terms and conditions therein. PAWC, the Butler Parties, I&E, the OCA, and the OSBA also filed Statements in Support. No Party opposed the Settlement.

On August 16, 2023, the ALJ sent a letter to the consumer protestants indicating that there was a Settlement from the Parties and directed the protestants to file any written objections to the Settlement no later than August 23, 2023. No written objections were filed by any consumer protestants.

The record in this case closed on August 23, 2023.

In the Recommended Decision issued on September 14, 2023, the ALJ recommended that the Commission deny the Settlement and the Application because PAWC did not meet its burden of establishing that there is an affirmative public

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<sup>8</sup> The only other active Parties to this proceeding are Center, Summit, and Cleveland-Cliffs, which have indicated that they do not oppose the Settlement. Settlement at 2, fn. 1.

benefit resulting from the acquisition of BASA's System under Sections 1102 and 1103 of the Code. R.D. at 1.

On September 20, 2023, the Commission issued a Secretarial Letter informing the Parties that the Application was inadvertently not published in the *Pennsylvania Bulletin* scheduled for June 10, 2023. In order to correct the record, and to ensure that due process was provided to satisfy 52 Pa. Code § 5.14(a), the Secretarial Letter stated that the Application would be published in the *Pennsylvania Bulletin* on September 30, 2023, and that any appropriate filings in response would be due on October 5, 2023. Notice of the Application was published in the September 30, 2023, edition of the *Pennsylvania Bulletin*. No responsive filings were submitted by the deadline of October 5, 2023.

As discussed, *supra*, PAWC and the Butler Parties filed Exceptions on September 21, 2023.<sup>9,10</sup> Reply Exceptions were filed by the OCA and the Joint Protestants on September 26, 2023.

On September 27, 2023, PAWC and the Butler Parties jointly filed a Motion to Strike. The Motion to Strike also requested that the Commission assign an expedited deadline of October 2, 2023, for the filing of answers to the Motion to Strike. On September 29, 2023, the Commission issued a Secretarial Letter denying the request to shorten the response period to answer the Motion to Strike and clarifying the due date for responses as October 17, 2023. The Joint Protestants filed a response to the Motion to Strike on October 16, 2023.

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<sup>9</sup> I&E also submitted a letter on September 21, 2023, in support of the Settlement.

<sup>10</sup> On September 26, 2023, PAWC filed an Update to its Exceptions informing the Commission of an update to a pending court proceeding referenced in PAWC's Exceptions.

## II. Discussion

### A. Transaction Overview

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. PAWC furnishes water and wastewater service to the public in a service territory encompassing more than 417 communities in thirty-seven counties and serves a combined population of over 2,300,000 customers across the Commonwealth. As of January 31, 2023, PAWC furnished wastewater services to approximately 97,305 customers, and furnished water services to approximately 679,777 customers, in Pennsylvania. PAWC St. 1 at 15-16.

Pursuant to the Municipality Authorities Act of 1945, the City and the Township incorporated BASA on November 3, 1962, to serve both municipalities, connect the collection sewers, and expand the sewage treatment plant. BASA St. 1 at 2. The Authority has a service area of approximately 32.5 square miles and provides wastewater service to portions of the Township and all of the City. While the Township and the City incorporated BASA, the Authority also provides service to portions of the following other municipalities: Center Township, Summit Township, the Borough of East Butler, Oakland Township, and Connoquenessing Township (Service Area). The Authority operates and maintains the System, consisting of 224 miles of interceptor sewers, eight miles of force mains, twenty-three pump stations, seven flow equalization

tanks, and the wastewater treatment plant located in Butler Township.<sup>11</sup> The System serves approximately 14,792 customers in the Service Area – which, as stated above, includes customers in portions of the Township, all of the City, Center Township, Summit Township, the Borough of East Butler, Oakland Township, and Connoquenessing Township. BASA St. 1 at 2-4; Application at ¶ 36.

On October 11, 2022, PAWC and BASA entered into an APA for the sale of the assets, properties, and rights of the Authority’s wastewater system at an agreed-upon price of \$231,500,000.<sup>12</sup> According to the APA, PAWC agreed to the following:

- Maintain an operations center at BASA’s headquarters for at least ten years after Closing, consisting of managers, customer service representatives and operators;
- Offer employment to eligible BASA employees following the Closing, subject to certain conditions;
- Use commercially reasonable efforts to develop a pilot program for a customer-owned damaged wastewater service lateral replacement program, and then petition the Commission for approval of that pilot program;
- Adopt, upon Closing, BASA’s monthly base rates. These rates are currently \$43.00 per month per equivalent dwelling unit (EDU), but will be increased to \$45.50 per month per EDU prior to Closing. BASA St. 1 at 10;

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<sup>11</sup> The plant process includes screening and grit removal, primary sedimentation, fixed-film biological treatment (trickling filters), extended-aeration activated sludge biological treatment, secondary sedimentation, tertiary clarification, and chlorine disinfection. Residual biosolids are disposed off-site by a contractor for disposal at a municipal solid waste landfill. Treated wastewater is discharged into Connoquenessing Creek under authorization set forth in National Pollutant Discharge Elimination System (NPDES) Permit No. PA0026697. The NPDES permit was effective September 1, 2018, and expires on August 31, 2023. OCA St. 2 at 12.

<sup>12</sup> The First Amendment to the APA will reduce that purchase price to \$230,000,000. *Pro Forma* First Amendment to the APA, Attachment 11.

- Propose no increase to BASA's base rates until the later to occur of: (1) the first anniversary of Closing; or (2) January 1, 2025. However, PAWC may apply a DSIC and/or State Tax Adjustment Surcharge, if approved by the Commission;
- In the first base rate case following Closing, PAWC will propose to move BASA to metered rates; and
- Assume an agreement that provides for free service to the Veterans Administration Hospital Reservation in Butler (the VA Hospital). BASA has not entered into any other agreements for free service.

R.D. at 9-10 (citing PAWC St. 1 at 14; PAWC St. 3 at 7-9).

As required by Section 1329(a)(4), PAWC and the Authority jointly retained the services of Herbert, Rowland, & Grubic, (HRG) to complete the engineering assessment and original cost of the System. PAWC Exh. SDF-2, Appendix A-15-a. PAWC selected Weinert Consultants, and BASA selected Gannett Fleming, as their respective UVEs to prepare FMV appraisals of the System. The PAWC-sponsored appraisal performed by Weinert Consultants concluded that the value of the System was \$246,178,265. The BASA-sponsored appraisal performed by Gannett Fleming concluded that the value of the System was \$232,429,000. Both appraisals were prepared in compliance with the Uniform Standards of Professional Appraisal Practice (USPAP) standards. The FMV as defined in Act 12 of 2016<sup>13</sup> is the average of these two appraisals which is \$239,303,632. Under Section 1329, the ratemaking rate base is the lesser of either the purchase price in the APA, which is \$231,500,000, or the FMV which is \$239,303,632. Therefore, since the purchase price is lower than the FMV, the ratemaking rate base for the System is \$231,500,000. PAWC St. 4 at 1-3; BASA St. 3 at 1, 4, 12-13.

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<sup>13</sup> Then-Governor Wolf signed into law Act 12 of 2016 (Act 12) on April 14, 2016. Act 12 amended Chapter 13 of the Code by adding a new section, Section 1329, which became effective on June 13, 2019. 66 Pa. C.S. § 1329 (Section 1329).

## **B. Public Input Hearings**

Two public input hearings were conducted telephonically to give the public an opportunity to be heard regarding the acquisition of the System by PAWC. The public input hearings were held on July 18, 2023, and July 19, 2023, at which a total of twenty-four individuals testified to raise issues to be considered by the Commission. R.D. at 16. We refer to the Recommended Decision for a detailed summary describing the positions of the witnesses who testified at the public input hearings, which is incorporated herein. *See*, R.D. at 16-19.

## **C. Legal Standards**

### **1. Burden of Proof, 66 Pa. C.S. § 332(a)**

As the proponent of a rule or order in this proceeding, PAWC has the burden of proof to establish that it is entitled to the relief it is seeking. 66 Pa. C.S. § 332(a). The Applicant must establish its case by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600 (Pa. Cmwlth. 1990), *alloc. denied*, 529 Pa. 654, 602 A.2d 863 (1992). That is, the Applicant's evidence must be more convincing, by even the smallest amount, than that presented by any opposing party. *Se-Ling Hosiery, Inc. v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950). Additionally, this Commission's decision must be supported by substantial evidence in the record. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & Western Ry. Co. v. Pa. PUC*, 489 Pa. 109, 413 A.2d 1037 (1980).

## 2. Certificate of Public Convenience, 66 Pa. C.S. §§ 1102, 1103

Section 1102(a)(1)(i) of the Code requires a utility to first obtain a Certificate of Public Convenience (Certificate) prior to beginning to offer or supply utility service to a different territory than that previously authorized by the Commission. 66 Pa. C.S. § 1102(a)(1)(i).

Section 1102(a)(3) of the Code requires a utility to first obtain a Certificate from the Commission prior to a utility or an affiliated interest of a utility to acquire or transfer, to any person or corporation by any method, property used or useful in the public service. 66 Pa. C.S. § 1102(a)(3).

Section 1103(a) of the Code establishes the standard for granting a Certificate required under Section 1102:

A certificate of public convenience shall be granted . . . only if the commission shall find or determine that the granting of such certificate *is necessary or proper for the service, accommodation, convenience or safety of the public.* The commission, in granting such certificate, may impose such conditions as it may deem to be just and reasonable.

66 Pa. C.S. § 1103(a) (emphasis added); *see also, Seaboard Tank Lines v. Pa. PUC*, 502 A.2d 763, 764-65 (Pa. Cmwlth. 1985).

According to the Pennsylvania Supreme Court, satisfying the standard of Section 1103(a) requires the Commission to find that the proposed transaction will “affirmatively promote the service, accommodation, convenience, or safety of the public in some substantial way.” *City of York v. Pa. PUC*, 449 Pa. 136, 141, 295 A.2d 825, 828 (1972) (*City of York*). In establishing this precedent, the Court held that the statute’s clear command is that the Commission must find that the granting of a certificate “will

affirmatively benefit the public.” *Id.* (overruling in part, *Northern Pennsylvania Power Co. v. Pa. PUC*, 333 Pa. 265, 267, 5 A.2d 133, 134).

The Supreme Court further held:

In conducting the underlying inquiry, the Commission is not required to secure legally binding commitments or to quantify benefits where this may be impractical, burdensome, or impossible; rather, the PUC properly applies a preponderance of the evidence standard to make factually-based determinations (including predictive ones informed by expert judgment) concerning certification matters.

*Popowsky v. Pa. PUC*, 594 Pa. 583, 611, 937 A.2d 1040, 1057 (2007) (*Popowsky*).

Further, the Court explained that demonstration of the affirmative public benefit does not require that every customer receive a benefit from the proposed transaction. *Popowsky*, 594 Pa. at 617-618, 937 A.2d at 1061. In addition, “in some circumstances conditions may be necessary to satisfy the Commission that public benefits sufficient to meet the requirement of Section 1103(a) will ensue.” *Id.* at n.21. The Commission can, under Section 1103(a), impose conditions that it deems just and reasonable. 66 Pa. C.S. § 1103(a).

One of the factors that the Supreme Court identified in *City of York* for the Commission to consider in determining whether there is an affirmative public benefit is:

[A]t least in a general fashion, the effect that a proposed merger is likely to have on future rates to consumers. Along with the likely effect of a proposed merger upon the service that will be rendered to consumers, the probable general

effect of the merger upon rates is certainly a relevant criteria of whether the merger will benefit the public.

*City of York*, 295 A.2d at 829.

In applying this specific factor, the Pennsylvania Commonwealth Court recently held that the Commission must perform “the balancing test required by Section 1102 of the Code to weigh all the factors for and against the transaction, *including the impact on rates*, to determine if there is a substantial public benefit.” *McCloskey v. Pa. PUC*, 195 A.3d 1055, 1066-1067 (Pa. Cmwlth. 2018), *appeal denied*, 207 A.3d 290 (Pa. 2019) (*McCloskey*) (emphasis added). While *McCloskey* held that rate impact must be addressed, it recognized that “the Commission is charged with deciding whether the impact of rates...is outweighed by ... other positive factors that...served [as] a substantial public benefit.” 195 A.3d at 1067.

The Commission and the courts have held that granting a certificate need not be “absolutely necessary” in order to be in the public interest. *See, Hess v. Pa. PUC*, 107 A.3d 246, 262 (Pa. Cmwlth. 2014). The Commonwealth Court reasoned, “[n]ot only would this approach be impractical and unrealistic, it would actually pose a danger to the health, safety and welfare of the public.” *Id.* In addition, when considering the public interest, the Commission may consider how the benefits and detriments impact “*all affected parties*, and not merely one particular group or geographic subdivision.” *Middletown Twp. v. Pa. PUC*, 482 A.2d 674, 682 (Pa. Cmwlth. 1984) (emphasis in original); *see also, Dunk v. Pa. PUC*, 232 A.2d 231, 234-35 (Pa. Super. 1967), *aff’d*, 434 Pa. 41, 252 A.2d 589 (1969) (where public benefit included companies and customers other than the proponent utility).

Recently, in *Cicero v. Pa. PUC*, 910 C.D. 2022 (Pa. Cmwlth. 2023) (*Cicero*), the Commonwealth Court, upheld prior precedent that the substantial

affirmative benefits of a proposed acquisition must outweigh the acknowledged harms resulting from the acquisition. The Court explained that where there are known harms, the transaction must have benefits that differ substantially from the benefits already being provided by the existing system operator to support approving the transaction. *Cicero* at 21. Furthermore, the Court clarified that:

Where...there are **no benefits that differ substantially** from the benefits already being provided by the existing system operator, those alleged benefits arise as a result of the acquiring utility's fitness, rather than from the actual transaction, and where there are acknowledged or known harms that will result from the transaction, there are insufficient net benefits to support approving the transaction and granting the [Certificate] under Section 1103(a).

*Id.* at 20 (emphasis in original). The Court explained that providing the same services as are already being provided, or providing for upgrades that the existing system operator is capable of providing, are not substantial affirmative benefits consistent with *City of York*, especially if the existing system is already operating safely and reliably. *Id.* at 19. Moreover, the public benefits arising from aspirational statements or benefits that cannot be quantified at the time of the transaction may not always constitute affirmative public benefits that will be substantial enough to outweigh known harms. *Id.* at 21.

To obtain a Certificate, the acquiring public utility has the burden, by a preponderance of the evidence, to establish that it is technically, legally, and financially fit to provide the proposed service. *McCloskey*, 195 A.3d at 1058. An existing certificate holder is entitled to a “continuing presumption regarding its fitness to operate,” which includes a presumption that the certificate holder has a propensity to operate legally. *Lehigh Valley Transp. Servs., Inc. v. Pa. PUC*, 56 A.3d 49, 58 (Pa. Cmwlth. 2012) (*Lehigh Valley Transp.*); *South Hills Movers, Inc. v. Pa. PUC*, 601 A.2d 1308, 1310 (Pa. Cmwlth. 1992). It is the protestant's burden to rebut that presumption.

*Lehigh Valley Transp.*, 56 A.3d at 58. Where an Applicant is both presumed fit and sets forth affirmative evidence demonstrating fitness, this burden is particularly heavy. *Id.*

### **3. Ratemaking Rate Base Value, 66 Pa. C.S. § 1329**

Section 1329 of the Code establishes a process for ratemaking purposes to value the plant of municipal-owned water and wastewater systems to be acquired by certificated public utilities. 66 Pa. C.S. § 1329. Under Section 1329, the value of water and wastewater system assets to be included in the acquiring utility's rate base for ratemaking purposes will be the lesser of the purchase price negotiated by the acquiring utility and seller or the "fair market value" of the selling utility's system. 66 Pa. C.S. § 1329(c)(2).

The fair market valuation process under Section 1329 where the acquiring utility and the seller must elect and agree to have the fair market value of the seller's assets established through separate, independent appraisals conducted by UVEs is voluntary. 66 Pa. C.S. § 1329(a). The Commission maintains a list of qualified UVEs from which the acquiring utility and seller must choose their respective appraisers. 66 Pa. C.S. §§ 1329(a)(1), (2).

The UVEs must prepare an appraisal of the seller's system assets in compliance with the USPAP, employing the cost, market and income approaches. 66 Pa. C.S. § 1329(a)(3). The fair market value of the system is defined as the average of the two separate UVE appraisals conducted in compliance with Section 1329(a)(3). 66 Pa. C.S. § 1329(g).

The Applicant must provide to the Commission copies of the appraisals; the purchase price; the ratemaking rate base; the closing costs; and, if applicable, a tariff and rate stabilization plan. 66 Pa. C.S. § 1329(d)(1).

#### **4. Utility-Municipal Contracts, 66 Pa. C.S. § 507**

Section 507 of the Code provides as follows regarding a utility's contract with a municipal corporation:

Except for a contract between a public utility and a municipal corporation to furnish service at the regularly filed and published tariff rates, no contract or agreement between any public utility and any municipal corporation shall be valid unless filed with the commission at least 30 days prior to its effective date. Upon notice to the municipal authorities, and the public utility concerned, the Commission may, prior to the effective date of such contract or agreement institute proceedings to determine the reasonableness, legality or any other matter affecting the validity thereof. Upon the institution of such proceedings, such contract or agreement shall not be effective until the Commission grants its approval thereof.

66 Pa. C.S. § 507.

Thus, pursuant to Section 507, the Commission has discretionary power to institute proceedings to determine the reasonableness, legality, and validity of the contracts between a municipality and a public utility. *Id.*; *see also, County of Allegheny v. Pa. PUC*, 159 A.2d 227, 233 (Pa. Super. 1960).

#### **5. Settlements in the Public Interest**

Pursuant to our Regulations at 52 Pa. Code § 5.231, it is the Commission's policy to promote settlements. A full settlement of all the issues in a proceeding eliminates the time, effort and expense that otherwise would have been used in litigating the proceeding, while a partial settlement may significantly reduce the time, effort, and expense of litigating a case. A settlement, whether whole or partial, benefits not only the

named parties directly, but, indirectly, all customers of the public utility involved in the case. *Pa. PUC, et al. v. Columbia Gas of Pennsylvania, Inc.*, Docket Nos. R-2015-2468056, *et al.* (Order entered December 3, 2015) at 6-7. Despite this policy, the Commission does not simply rubber stamp settlements without determining whether the terms are in the public interest. *Pa. PUC v. Philadelphia Gas Works*, Docket No. M-00031768 (Order entered January 7, 2004); *Pa. PUC v. CS Water and Sewer Assoc.*, 74 Pa. P.U.C. 767 (1991); *Pa. PUC v. Philadelphia Electric Co.*, 60 Pa. P.U.C. 1 (1985).

## **6. General Standards**

In the Recommended Decision, the ALJ made fifty-seven Findings of Fact and reached twenty-eight Conclusions of Law. *See*, R.D. at 5-15, 67-71. The Findings of Fact and Conclusions of Law are incorporated herein by reference and are adopted without comment unless they are either expressly or by necessary implication rejected or modified by this Opinion and Order.

As we proceed in our review of the various positions of the Parties in this proceeding, we note that the Commission is not required to consider expressly or at length each contention or argument raised by the parties. *Consolidated Rail Corp. v. Pa. PUC*, 625 A.2d 741 (Pa. Cmwlth. 1993); *also see, generally, University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984). Exceptions that we do not specifically address shall be deemed to have been duly considered and denied without further discussion.

### **D. Joint Petition**

As stated above, the Joint Petitioners reached a unanimous settlement in this proceeding. In the Joint Petition filed by PAWC, the Butler Parties, I&E, the OCA, and the OSBA, all of the issues that were the subject of litigation in this proceeding were

resolved. The Joint Petition consists of a twenty-five page document, accompanied by ten Attachments. The body of the document contains the terms and conditions of the Settlement agreed to by the Joint Petitioners, with Attachments 1 through 5, constituting Statements in Support of the Joint Petition submitted by PAWC, the Butler Parties, I&E, the OSBA, and the OCA, respectively. Attachments 6 through 10 contain proposed Findings of Fact, proposed Conclusions of Law, proposed Ordering Paragraphs, a *pro forma* tariff supplement reflecting BASA's wastewater rates in effect at closing, and the First Amendment to the APA, respectively. The Joint Petition also referenced any filings needed to complete the Settlement, including (without limitation) the PAWC-proposed Tariff.

## **1. Terms of the Settlement**

The principal terms of the Settlement are set forth in Section III of the Joint Petition, and are shown below in full as they appear in the Joint Petition:

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

15. The Joint Petitioners agree that the Commission should approve PAWC's acquisition of the wastewater system assets ("System") currently owned by BASA and PAWC's right to begin to offer, render, furnish, or supply wastewater services in the areas served by the System, as well as any other necessary approvals or certificates for the transactions, subject to approval of all of the following conditions and without modification.

### **B. Tariff**

16. The *pro forma* tariff supplement attached to this Settlement, including all rates, miscellaneous fees and charges, rules and regulations regarding conditions of PAWC's wastewater service, shall be permitted to become effective immediately upon closing of the transaction ("Closing").

17. In the first base rate proceeding that includes the BASA wastewater system assets, PAWC will propose to charge cost-of-service based rates for wastewater service to all entities it serves in the System, including but not limited to the VA Hospital, as limited by Paragraph 19(e) below.

**C. Rates**

18. 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 in a future PAWC proceeding.
19. In the first base rate case that includes the System assets:
  - a. PAWC will submit a cost of service study that removes all costs and revenues associated with the operation of BASA's systems.
  - b. PAWC will provide a separate cost of service study for the BASA system.
  - c. PAWC will not propose an increase in BASA's base rates if the rates would become effective before the later of: (a) the first anniversary of Closing or (b) January 1, 2025.
  - d. In PAWC's first base rate case that includes the BASA system assets, if PAWC proposes a different effective date for new rates for BASA customers beyond the effective date of new rates for other customers, PAWC agrees to calculate its proof of revenue as if the BASA customers were paying proposed rates without any delay to the effective date. The Joint Petitioners agree that all rights are reserved with respect to the issue of delayed effective dates of rates in subsequent proceedings. This term should not be construed to limit parties' ability to make recommendations in any future PAWC base rate case to bring customers in systems

with delayed effective dates to an appropriate cost of service as though they have paid the tariffed rates without any delay.

- e. PAWC will propose to move the System to 1.4x the current System rate or PAWC's proposed Rate Zone 1 system-average wastewater rates, whichever is lower, upon the later of (a) the first anniversary of Closing or (b) January 1, 2025.
- f. PAWC may agree to rates other than those proposed for System customers in the context of a settlement of the base rate case.
- g. OCA, I&E, and OSBA reserve their rights to address PAWC's rate proposals fully, and to make other rate proposals. The Parties expressly recognize the Commission's ultimate ratemaking authority to set just and reasonable rates and, notwithstanding anything to the contrary contained in this Paragraph 19, may enter into a settlement of the base rate case, whether full or partial and whether unanimous or non-unanimous, on reasonable terms and conditions.
- h. The rate at Closing for System residential wastewater customers with an average usage of 3,212 gallons per month is approximately \$45.50.
- i. The current rate for PAWC residential Rate Zone 1 wastewater customers with an average usage of 3,212 gallons per month is approximately \$106.00.

**D. Industrial Pretreatment Program ("IPP") Fees**

- 20. The Joint Petitioners acknowledge that IPP fees are miscellaneous fees that may be applied to acquired customers, rather than existing rates that must be adopted by the acquiring utility pursuant to Section 1329(d)(v). IPP fees are intended to cover costs associated with a comprehensive enforcement program to ensure that industrial wastewater is properly pretreated in order to protect the integrity of

the System and the environment, and to ensure that the costs are allocated to the cost causers and not other ratepayers. Without imposition of the IPP fees, industrial customers would have no meaningful incentive to pretreat their wastewater. The *pro forma* tariff supplement attached to this Settlement incorporates BASA industrial customers into PAWC's existing IPP tariff and does not exempt any BASA industrial customers from IPP fees. IPP tariffed fees will be adjusted in the context of future PAWC base rate proceedings. Impacted industrial customers were given notice of the possibility of the imposition of PAWC's tariffed IPP fees by direct mail notice from PAWC, dated May 10, 2023, and were afforded an opportunity to participate in this proceeding. The imposition of IPP fees is supported by substantial evidence of record.

**E. Fair Market Value for Ratemaking Rate Base Purposes**

21. Joint Petitioners agree that pursuant to 66 Pa. C.S. § 1329, PAWC shall be permitted to use \$228,000,000 for ratemaking rate base purposes for the acquired System.
22. The Joint Petitioners agree that PAWC may record the acquisition at the net value of the assets, consistent with generally accepted accounting principles.
23. PAWC and BASA have executed a First Amendment to the Asset Purchase Agreement ("First Amendment") to reflect a purchase price of \$230,000,000. A copy of the First Amendment is attached. **Attachment 10.** PAWC requests approval of the First Amendment pursuant to 66 Pa. C.S. § 507.

**F. Distribution System Improvement Charge**

24. PAWC will not include System-related investments in its distribution system improvement charge ("DSIC") until PAWC collects a DSIC from System customers. PAWC shall be permitted to collect a DSIC from

System customers upon (i) PAWC's filing of an amended wastewater Long-Term Infrastructure Improvement Plan ("Amended LTIIIP") including the System, which does not re-prioritize other existing commitments in other service 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 the System and all other systems included in the amended LTIIIP into PAWC's DSIC tariff, including all customer safeguards applicable thereto, no later than the next quarterly DSIC filing after Commission approval of the Amended LTIIIP.

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

25. The Joint Petitioners acknowledge that the Application includes a request that (i) PAWC be permitted to accrue Allowance for Funds Used During Construction ("AFUDC") for post-acquisition improvements not recovered through the DSIC for book and ratemaking purposes and (ii) PAWC be permitted to defer depreciation related to post acquisition improvements not recovered through the DSIC for book and ratemaking purposes. Any claims for AFUDC and deferred depreciation related to post-acquisition improvements not recovered through the DSIC for book and ratemaking purposes will be addressed in PAWC's first base rate case which includes 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.

**H. Transaction and Closing Costs**

26. The Joint Petitioners acknowledge that the Application includes a request that PAWC be permitted to claim transaction and closing costs associated with the acquisition of the System. The Joint Petitioners agree that they will not contest these requests 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.

27. The inclusion of outside legal fees, if any, in PAWC's transaction and closing costs under the Asset Purchase Agreement shall be separately identified in PAWC's next base rate case, and OCA, I&E and OSBA reserve the right to challenge the reasonableness, prudence, and basis for such fees.
28. Any claim by PAWC to recover transaction and closing costs associated with the transaction will not include costs incurred by BASA.

**I. Approval of Section 507 Agreements<sup>14</sup>**

29. Pursuant to 66 Pa. C.S. § 507, the Commission shall issue Certificates of Filing or approval for:
  - a. The Asset Purchase Agreement By and Between Butler Area Sewer Authority, as Seller, and Pennsylvania-American Water Company, as Buyer, Dated as of October 11, 2022, and the attached First Amendment thereto;
  - b. Water Pollution Control Agreement for Central Butler County between City of Butler, Township of Butler, Township of Center, Township of Summit, Borough of East Butler, Deshon Area Sanitary Disposal and Sewer Authority, East Butler Borough Sewer Authority, East Butler Borough Sewer Authority, Meridian Water and Sewer Authority, Municipal Water and Sewer Authority of Center Township and Butler Area Sewer Authority dated as of February 20, 1974;

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<sup>14</sup> The OCA does not join in this paragraph but does not oppose PAWC's request.

- c. Service Agreement between The Township of Oakland and Butler Area Sewer Authority for the Service Area along Route 38 dated March 7, 1994;
- d. Service Agreement between the Township of Connoquenessing and Butler Area Sewer Authority for Cupps Road Service Area dated April 3, 1995; and
- e. Service Agreement between the Township of Connoquenessing and Butler Area Sewer Authority for Winterwood Drive Service Area dated December 14, 2005.

**J. Cost of Service Studies**

- 30. In the first base rate case that includes the System's assets, PAWC will submit a cost of service study that removes all costs and revenues associated with the operation of the System.
- 31. In the first base rate case that includes the System's assets, PAWC will also provide a separate cost of service study for the System consistent with typically filed ratemaking exhibits including, but not limited to, the following: Rate Base (Measures of Value), Statement of Operating Income, Proof of Revenue, and Rate of Return, which correspond to the applicable test year, future test year, and fully projected future test year measurement periods. In the first PAWC base rate case that includes the BASA system, when PAWC provides customer notice, it shall provide notice to customers in the BASA system consistent with the rates agreed to be proposed in Paragraph 19(e), above.

**K. Low Income Program Outreach and Welcome Letter**

- 32. Within the first billing cycle following Closing, PAWC shall include a bill insert to System customers regarding its low income programs and shall include such information in a welcome letter to System 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 automatically enroll any BASA wastewater customers, who are PAWC water customers enrolled in PAWC's water low income programs, in PAWC's wastewater low-income programs following Closing.

33. The welcome letter will be sent within the first 30 days of Closing and will also include information about payment options (including low-income programs, eligibility requirements, PAWC contact information), free places to pay, and in-person bill payment locations reasonably proximate to the areas served by the BASA system.
34. PAWC will work with community-based organizations with offices local to the areas served by the System for purposes of providing information and enrolling customers in PAWC's customer-assistance programs. PAWC will include this information in the welcome letter referenced in the previous paragraph.

**L. Hardship Fund**

35. Effective on and after Closing, PAWC will increase eligibility for hardship grants to all PAWC customers including existing customers and newly acquired customers from the BASA System from 200% to 250% of Federal Poverty Income Guidelines ("FPIG"). All parties reserve the right to re-evaluate the appropriate eligibility for hardship grants in a future base rate case filed after five (5) years following Closing.
36. In addition to existing commitments and any commitments made in a future base rate case, PAWC will contribute \$700,000 annually to the Company's hardship grant program for the five (5) years following Closing (\$3,500,000 total). These contributions shall not be recovered in rates. All unspent funds at the end of the program year will be rolled over and added to the

budget for the hardship grant program in the following year(s).

**M. Easements**

37. PAWC and BASA should be required to (1) identify all missing easements including public rights-of-way and other property rights; (2) take any and all necessary actions to obtain the missing easements and other property rights so that they may be conveyed to PAWC at Closing; and (3) BASA shall bear all costs and expenses for obtaining and conveying the missing easements and other property rights.
38. Additionally, if for any circumstances beyond BASA's control where it is unable to transfer all missing easements including public rights-of-way and other property rights before or at the Closing, PAWC and BASA may at their discretion close the transaction without the transfer of missing easements and other property rights, provided that an escrow account be established as set forth in the APA in which BASA will fund an easement escrow fund in the amount of \$2,000 for each missing easement.

**N. Commercial Customer Payment Arrangements**

39. At Closing, PAWC will implement a formal program for payment arrangements for commercial customers, including eligibility and payment terms.

**O. Other Necessary Approvals**

40. The Commission shall issue any other approvals or certificates appropriate, customary, or necessary under the Code to carry out the transactions contemplated in the Application in a lawful manner.

Joint Petition at 6-14.

## **E. Recommended Decision**

### **1. Sections 1102 and 1103 Approvals**

#### **a. Fitness**

The ALJ began by noting that as an existing, certificated public utility, PAWC enjoys a presumption of fitness in this proceeding. Here, no Party presented evidence to challenge PAWC's fitness. R.D. at 31-32.

Regarding legal fitness, the ALJ summarized PAWC's evidence stating that there are no pending legal proceedings challenging PAWC's ability or propensity to operate safely and legally and that as a regulated public utility, the Company has a good compliance history with the Commission. R.D. at 32.

In terms of financial fitness, the ALJ noted that PAWC had total assets of \$5.9 billion and annual revenues of \$769 million for 2021. Additionally, for that same year, the Company had operating income of approximately \$342 million and net income of approximately \$229 million, which produced cash flows from operations of approximately \$438 million. PAWC highlighted its ability to generate positive operating cash flows and to obtain financing through equity investments, lines of credit, and long-term debt financing at favorable rates. In addition, PAWC testified that it does not anticipate that the acquisition of the System will have a negative impact on PAWC's cash flows, credit ratings, or access to capital and therefore, the Company's ability to maintain its provision of safe, adequate, and reasonable service to its existing customers at just and reasonable rates will be unaffected. R.D. at 32.

As to technical fitness, PAWC proffered that it currently employs 1,150 professionals with expertise in all areas of water and wastewater utility operations.

Additionally, PAWC, as a subsidiary of American Water has additional resources of highly trained professionals to support PAWC in its operations. Moreover, PAWC has expertise acquiring water and wastewater systems with owners in the public and private sectors, and successfully integrating such assets into its business operations. To minimize customer inconvenience brought on by infrastructure failure, PAWC maintains an ongoing program of capital investment that is focused on methodically replacing and adding new pipes, treatment and pumping facilities, and other water and wastewater infrastructure. R.D. at 33.

**b. Affirmative Public Benefits**

**i. PAWC's Position**

The ALJ summarized PAWC's position on the affirmative public benefits of the transaction with respect to each stakeholder group.

First, PAWC argued that the transaction benefits the public-at-large, including all Commonwealth residents, whether or not they are customers of PAWC or BASA, by promoting the Commission's policy favoring regionalization and consolidation of water and wastewater systems and the public policy goals in Section 1329 of the Code. R.D. at 33-34.

PAWC also suggested that the transaction provides environmental benefits, noting the System's history of environmental challenges, including defects and aging infrastructure in the collection system from the high level of inflow and infiltration which resulted in sewer system overflows (SSOs). The Company noted that BASA is currently subject to a 2019 Corrective Action Plan (CAP) with the Pennsylvania Department of Environmental Protection (PADEP), which mandates sewer rehabilitation repairs and the replacement of sewage pump stations in certain areas of the System and places a

restriction on new sewer connections in those locations as well. The implementation of the 2019 CAP revealed several deficiencies within the BASA System, evidencing the need for a comprehensive overhaul of the aging System. Issues within the BASA System pertaining to SSOs and hydraulic overloading are still ongoing. If the transaction is approved, PAWC will take over BASA's duties under the 2019 CAP and implement a five-year capital improvement plan totaling \$75.8 million to rebuild the System and eliminate the ongoing SSOs and other deficiencies. R.D. at 34-35.

As for capital investments, the Company has made over three times the level of investment in its wastewater system than that made by BASA in its System from 2018 through 2021. It appears that BASA's present rates are so low that the System is unable to make investments in reasonable and prudent maintenance. Should the Commission deny the transaction, PAWC argued that BASA would have to substantially increase customers' rates. However, even with a substantial rate increase, it is the position of PAWC that BASA lacks the technical skill and project experience to complete the complex projects that are necessary to improve and bring the System into compliance. R.D. at 36.

Next, PAWC contended that the transaction benefits the Butler Parties. According to PAWC, the transaction fulfills the will of the municipal officials who weighed the advantages and disadvantages of BASA's continued ownership of the System and determined that the significant costs required to continue operating the System were too excessive for BASA and better addressed by a larger, more experienced public utility. The transaction achieves the objectives behind selling the System, including making improvements to the System and bringing it into compliance with environmental laws and regulations while maintaining reliable service and providing the opportunity for local economic development. R.D. at 37.

Additionally, PAWC listed the benefits that the transaction will have on the City and the Township, including, receipt of the balance of the proceeds from the sale of the System, the System becoming subject to tax, economic development resulting from an improved and compliant System, coordination of construction projects resulting in less inconvenience to the public, and retainment of active BASA personnel. PAWC concluded that the benefits of the transaction outweigh any insignificant detriments with respect to this stakeholder group. Although the residents of the City and the Township who are customers of BASA may experience an increase in rates, a portion of those increases would have occurred regardless of ownership of the System. R.D. at 38-39.

Next, PAWC asserted that the transaction benefits other municipalities in the Butler Area as well. According to PAWC, while municipalities surrounding the City and the Township will not receive any of the proceeds from the transaction, tax revenues will increase for these municipalities due to the System becoming subject to tax. The Company further contended that an improved and compliant System will promote economic development in other municipalities, directly benefiting the residents of such municipalities. R.D. at 39.

Regarding BASA's existing customers, PAWC argued that the transaction, as modified by the Settlement, benefits BASA's existing customers as these customers will enjoy many of the same benefits as other PAWC customers, including PAWC's commitment to using a rate base of \$228,000,000 for the System rather than the initial purchase price of \$231,500,000, an increase in eligibility for hardship grants, an annual contribution from PAWC to its hardship contribution program, a formal payment arrangement program for commercial customers, and economies of scale. In addition, PAWC asserted that BASA's existing customers will enjoy special benefits such as customer assistance programs, proposed metered rates, and regulatory oversight. According to PAWC, there will be no immediate impact on the rates of BASA's customers as PAWC will assume BASA's current rates at the time of closing. With

respect to the first base rate case where the System is included in PAWC's rate base, PAWC contended that it will propose to move the System to 1.4 times the current System rate or PAWC's proposed Rate Zone 1 system-average wastewater rates, whichever is lower. R.D. at 40-43.

Lastly, PAWC maintained that the transaction, as modified by the Settlement, has unique benefits for PAWC's existing wastewater customers. The Company highlighted the addition of new customers to PAWC's wastewater customer base which will promote long-term rate stability. Existing customers in areas requiring improvement will benefit from the sharing of the cost of such improvements among more customers. The expansion of eligibility for PAWC's low-income customer assistance programs and PAWC's contribution to its hardship fund will also provide many additional existing PAWC customers with assistance in paying their utility bills. Moreover, PAWC asserted that it will not include System-related investments in its DSIC until it collects a DSIC from System customers, which ensures that PAWC's existing customers do not have to pay all the costs for improvements to the System. As a final argument, PAWC stated that the transaction will only result in an increase in rates for its existing water customers, if in a future rate case, the Commission determines that an allocation of PAWC's wastewater revenue requirement to the water customer base is in the public interest. R.D. at 44- 45.

## **ii. BASA's Position**

The ALJ also summarized BASA's similar arguments pertaining to the managerial, technical, and financial resources and benefits of PAWC.

According to BASA, the compliance issues identified in the 2019 CAP was one of the main reasons the Authority explored a sale of its System. BASA acknowledged that it does not have the technical or financial resources to implement the

comprehensive overhaul of the aging System or the capital investment necessary to bring the System into compliance absent a significant rate increase. Even with a significant rate increase, BASA submitted that it lacks the technical skill and project experience to complete the complex projects that are necessary to improve and bring the System into compliance. R.D. at 45-47.

BASA contended that the transaction will provide substantial affirmative public benefits to the Butler community as PAWC has agreed to retain all active personnel currently employed by BASA with significantly similar pay and benefits and award contracts for construction projects to local contractors in Butler, to the extent possible. The Authority further contended that the Butler community at large will benefit from the transaction as the improved and compliant System will promote more business within the community. R.D. at 47-48.

While rate increases are unavoidable even absent the transaction, BASA argued that certain provisions under the Settlement, including PAWC's commitment with respect to the first base rate case, an increase in eligibility for hardship grants for all PAWC customers, an annual contribution from PAWC to the Company's hardship contribution program, and a formal payment arrangement program for commercial customers, will benefit acquired BASA customers and serve to counteract any potential rate increase. R.D. at 49.

### **iii. OCA's Position**

As an initial matter, the ALJ noted that while the OCA did not address any affirmative public benefit to the transaction, the OCA indicated that the Settlement should be approved. The ALJ summarized the OCA's arguments regarding its identification of the need for PAWC to provide - in the first base rate case in which it includes BASA's assets in rate base - a cost of service study that removes all costs and

revenues associated with the operations of the BASA wastewater system, as well as a separate cost of service study for the BASA System. The OCA contended that these studies will provide information to establish rates that reflect the costs for the BASA System. Additionally, the OCA expressed its concern that delaying rate increases for customers in the BASA system would place existing wastewater and water customers of PAWC at risk to subsidize the revenue requirement needed to maintain rates below the new rates set in the base rate case but that such risk was mitigated in the Settlement by reserving all parties' rights with regard to rate recommendations in future PAWC proceedings. Similarly, under the Settlement, the OCA noted that in the first base rate case where PAWC includes BASA's wastewater system assets in rate base, PAWC will propose to move the System to 1.4 times the current System rate or PAWC's proposed Rate Zone 1 system-average wastewater rates, whichever is lower. Together, the terms of the Settlement, according to the OCA, will give the parties a way to set rates for BASA customers that reflect the cost of service under PAWC ownership, or movement toward the cost of service, and that may differ, as necessary, from rates established for other water and wastewater customers. By doing this, the potential level of subsidy by PAWC's other water and wastewater customers will be reduced. R.D. at 50-51.

#### **iv. OSBA's Position**

The ALJ summarized the OSBA's position that PAWC and BASA have complied with all Section 1329 requirements. The OSBA expressed that its concern regarding the rate increase to BASA's customers in PAWC's first rate case was addressed by way of the agreed-upon 1.4 times limitation. Similarly, the OSBA noted that its request for a formal payment arrangement program for commercial customers was agreed to by PAWC, which the OSBA believed to be proper due to the state of the economy. R.D. at 54-55.

## **v. I&E's Position**

In summary of I&E's arguments, the ALJ noted I&E's Recommendation of the approval of the transaction and issuance of a Certificate of Public Convenience to PAWC as, according to I&E, the Company's technical, legal, and financial fitness is supported by the record and undisputed. I&E contended that the transaction will provide affirmative public benefits in that BASA customers are guaranteed a minimum one-year rate freeze, BASA customers with low incomes will be provided with access to assistance in paying their utility bills, and the implementation of PAWC's capital program will bring the System into compliance with the 2019 CAP. I&E emphasized the importance of the realization of public benefits through the Settlement, which will serve to protect both existing PAWC customers and newly acquired customers. R.D. at 55-56.

### **2. Recommendation**

#### **a. The Public Interest**

The ALJ began by noting the determination of the General Assembly that fair market value acquisitions of municipal water and wastewater systems advance the public interest, which is reflected in Section 1329. The ALJ explained that to approve the application, the Commission must decide that there are affirmative public benefits. The ALJ further observed the *City of York* affirmative public benefits test, which involves the Commission's consideration of the harms of the acquisition with respect to three specific stakeholder groups: (1) existing PAWC wastewater customers; (2) existing PAWC water customers, who might potentially bear costs of the BASA System if the Commission permits costs to be shifted under 66 Pa. C.S. § 1311(c); and (3) the existing BASA customers who will be transferred to PAWC. R.D. at 59-60.

The ALJ found a lack of evidence to establish that the System under PAWC's ownership would affirmatively promote the service, accommodation, convenience, or safety of the public. In addition, the ALJ determined that the evidence did not establish that any benefit to be realized from the proposed transaction would outweigh the harms to current PAWC water and wastewater customers or existing BASA wastewater customers. Accordingly, the ALJ recommended that the Settlement and Application be denied. R.D. at 66.

**b. Fitness**

As an initial matter, the ALJ acknowledged that as a certificated public utility, PAWC's fitness is presumed. The ALJ explained that no Party presented a substantial challenge to PAWC's fitness and the Company outlined in detail the evidence to support its claim that it possesses the legal, financial, technical and managerial fitness to provide the service proposed in its Application. R.D. at 60.

**c. Substantial Affirmative Public Benefits**

The ALJ noted that many of the benefits suggested by PAWC are overly general in nature and fail to address the corresponding harm or potential harm to existing PAWC customers and acquired BASA customers. R.D. at 60. Regarding affirmative public benefits, the ALJ addressed the following three areas of consideration: (1) harm to existing PAWC wastewater and water customers; (2) harm to BASA customers; and (3) whether the adverse impacts to the existing customers of PAWC and BASA outweigh the benefits of the transaction. R.D. at 62-66.

**i. Harm to Existing PAWC Wastewater and Water Customers**

Under the first consideration, the ALJ determined that PAWC's existing water customers are at risk in the short term of being required to support the costs of acquiring the BASA customers in this transaction. The ALJ noted that all PAWC water customers are already required to pay for wastewater disposal either to another provider, to PAWC, or with their individual wastewater system. In addition, the ALJ rejected PAWC's characterization of an anticipated rate increase as hypothetical. According to the ALJ, a rate increase to existing PAWC customers, at least in the short term, is a certainty. In support, the ALJ noted that PAWC has other Section 1329 acquisitions pending or that have been approved since its last base rate case. The ALJ considered these other Section 1329 acquisitions, for which the Company projects revenue requirement deficiencies, as likely resulting in increased rates for acquired or existing customers in the short term and delaying any potential benefits to customers from cost sharing further into the future. Additionally, the ALJ noted the agreed-upon rate cap for BASA customers. R.D. at 62.

**ii. Harm to Butler Area Sewer Authority Customers**

With respect to the second consideration, the ALJ noted the substantial public opposition to PAWC's acquisition of the System, emphasizing that approximately twenty-four PAWC and BASA customers testified at the public input hearing regarding anticipated harms that would result from the proposed acquisition. The ALJ reasoned that existing BASA customers testified that the Authority does not have any issues providing service to its existing customers. The ALJ stated that the record evidence shows that the Authority itself has the means to service its existing and future customers and complete the necessary upgrades in the future without PAWC's acquisition. The

ALJ further noted the Authority's subjection to the 2019 CAP and its progress in remediating issues and providing safe and reliable service. R.D. at 62-63.

**iii. The Adverse Impacts on PAWC's Existing Customers and the Butler Area Sewer Authority Customers Outweigh the Benefits of the Proposed Transaction**

Regarding the third consideration, the ALJ found that the purported benefits of acquiring the Authority's System did not outweigh the adverse impacts of the proposed transaction. Rather, the ALJ concluded that the proposed acquisition would detrimentally impact wastewater customers in BASA due to anticipated increased rates without providing any substantial or necessary benefits to BASA customers. The ALJ also determined that the proposed transaction increased costs for PAWC's current customers until and unless the BASA customers' rates increase to cover the revenue deficiency estimated in this matter. R.D. at 66.

First, the ALJ concluded that the amount of PAWC's *total* deficient revenue requirement would exceed approximately \$45,400,000. Further, the ALJ noted that when questioned whether PAWC negotiated the purchase price for the System with the expectation that it would be able to transfer any deficient revenue requirement via Act 11 to its water customers, PAWC testified that, with respect to negotiating a purchase price, PAWC does not specifically address this issue in its consideration. The ALJ emphasized the importance of a wastewater public utility, when negotiating a purchase price, to consider the implications from its most recently approved base rate case and the impact that increasing burdens from acquisitions might have on its existing water and wastewater customers. In conclusion, the ALJ found that PAWC did not make these considerations when negotiating the purchase price with the Authority. R.D. at 63.

The ALJ explained that when approving an application under Section 1329, the Commission essentially includes the relevant rate implications in the future rate case of the acquiring public utility. In doing so, the ALJ stressed that the Commission would be approving a substantial addition towards the revenue requirement at this point. R.D. at 64.

Next, the ALJ recommended that when assessing the public benefit, the Commission should consider the totality of the utility's financial abilities and the future ratemaking impacts. According to the ALJ, the question of the impact and implications of ongoing wastewater acquisitions, such as this Application, which could result in an increasing revenue requirement allocation to PAWC water customers, weighs negatively on whether approval is in the public interest if a wastewater utility cannot support its current operations through its revenues. R.D. at 64.

Regarding the deficient revenue requirement, the ALJ found that while a cost of service study may help determine an appropriate level of future rates, it will not lessen this deficiency. Additionally, the ALJ emphasized that, according to Attachment OCA-I-21, BASA's year one revenue will be \$12,698,000 and under the proposed 1.4 times rate increase, would increase to approximately \$17,777,200, which is still significantly less than the BASA system's predicted revenue requirement of \$31,202,000 and leaves a revenue requirement deficiency of \$13,424,800. The ALJ concluded that the settlement term providing for a \$228,000,000 ratemaking rate base, rather than a purchase price of \$230,000,000 does little to lessen this deficiency. R.D. at 65.

Further, the ALJ reasoned that BASA provides adequate service to its customers, is making progress with its 2019 CAP, and can obtain the financing needed to complete the capital improvement program. According to the ALJ, BASA's customers will experience a considerable rate increase under either BASA's continuing operation or PAWC's acquisition. The ALJ noted, however, that a municipal authority is not required

to include a rate of return on equity for either the \$228 million acquisition or the \$75 million in capital improvements and can obtain lower cost financing than available to an investor-owned utility like PAWC. R.D. at 65-66.

## **F. Exceptions<sup>15</sup>**

### **1. PAWC**

#### **a. Exception No. 1**

In its Exception No. 1, PAWC excepts to the Recommended Decision's conclusion that the Settlement of the parties is not in the public interest,<sup>16</sup> contending that the Recommended Decision erroneously deviated from the Commission's policy of promoting settlements. According to PAWC, such a determination sends a chilling message to litigants which will discourage future settlements considerably. PAWC submits that this result is contrary to the public interest in that moving forward, litigants

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<sup>15</sup> On September 21, 2023, I&E submitted a letter stating that it supports the Settlement as being in the public interest. I&E states that the issues it raised relating to the proposed acquisition were successfully resolved in testimony or in the Settlement. I&E further noted that it is the policy of the Commission to encourage settlements, and that this Settlement meets all the standards necessary to warrant the requisite approvals under the Code.

<sup>16</sup> In Note 3 of PAWC's Exception No. 1, PAWC notes the absence of any cite to the Pennsylvania Commonwealth Court's recent decision in *Cicero* from the Recommended Decision and contends that the Recommended Decision appears to be based, in part, on an interpretation of that case (wherein ALJ Guhl's recommended denial of the application was reversed by the Commission). PAWC further notes the pending nature of three applications for reargument *en banc* filed in *Cicero*. According to PAWC, the facts of each case are distinguishable and the issues on appeal in *Cicero* were considered in the development of the Application and negotiation of the Settlement in the instant case. On September 26, 2023, PAWC filed a letter with the Commission's Secretary updating its Exceptions to reflect the Commonwealth Court's denial of the pending applications for reargument *en banc* in *Cicero* and noting that the case could be appealed to the Pennsylvania Supreme Court.

and the Commission will expend significant resources litigating cases due to heightened uncertainty regarding the Commission's policy of promoting settlements. PAWC Exc. at 3.

PAWC objects to the purported failure of the Recommended Decision to give due consideration to all Settlement provisions in reaching its conclusion. According to PAWC, not only does the Application meet the statutory requirements of Sections 507, 1102(a), and 1329, but the Settlement also contains numerous additional provisions that clearly demonstrate that the transaction satisfies the applicable legal standards, including the requirement that the acquisition be shown to affirmatively promote the service, accommodation, convenience, or safety of the public. The Company references examples of the affirmative public benefits provided in the Settlement and contends that many of these public benefits could not have been realized in the absence of a settlement as the Commission would not have had the authority to order many of them. It is PAWC's position that the ALJ erred by overlooking these affirmative public benefits and by giving too little weight to the benefits and too much weight to the supposed harms. PAWC Exc. at 4-6.

Additionally, the Company argues that the Recommended Decision inappropriately rewrites Section 1329 by essentially holding that as long as a seller is providing adequate service and can borrow more money, any Section 1329 application should be denied because of the rate impacts of the acquisition. According to PAWC, such a holding restricts Section 1329 to acquisitions of troubled systems and undermines the General Assembly's determination that fair market value acquisitions of municipal water and wastewater systems further the public interest. PAWC references the OCA's argument in *Cicero* that the Commission's analysis was too lenient and essentially allowed any acquisition to be approved. The Company contends that the analysis of the Recommended Decision in this case goes too far in the opposite direction. PAWC Exc. at 8-9.

PAWC asserts that the evidence demonstrates that the Settlement is in the public interest and should be approved because the benefits of the transaction outweigh the detriments for all stakeholder groups and the Settlement is consistent with Pennsylvania law. Therefore, PAWC requests that the Commission reverse the Recommended Decision and find that the Settlement is in the public interest. PAWC Exc. at 9.

**b. Exception No. 2**

In its Exception No. 2, PAWC notes that as a public utility, it enjoys a rebuttable presumption of fitness and that its fitness was unchallenged in this proceeding. Nevertheless, the Company avers that it provided extensive evidence demonstrating its fitness. In addition, PAWC argues that while the ALJ finds that no Party presented a substantial challenge to PAWC's fitness, the Recommended Decision does not include a finding on this legal issue. Therefore, PAWC requests that the Commission find that PAWC is legally, technically, and financially fit to own and operate BASA's System. PAWC Exc. at 10.

**c. Exception No. 3**

PAWC argues in its Exception No. 3 that the Recommended Decision erred in its conclusion that the acquisition does not affirmatively promote the service, accommodation, convenience, or safety of the public in some substantial way. PAWC Exc. at 10-11.

First, PAWC argues that the Recommended Decision's analysis was limited to the impact of the acquisition on BASA's existing customers and PAWC's existing customers when the focus of the analysis must be on all affected parties. PAWC Exc. at 12. Additionally, PAWC argues that the Recommended Decision should have

considered the benefits and detriments of the acquisition for three important stakeholder groups: (1) BASA, the City, and the Township; (2) other municipalities in the Butler area; and (3) the public-at-large. PAWC Exc. at 11-12.

Regarding BASA, the City, and the Township, PAWC reiterates its arguments from its testimonies that this stakeholder group will benefit from the acquisition. PAWC notes that the record does not demonstrate that the acquisition will have any significant detrimental impacts on this group. Therefore, PAWC submits that the acquisition's benefits outweigh the detriments for BASA, the City, and the Township. However, PAWC asserts that the analysis of the Recommended Decision ignored these substantial affirmative public benefits of the transaction. PAWC Exc. at 13-15.

Similarly, with respect to other municipalities in the Butler area, PAWC again reiterates the benefits that the acquisition will have on this stakeholder group as raised in its testimonies. According to the Company, the benefits of the acquisition outweigh the costs with respect to this stakeholder group, but the Recommended Decision failed to consider these benefits. PAWC Exc. at 16-17.

Next, PAWC repeats its position from its testimonies that the acquisition benefits the members of the public-at-large. Specifically, the Company asserts that the Recommended Decision dismisses the acquisition's environmental benefits by noting that BASA is subject to a 2019 CAP and is making progress in remediating issues and providing safe service. Likewise, PAWC further contends that the Recommended Decision undervalued the significance of the repeated instances of environmental non-compliance in the System by stating that BASA is making progress in remedying issues and claiming that the record demonstrates the adequacy of existing BASA service. According to PAWC, there is a broad range of adequate service and most consumers would want to receive grade "A" service over service that is barely adequate. PAWC submits that the record does not demonstrate any significant detriments from the

acquisition to the public-at-large. PAWC concludes that the acquisition's affirmative benefits outweigh the detriments to this stakeholder group and that the Recommended Decision failed to give sufficient weight to these benefits. PAWC Exc. at 17-21.

Second, PAWC asserts that the Recommended Decision erred in its analysis of the impact of the acquisition on BASA's and PAWC's existing customer base. Specifically, PAWC argues that the benefits of the acquisition outweigh the detriments for the three following stakeholder groups: (1) BASA's existing customers; (2) PAWC's existing wastewater customers; and (3) PAWC's existing water customers. PAWC Exc. at 21.

Regarding BASA's existing customers, PAWC reiterates its position from its testimonies that through the acquisition, this stakeholder group will experience not only the same benefits and detriments as do other members of the public-at-large, but also unique benefits that are not enjoyed by other members of the public-at-large, and many of the same benefits as will other PAWC customers, some of which include: (1) a commitment to limit the first rate increase for BASA's existing customers in PAWC's rate base rather than increasing their rates by 94.4 percent; (2) certain economies of scale that will result from the acquisition; (3) BASA customers becoming eligible to participate in PAWC's customer assistance program; (4) a commitment to move the BASA System to metered rates; and (5) the wastewater service to BASA customers becoming subject to regulatory oversight of the Commission. According to the Company, the Recommended Decision undervalued the other benefits of the acquisition for BASA's existing customers by erroneously characterizing such benefits as overly general in nature. It is PAWC's position that the Recommended Decision failed to consider many of the specific benefits of the acquisition on BASA's existing customers. PAWC Exc. At 22-26.

As to rate impact, PAWC contends that the Recommended Decision erred in concluding that the rate impacts of the acquisition for BASA customers outweigh all the benefits. According to PAWC, disapproval of the acquisition would likely necessitate BASA to impose a substantial rate increase to help fund capital projects and BASA would not be subject to Commission regulatory oversight in setting these new rates. However, if the acquisition is approved, PAWC reasoned that there will be no immediate impact on the rates to BASA's customers, as PAWC will adopt BASA's rates in effect at the time of Closing. In conclusion, PAWC submits that the Recommended Decision overstated the rate impact of the acquisition for BASA's existing customers. PAWC Exc. at 24-25.

Similarly, PAWC repeats its arguments from its testimonies that the Acquisition benefits PAWC's existing wastewater customers in the same way that it benefits all other members of the public-at-large and provides specific benefits as well. PAWC submits that the Recommended Decision overstated the acquisition's rate impact for PAWC's existing wastewater customers because it incorrectly considered the rate impact of the acquisition together with the rate impacts of other PAWC acquisitions and not the acquisition alone. According to PAWC, the acquisition will not have an immediate rate impact on this stakeholder group and any future rate impact will be determined by the Commission in future rate cases. PAWC further contends that the benefits of the acquisition outweigh the detriments for PAWC's existing wastewater customers when considering the uncertainty of the extent of the rate impacts on this stakeholder group and the certainty of the benefits. PAWC emphasizes that affirmative public benefit does not mean that every customer receives a benefit from the transaction as the main objective is to serve the interests of the public. PAWC Exc. at 26-30.

Regarding PAWC's existing water customers, the Company again, repeats its arguments made in its testimonies that the acquisition benefits this stakeholder group in the same way that it benefits all other members of the public-at-large. Noting that

some of its existing water customers are also BASA's existing wastewater customers, PAWC reiterates that the benefits of the acquisition outweigh the detriments for BASA's existing wastewater customers as well as the additional benefits for all of PAWC's existing customers. As was the case for PAWC's existing wastewater customers, PAWC claims that the Recommended Decision overstated the rate impact for PAWC's existing water customers by not limiting its analysis to the facts of this acquisition alone. PAWC disagreed with the purported reasoning of the Recommended Decision that PAWC's existing water customers are at risk for supporting the costs of acquiring the BASA customers when all PAWC water customers already must pay for wastewater disposal. According to the Company, the benefits of the acquisition clearly outweigh the detriments for PAWC's existing water customers. PAWC Exc. at 30-33.

As for relief, PAWC requests that the Commission reverse the Recommended Decision and approve the Application, as modified by the Settlement, without modification. Additionally, PAWC presents purported, disadvantageous results of the following scenarios: (1) adoption of the Recommended Decision by the Commission, which PAWC contends would likely result in an appeal by at least one party and subsequent withdrawal from the Settlement by a Joint Petitioner; and (2) modification of the Recommended Decision and approval of the Settlement with modifications, which PAWC asserts would require the issuance of a Tentative Order and an opportunity for the Joint Petitioners to comment on the proposed modifications, preventing the Commission from complying with the Section 1329 statutory deadline. PAWC Exc. at 34-35.

## **2. The Butler Parties**

The Butler Parties filed Exceptions to the Recommended Decision on September 21, 2023. The Exceptions generally object to the Application and analysis of Sections 1102, 1103, and 1329 of the Code conducted by the ALJ in the Recommended

Decision. The Exceptions also note the Butler Parties generally adopt and incorporate the Exceptions filed by PAWC.

**a. Exception No. 1**

The Butler Parties' first Exception argues the Recommended Decision undermines the Commission's policy encouraging settlement of disputes before the Commission. Butler Parties Exc. at 5. Referring to the Commission's policy at 52 Pa. Code § 5.231(a), the Butler Parties add the Commission has previously found "the results achieved from a negotiated settlement or stipulation, or both, in which the interested parties have had an opportunity to participate are often preferable to those achieved at the conclusion of a fully litigated proceeding." *Id.*, citing 52 Pa. Code § 69.401. The Butler Parties suggest the ALJ's analysis in the Recommended Decision directly contradicts the stated policy of the Commission, ignores the public benefits considered by the participating parties, and requests the Commission reject the Recommended Decision and adopt the Settlement without modification. *Id.* at 7-8.

**b. Exception No. 2**

The Butler Parties, in their second Exception, except to the ALJ's analysis of the legal standards in Sections 1102 and 1103 of the Code as interpreted by Pennsylvania courts. Specifically, the Butler Parties claim the ALJ wrongly compared the benefits of the acquisition contemplated in the Settlement to the benefits already provided by the incumbent utility, incorrectly finding the transaction was not in the public interest based on current operating standards and potential rate increases. Additionally, the Butler Parties submit the standard does not require the acquiring party to prove an inability of the current operator to provide adequate service. The Butler Parties allege this analysis and standard would render any potential acquisition pursuant to Section 1329 not in the public interest and the analysis should be limited to whether

the acquisition affirmatively promotes the service, accommodation, convenience, or safety of the public in some substantial way. The Butler Parties ask the Commission to reject the analysis of the ALJ in the Recommended Decision. *Id.* at 8 -12.

**c. Exception No. 3**

The Butler Parties' third Exception addresses the Recommended Decision's conclusion that the substantial public benefits of the transaction do not outweigh the harm of potential rate impacts is unsupported and contradicted by the evidence in this matter. The Butler Parties make three arguments in support of this position: (1) the ALJ mischaracterized the scope of public opposition to the proposed sale, (2) the Recommended Decision misstated BASA's capabilities to provide the same level of service, and (3) the Recommended Decision failed to consider all the evidence proffered in support of the proposed transaction. Each of these arguments relies on citations to the evidentiary record that are summarized below. In arguing the Recommended Decision mischaracterized the public opposition to the transaction, the Butler Parties noted that only eleven of the twenty-four individuals testifying at the Public Input Hearings in this matter were BASA customers, which represents approximately .074 percent of BASA customers. The Butler Parties go on to state their position that BASA cannot fund necessary capital improvements without a "significant increase in rates," BASA has existing debt limiting its ability to continue providing efficient service, and that BASA "simply could not" execute a \$75 million capital improvement project as efficiently as PAWC. *Id.* at 8-12. Finally, the Butler Parties contend the ALJ failed to consider the totality of public benefits the sale provides, including access to PAWC customer assistance programs, sales proceeds helping to benefit local communities, improved reliability, and terms negotiated between the parties to mitigate potential rate impact. *Id.* at 12-21.

**d. Exception No. 4**

In their final Exception, the Butler Parties assert the Recommended Decision creates a new standard and policy that a municipality or municipal authority cannot sell its assets unless or until dire circumstances or inadequate service warrant the sale. The Butler Parties allege the Recommended Decision’s conclusion that “[t]he service being provided by BASA does not appear to be inadequate and other relevant evidence does not substantiate that the impact the transaction will have on rates outweighs the marginal benefits that would be provided.” The Exception argues that this standard and policy goes beyond the stated requirement that the Parties show the transaction will “affirmatively promote the service, accommodation, convenience or safety of the public” and should be rejected by the Commission. *Id.* at 21.

**G. Reply Exceptions**

**1. The OCA**

The OCA submitted limited Reply Exceptions on September 26, 2023. Broadly, the Reply Exceptions reported the OCA’s disagreement with assertions of law included in the Exceptions filed by PAWC and the Butler Parties. The OCA contends PAWC, and the Butler Parties utilize rules and conclusions of law that are “fundamentally disputed” and utilize hyperbole to suggest a rejection of the Settlement in this matter will chill future efforts to resolve matters. OCA R. Exc. at 1.

The OCA objects to four assertions made in the PAWC and Butler Parties Exceptions: (1) PAWC claims that the Settlement provides benefits and outcomes which were contested on the record; (2) PAWC’s assertion that the ALJ’s reasoning is counter to the legislative intent of Section 1329; (3) the Company’s opinion that the ALJ’s reasoning would only allow for troubled systems to be eligible for acquisition via

Section 1329; and (4) PAWC's contention that the ALJ's legal analysis would establish a new, unreasonably high, standard for Section 1329 transactions. The OCA objects to these four legal theories as they were not part of the Settlement, and the Settlement combined with the Statements in Supports provide the basis for the Settlement. *Id.* at 2.

In support, the OCA maintains that the Commission has authority to modify or reject a proposed settlement. The OCA offers examples of settlement agreements rejected by the Commission, including a case involving PAWC, countering PAWC and the Butler Parties assertion that modification or rejection of the proposed Settlement will chill future settlements. The OCA notes that provisions of the Settlement consider the very prospect the agreement may be amended or rejected, and reserve certain procedural rights should that occur. The OCA offers that the Code and relevant precedent establish that despite favoring settlements and the resulting saving of resources, the Commission does not simply acquiesce to settlements without a review of their terms to determine whether they are in the public interest. The OCA requests that if the Commission were to grant the Exceptions of PAWC and the Butler Parties, it should reject the assertions of fact and law contested by the OCA. *Id.* at 3-7.

## **2. Protestants, Center Township and Summit Township**

The Joint Protestants filed Reply Exceptions on September 26, 2023. The Joint Protestants request that the Commission reject the Exceptions of PAWC and the Butler Parties and adopt the Recommended Decision. The Reply Exceptions can be viewed as advancing three arguments in support of adopting the Recommended Decision: (1) PAWC and the Butler Parties attempted to negotiate away the public interest and failed to meet their burden to show the transaction affirmatively benefits the public; (2) substantial evidence exists to support the Recommended Decision but not to support rejecting the Recommended Decision; and (3) in light of the Commonwealth Court's

opinion in *Cicero*, the Code requires a “compelling public interest” that was not met by PAWC and the Butler Parties. Joint Protestants R. Exc. at 3-8.

The Joint Protestants, in support of their first argument, refer to various pieces of record evidence supporting a finding that the proposed transaction was not in the affirmative public interest. Among these are the adequacy of the service provided by BASA, the potential for major rate increases should the sale be consummated, and similarities in the ability of BASA and PAWC to secure necessary funding for capital improvement projects. The Joint Protestants offer that the ALJ conducted a thorough analysis of the evidence in finding there was not substantial evidence supporting the transaction. Further, the Joint Protestants allege that mere contractual agreement about possible benefits does not provide substantial evidence of those benefits, and the Joint Protestants ask the Commission to adopt the reasoning of the Recommended Decision. In their second argument, the Joint Protestants rely on the analysis of the Commonwealth Court in *Cicero* to further advance their assertion that PAWC and the Butler Parties failed to present substantial evidence in support of the transaction or in favor of rejecting the Recommended Decision. In their third argument, the Joint Protestants reiterate much of their previous argument in asking the Commission to find no “substantial reason” exists for the proposed transaction promoting the service, accommodation, convenience or safety of the public. *Id.* at 5-9.

#### **H. Joint Motion to Strike the Reply Exceptions of the Joint Protestants and Response of Joint Protestants**

In the Motion to Strike, PAWC and the Butler Parties contend that the Commission should strike the Joint Protestants’ Reply Exceptions because the Joint Protestants waived their arguments by not submitting them to the ALJ. While the Joint Protestants argued that the Commission should adopt the Recommended Decision and disapprove the Application because the Settlement did not produce affirmative benefits,

PAWC and the Butler Parties argue that the Joint Protestants did not offer any of their arguments to the ALJ in the proceeding below. PAWC and the Butler Parties submit that the Joint Protestants: (1) supported a modified Briefing schedule, which removed the opportunity to brief any remaining disputed issues; (2) did not file written objections to the Settlement; and (3) advised the ALJ and Parties that they did not object to the Settlement and would take no further action in this matter. Therefore, PAWC and the Butler Parties aver that the Joint Protestants waived all of the arguments in their Reply Exceptions by not presenting them to the ALJ. Motion to Strike at 7-8.

Furthermore, PAWC and the Butler Parties argue that allowing the Joint Protestants to change their position to oppose the Settlement would put them in a position to appeal if the Commission approves the Settlement, which would not be in the public interest. PAWC and the Butler Parties aver that parties should not be able to obtain what they want through a Settlement and later oppose the Settlement. *Id.* at 9.

In addition, PAWC and the Butler Parties aver that they waived the opportunity to present rejoinder testimony and cross-examine certain witnesses at hearing in reliance on the Joint Protestants' representations that they would join the Settlement, and the Butler Parties withdrew motions to strike certain testimony of certain witnesses as well. Also, PAWC and the Butler Parties state that the Parties agreed to waive the opportunity to file Briefs based upon the Joint Protestants' representation that they would join the Settlement. PAWC and the Butler Parties further submit that the record, which is closed in this proceeding, could have been substantially different if the Parties had known that the Joint Protestants would change their position later in the proceeding and oppose the Settlement. PAWC and the Butler Parties contend that allowing the Joint Protestants to change their position now would raise significant due process concerns because PAWC, the Butler Parties, and the other Parties to the Settlement would be denied an opportunity to be heard on the Joint Protestants' new position. *Id.* at 9-11. PAWC and the Butler Parties liken the Joint Protestants' position change in Reply Exceptions to a

party raising issues for the first time in a reply brief, which the Commission has prohibited as a due process violation because other parties could not file a response. *Id.* at 11, citing *Sattar v. Aqua Pennsylvania, Inc.*, Docket No. C-2010-2169756 (Order entered July 28, 2011).

Moreover, PAWC and the Butler Parties argue that the Joint Protestants should be estopped from asserting a position in their Reply Exceptions that directly contradicts their position before the ALJ. PAWC and the Butler Parties aver that the elements of equitable estoppel have been met in this case because: (1) the Joint Protestants induced PAWC and the Butler Parties to decline the opportunity to introduce rejoinder testimony, waive cross-examination, and withdraw motions to strike by representing that they would join the Settlement; (2) PAWC and the Butler Parties relied on the Joint Protestants' inducement; and (3) PAWC and the Butler Parties would be prejudiced if the Joint Protestants were permitted to oppose the Settlement in their Reply Exceptions. *Id.* at 12, citing *Guardian Life Ins. Co. of America v. Zerance*, 479 A.2d 949 (Pa. 1984); *Sabino v. Junio*, 272 A.2d 508 (Pa. 1971).

PAWC and the Butler Parties also argue that the Commission should strike the Joint Protestants' Reply Exceptions to further the Commission's policy of encouraging settlements. PAWC and the Butler Parties contend that allowing a party to change its position after an ALJ issues a decision on a settlement would seriously undermine the Commission's policy of promoting settlements. PAWC and the Butler Parties reason that parties would be reluctant to enter into settlements if other parties could change positions prior to a final order being issued, which will cause parties to fully litigate cases and result in wasted resources in cases that would otherwise be settled. *Id.* at 13.

Finally, as discussed, *supra*, PAWC and the Butler Parties request that the Commission assign an expedited deadline of October 2, 2023, for filing answers to the Motion to Strike rather than the twenty days prescribed by 52 Pa. Code § 5.103(c).<sup>17</sup>

In response, the Joint Protestants argue that the Motion to Strike is procedurally invalid and substantively deficient and should be denied. The Joint Protestants aver that because they are not Parties to the Settlement, they have the right and duty to raise the issue of the intervening decision in *Cicero*. The Joint Protestants further argue that they do not reargue their testimony previously presented or include additional facts in their Reply Exceptions, but rather present a legal argument regarding the ALJ's analysis of *Cicero*. Joint Protestants' Response to Motion to Strike at 2-3.

Furthermore, the Joint Protestants submit that the Code does not provide for further filings in response to ALJ recommendations, and that filings after Reply Exceptions are generally invalid and should not be allowed. Instead, the Joint Protestants contend that they properly made reference to precedential case law and related arguments. The Joint Protestants suggest the Motion to Strike is akin to surrebuttal to Reply Exceptions. *Id.* at 4, 6.

In addition, the Joint Protestants argue that the Motion to Strike is substantively deficient. The Joint Protestants aver that while PAWC and the Butler Parties assert that the Joint Protestants waived the ability to file Reply Exceptions because they did not raise the issues earlier in the proceeding, PAWC and the Butler Parties cited to matters outside of the Settlement in their Exceptions, and the OCA raised issues regarding *Cicero* in its Reply Exceptions. The Joint Protestants contend that they

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<sup>17</sup> As discussed, *supra*, this request was denied by Secretarial Letter issued on September 29, 2023.

must be given a chance to respond to PAWC and the Butler Parties raising matters outside the record in their Exceptions. *Id.* at 6-7.

The Joint Protestants further argue that the Motion to Strike fails to identify any arguments raised by the Joint Protestants that was not raised below. Rather, the Joint Protestants state that their Reply Exceptions follow the ALJ's opinion and do not assert any new issues that were not raised by either the ALJ or PAWC and the Butler Parties in their Exceptions. The Joint Protestants aver that PAWC and the Butler Parties raised *Cicero* in their Exceptions, and the Joint Protestants limited their Reply Exceptions to the same issue, and that PAWC and the Butler Parties cannot now attempt to offer surrebuttal arguments or new evidence. The Joint Protestants contend that action does not repeat evidence submitted earlier or introduce new factual matters, but it addresses the ALJ's analysis of *Cicero* in the Recommended Decision, "which is a typical and permissible use of a Reply Exception." *Id.* at 8-9.

## **I. Disposition**

### **1. Motion to Strike**

First, we will address PAWC's and the Butler Parties' Motion to Strike. Upon review, we find that the Motion to Strike should be granted, and the Reply Exceptions filed by the Joint Protestants should be stricken. Simply, the Joint Protestants waived their arguments included in their Reply Exceptions because they did not make or submit those arguments earlier in the proceeding before the ALJ.

The Pennsylvania Supreme Court has applied the waiver doctrine, holding that issues not raised or presented at the trial stage will not be considered on appellate review. *Pa. PUC Bureau of Investigation and Enforcement v. Uber Technologies, Inc., Gegen, LLC, Rasier LLC, and Rasier-PA LLC*, Docket No. C-2014-2422723

(Opinion and Order entered September 1, 2016) (*Uber Technologies*) (citing *DeMarco v. Jones & Laughlin Steel Corp.*, 522 A.2d 26 (Pa. 1987) (*DeMarco*); *Dilliaine v. Lehigh Trust Co.*, 322 A.2d 114 (Pa. 1974); *Commonwealth v. Clair*, 326 A.2d 272 (Pa. 1974)). The Supreme Court further explained that the waiver doctrine applies to administrative proceedings. *See, Uber Technologies; DeMarco* (citing *Wing v. Unemployment Compensation Board of Review*, 436 A.2d 179 (Pa. 1981)).

The Commission has also applied the principle of waiver and held that a party is barred from raising additional issues or facts in Exceptions that were not originally pleaded earlier in a proceeding or raised at hearing. *See, Cynthia Young-Nelson v. PECO Energy Co.*, Docket No. F-2019-3009953 (Order entered December 3, 2020); *Meghan Flynn, et al. v. Sunoco Pipeline, L.P.*, Docket No. C-2018-3006116, *et al.* (Opinion and Order entered November 18, 2021); *Uber Technologies* (citing *Petition of PPL Electric Utilities Corporation for Approval of a Distribution System Improvement Charge*, Docket Nos. P-2012-2325034, *et al.* (Opinion and Order entered October 1, 2015)). In addition, the Commission has held, in the interest of judicial economy, that it will not grant exceptions or reconsideration when a party failed to raise an argument earlier in the proceeding. *Ruth Mathieu-Alce v. Philadelphia Gas Works*, Docket No. F-2015-2473661 (Opinion and Order entered April 7, 2016) (citing *Hess v. Pa. PUC*, 107 A.3d 246 (Pa. Cmwlth. 2014); *Pa. PUC v. York Cab, Inc.*, Docket No. C-2010-2212946 (Opinion and Order entered April 18, 2013); *Generic Investigation Regarding Transportation Assessments*, Docket No. I-2008-2022003 (Order entered August 26, 2008)).

None of the arguments offered by the Joint Protestants in their Reply Exceptions in support of the adoption of the Recommended Decision, which recommended that the Settlement and Application should be denied because PAWC did not establish an affirmative public benefit resulting from the acquisition of BASA's wastewater system assets, were offered to the ALJ or raised earlier in the proceeding

below by the Joint Protestants. In addition to not raising their arguments earlier in the proceeding, the Joint Protestants also supported a modified Briefing schedule, which resulted in the removal of the opportunity for the Parties to brief any remaining disputed issues. Furthermore, the Joint Protestants did not file written objections to the Settlement, and they advised the ALJ and the Parties that they did not object to the Settlement and would take no further action in this matter. By relying on the Joint Protestants' representations that they would join the Settlement, other parties, including PAWC and the Butler Parties, waived their opportunity to present rejoinder testimony and cross-examine certain witnesses at hearing. Also, certain motions to strike the testimony of witnesses were also withdrawn by the Butler Parties based on the Joint Protestants' representations. *See*, Motion to Strike at 7, 9.

Therefore, we find that the Joint Protestants waived the arguments in their Reply Exceptions because they failed to raise them before the ALJ or earlier in the proceeding. Accordingly, we will grant the Motion to Strike and strike the Reply Exceptions of the Joint Protestants. Inasmuch as we are granting the Motion to Strike because the Joint Protestants waived their arguments by not raising them earlier in the proceeding, we conclude that it is not necessary to address, at this time, the additional arguments contained in the Motion to Strike with respect to striking the Reply Exceptions for due process reasons, under the doctrine of equitable estoppel, and in furtherance of the Commission's policy encouraging settlements.

## **2. Sections 1102/1103 Analysis**

Next, we will turn to the fitness and affirmative benefits issues to be reviewed when considering approvals under 66 Pa. C.S. §§ 1102 and 1103. Upon review of the record, we agree with the ALJ that PAWC has proven that it is technically, legally, and financially fit to acquire BASA's System. As the ALJ pointed out, no party disputed or challenged PAWC's technical, legal, and financial fitness to render wastewater

service. In addition, PAWC is a public utility regulated by the Commission with a good compliance history and there are no pending legal proceedings that would suggest PAWC is not legally fit to provide service to customers on BASA's System. PAWC has also demonstrated on the record that it possesses the requisite financial and technical fitness to provide safe, adequate, and reasonable service to its customers. R.D. at 32-33 (citing PAWC St. 1 at 6, 22-23; PAWC St. 2 at 2, 19-21; PAWC St. 3 at 3-5).

With respect to evaluating whether the acquisition has substantial affirmative public benefits that outweigh the harms resulting from the acquisition, as set forth in the Commonwealth Court's decision in *McCloskey*, our obligation in performing "the balancing test under Section 1102 of the Code [is] to weigh all the factors for and against the transaction, including the impact on rates, to determine if there is a substantial public benefit." *McCloskey*, 195 A.3d at 1066 (applying *City of York*). We are further "charged with deciding whether the impact of rates ... is outweighed by ... other positive factors that ... served [as] a substantial public benefit." *Id.* at 1067. Moreover, the Pennsylvania Supreme Court has explained that "in some circumstances conditions may be necessary to satisfy the Commission that public benefits sufficient to meet the requirement of Section 1103(a) will ensue." *Popowsky*, 937 A.2d at 1061, n.21. The Commission has consistently applied this balancing test for evaluating whether to issue Certificates in Section 1329 proceedings. *See, e.g., Cheltenham, Application of Pennsylvania-American Water Company – Valley Township*, Docket Nos. A-2020-3019859 and A-2020-3020178 (Opinion and Order entered October 28, 2021), and *Lower Makefield*.

In the seminal Section 1329 case in *McCloskey*, the Commonwealth Court considered the Commission's findings that the applicant in that proceeding, as an owner of numerous water and wastewater systems, had sufficient expertise and ability to raise capital to support system operations. The Court also acknowledged the finding that the Commission has a policy in support of consolidation and regionalization of wastewater

system assets that allows for increased maintenance, upgrade, and expansion of public sewer and water facilities. In its rationale, the Court stated that these Commission findings were of the type that the Pennsylvania Supreme Court in *Popowsky* held were sufficient to meet the Section 1103 public benefit standard. “As per [*Popowsky*], these *aspirational statements are substantial evidence* to support the notion that there is a public benefit for the merger.” *McCloskey*, 195 A.3d at 1065 (emphasis added).

Recently, as discussed, *supra*, the Commonwealth Court in *Cicero* reversed a Commission Order that had approved the acquisition of a municipality’s wastewater assets by a large public utility under 66 Pa. C.S. § 1329 because the benefits did not outweigh the acknowledged harms of the acquisition. The Court in *Cicero* upheld prior precedent that the substantial affirmative 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 consistent with *City of York*. Also, the Court stated that public benefits arising from aspirational statements or those benefits that cannot be quantified at the time of the transaction may not always constitute affirmative public benefits that will be substantial enough to outweigh known harms. *See, Cicero* at 19, 21.

PAWC argued that the transaction benefits the public-at-large by promoting the Commission’s policy favoring regionalization and consolidation of water and wastewater systems and the public policy goals in 66 Pa. C.S. § 1329. R.D. at 33-34. Indeed, the Commission supports the consolidation and regionalization of water and wastewater system assets. To that end, in our *Final Policy Statement on Acquisitions of*

*Water and Wastewater Systems*, Docket No. M-00051926 (Order entered August 17, 2006) (*2006 Final Policy Statement*), we stated:

[A]cquisitions of smaller systems by larger more viable systems will likely improve the overall long-term viability of the water and wastewater industry. Additionally, these types of acquisitions will also enhance the quality of ratepayers' daily lives, promote community economic development and provide environmental enhancements. We strongly believe that these types of acquisitions generally serve public policy goals....

*2006 Final Policy Statement* at 18.

More recently, and after enactment of Section 1329, we emphasized similar public policy goals. We explained that Section 1329 reflects a determination by the General Assembly that fair market value acquisitions of municipal water and wastewater systems further the public interest. *See, generally, Implementation of Section 1329 of the Public Utility Code – Tentative Implementation Order*, Docket No. M-2016-2543193 (Order entered July 21, 2016) (*TIO*); and *Implementation of Section 1329 of the Public Utility Code – Tentative Supplemental Implementation Order*, Docket No. M-2016-2543193 (Order entered September 20, 2018) (*TSIO*). Specifically, we noted that there are a number of water and wastewater systems owned by municipal corporations or authorities throughout the Commonwealth where sale to an investor-owned public utility can facilitate necessary infrastructure improvements and ensure the continued provision of safe, reliable service to customers at reasonable rates. *TIO* at 2. Additionally, we explained that:

[t]he development of water and wastewater service throughout the Commonwealth over the years has led to the creation of large numbers of geographically dispersed water and wastewater systems owned by municipal corporations or authorities. For these systems, sale to a larger, well-capitalized and well-run regulated public utility or entity can

be prudent because it can facilitate necessary infrastructure improvements and access to capital markets, and, ultimately, it can ensure the long-term provision of safe reliable service to customers at reasonable rates.

*TSIO* at 4.

The proposed acquisition is no exception to these principles. Furthermore, the analysis set forth in *City of York, McCloskey, Popowsky, and Cicero* is equally applicable in this proceeding. Therefore, we shall further evaluate whether PAWC has established that the substantial affirmative benefits of the proposed acquisition outweigh the acknowledged harms resulting from it. Our evaluation will consider whether PAWC has satisfied the preponderance of the evidence standard with the understanding that it is not required to secure legally binding commitments nor quantify benefits if impracticable, burdensome, or impossible. *See, Popowsky* at 1057; *Cicero* at 19. Additionally, an integral part of our review must include full consideration of the harms of the acquisition on the existing customers of PAWC and BASA, and the public-at-large.

Pursuant to Sections 1102 and 1103 of the Code, we agree with PAWC and the Butler Parties that, based upon the record evidence in this particular instance, the acquisition has substantial affirmative public benefits that outweigh the potential harms resulting from the acquisition. Therefore, we will grant the Application.

PAWC has provided numerous affirmative public benefits provided in the Settlement, including: (1) in the first base rate case in which BASA's System is included in PAWC's rate base, PAWC will propose to move the BASA System to 1.4 times the current BASA System rate or PAWC's proposed Rate Zone 1 system-average wastewater rates, whichever is lower, upon the latter of the first anniversary of the closing of the transaction or January 1, 2025, rather than a potential 94.4 percent increase; (2) the

ability for existing BASA customers to participate in PAWC's customer assistance program following the acquisition; (3) placing the lower amount of \$228,000,000 into PAWC's rate base as a result of the transaction rather than the amended \$230,000,000 purchase price; (4) an increased eligibility for hardship grants for all PAWC customers; (5) a contribution by PAWC to its hardship grant program of \$700,000 annually for five years, totaling \$3.5 million; (6) provisions that protect customers from paying for the acquisition of easements post-closing; and (7) PAWC's adoption of a formal program for payment arrangements for commercial customers. PAWC Exc. at 5.

In addition to these stated benefits, the Butler Parties included additional benefits as a result of the acquisition. Some of these benefits include: (1) PAWC's commitment to retain all active personnel of BASA with similar compensation and employment benefits; (2) PAWC's commitment to award development project contracts to Butler-county based contractors; (3) PAWC's commitment to maintain an operations center at BASA's current headquarters for at least ten years; (4) the expectation that business will be more encouraged to open in the greater Butler area; and (5) the influx of cash to the Butler Parties from the sale proceeds. Butler Parties Exc. at 19.

Further, there are important environmental benefits identified by PAWC and BASA whereby PAWC will assume BASA's responsibilities under the 2019 CAP to rebuild infrastructure to address environmental compliance issues, as well as PAWC's capital plan to spend \$75.8 million over five years on the 2019 CAP projects and other projects to upgrade and maintain the System.

The Commission agrees with PAWC and the Butler Parties that the Recommend Decision erred in concluding that *the potential rate impacts of the acquisition alone* outweigh all the above-listed benefits. Regarding BASA's existing customers, we agree with PAWC that disapproval of the acquisition would likely necessitate BASA to impose a substantial rate increase to help fund necessary capital

projects (totaling almost \$80 million) and BASA would not be subject to Commission regulatory oversight in setting these new rates. However, if the acquisition is approved, there will be no immediate impact on the rates to BASA's customers, as PAWC will adopt BASA's rates in effect at the time of Closing.

Regarding PAWC's existing wastewater customers, the Commission agrees with PAWC that the Recommended Decision incorrectly considered the rate impact of the acquisition together with the rate impacts of *other* PAWC acquisitions and not this acquisition alone. Based on the record evidence, this acquisition will not have an immediate rate impact on PAWC's existing wastewater customers, and any future rate impact will be determined by the Commission in future rate cases. The benefits of the acquisition outweigh the detriments for PAWC's existing wastewater customers when considering the uncertainty of the extent of the rate impacts on PAWC's existing customers and the certainty of the benefits.

### **III. Conclusion**

Based on the foregoing discussion, we shall: (1) grant the Motion to Strike; (2) grant the Exceptions of PAWC and the Butler Parties to the extent they argue that the benefits of the acquisition outweigh any potential harms; (3) modify the Recommended Decision; (4) approve the Settlement without modification; and (5) grant the Application, consistent with this Opinion and Order. **THEREFORE,**

#### **IT IS ORDERED:**

1. That the Joint Motion of Pennsylvania-American Water Company, the Butler Area Sewer Authority, the City of Butler, and the Township of Butler, to Strike the Exceptions Filed Jointly by the Townships of Summit and Center, filed on September 27, 2023, at Docket No. A-2022-3037047, is granted.

2. That the Exceptions of Pennsylvania-American Water Company, and the Exceptions of the Butler Area Sewer Authority, the City of Butler, and the Township of Butler, each filed on September 21, 2023, at Docket No. A-2022-3037047, are granted, consistent with this Opinion and Order.

3. That the Recommended Decision of Administrative Law Judge Marta Guhl issued on September 14, 2023, at Docket No. A-2022-3037047, is modified, consistent with this Opinion and Order.

4. That the Joint Petition for Approval of Unanimous Settlement of All Issues filed by Pennsylvania-American Water Company, the Butler Area Sewer Authority, the Township of Butler, the City of Butler, the Commission's Bureau of Investigation and Enforcement, the Office of Consumer Advocate, and the Office of Small Business Advocate, on August 14, 2023, at Docket No. A-2022-3037047, is approved without modification.

5. That the Application filed by Pennsylvania-American Water Company pursuant to Sections 1102, 1103, 1329, and 507 of the Pennsylvania Public Utility Code for Approval of its Acquisition of the Wastewater System Assets of the Butler Area Sewer Authority, on February 14, 2023, at Docket No. A-2022-3037047, is granted, subject to the terms and conditions set forth in Section III, Paragraph Nos. 15-39 of the Joint Petition for Approval of Unanimous Settlement of All Issues filed on August 14, 2023, consistent with this Opinion and Order.

6. That within ten days after the closing of the Pennsylvania-American Water Company's acquisition of the Butler Area Sewer Authority wastewater system, Pennsylvania-American Water Company shall file notice of closing of the transaction with the Commission at this docket.

7. That the Commission's Secretary shall issue a Certificate of Public Convenience evidencing Pennsylvania-American Water Company's rights under Sections 1102(a)(1), 1102 (a)(3), 1103(a) and 1329(c)(2) of the Pennsylvania Public Utility Code, 66 Pa. C.S. §§ 1102(a)(1), 1102(a)(3), 1103(a), and 1329(c)(2), subject to the conditions set forth in this Opinion and Order, to: (a) acquire, by sale, substantially all of the assets, properties and rights related to the wastewater collection and treatment system owned by Butler Area Sewer Authority; (b) begin to offer, render, furnish and supply wastewater service to the public in the areas served by the wastewater collection and treatment system owned by Butler Area Sewer Authority 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 (c) incorporate the ratemaking rate base of \$228,000,000 for the Butler Area Sewer Authority wastewater system assets in its next base rate case pursuant to 66 Pa. C.S. § 1329(c)(2).

8. That within ten days after the closing of the Pennsylvania-American Water Company's acquisition of the Butler Area Sewer Authority wastewater system, Pennsylvania-American Water Company shall file with the Commission compliance tariff supplements, to be effective on one day's notice, consistent with the *pro forma* tariff supplement submitted as Attachment 9 of the Joint Petition for Approval of Unanimous Settlement of All Issues for the Butler Area Sewer Authority's wastewater system, including all rates, rules and regulations regarding conditions of Pennsylvania-American Water Company's wastewater service as revised in this proceeding for customers of the Butler Area Sewer Authority post-closing. The *pro forma* tariff supplement will incorporate Butler Area Sewer Authority industrial customers into Pennsylvania-American Water Company's existing Industrial Pretreatment Program tariff and will not exempt any Butler Area Sewer Authority industrial customers from Industrial Pretreatment Program fees. Industrial Pretreatment Program tariffed fees will

be adjusted in the context of future Pennsylvania-American Water Company base rate proceedings.

9. That Pennsylvania-American Water Company, in the first base rate proceeding that includes the Butler Area Sewer Authority wastewater system assets, shall charge cost of service-based rates for wastewater service to all entities it serves in the Butler Area Sewer Authority system, including but not limited to, the Veterans Administration Hospital, as limited by Ordering Paragraph (10)(e) below.

10. That Pennsylvania-American Water Company, in the first base rate proceeding that includes the Butler Area Sewer Authority wastewater system assets, shall:

(a) submit a cost of service study that removes all costs and revenues associated with the operation of Butler Area Sewer Authority's wastewater system, in accordance with Ordering Paragraph No. 19 below;

(b) provide a separate cost of service study for the Butler Area Sewer Authority wastewater system, in accordance with Ordering Paragraph No. 20 below;

(c) not propose an increase in Butler Area Sewer Authority's rates if the rates would become effective before the later of: (i) the first anniversary of closing of the Pennsylvania-American Water Company's acquisition of the Butler Area Sewer Authority wastewater system; or (ii) January 1, 2025;

(d) calculate its proof of revenue as if the Butler Area Sewer Authority customers were paying proposed rates without any delay

to the effective date if Pennsylvania-American Water Company proposes a different effective date for new rates for Butler Area Sewer Authority customers beyond the effective date of new rates for other customers in Pennsylvania-American Water Company's first base rate case that includes the Butler Area Sewer Authority wastewater system assets. All rights of the Joint Petitioners shall be reserved with respect to the issue of delayed effective dates of rates in subsequent proceedings, and the Joint Petitioners' ability to make recommendations in any future Pennsylvania-American Water Company base rate case to bring customers in systems with delayed effective dates to an appropriate cost of service as though they have paid the tariffed rates without any delay shall not be limited;

(e) propose to move the Butler Area Sewer Authority wastewater system to 1.4 times the current Butler Area Sewer Authority wastewater system rate or Pennsylvania-American Water Company's proposed Rate Zone 1 system-average wastewater rates, whichever is lower, upon the later of: (i) the first anniversary of closing of the Pennsylvania-American Water Company's acquisition of the Butler Area Sewer Authority wastewater system; or (ii) January 1, 2025;

(f) be permitted to agree to rates other than those proposed for Butler Area Sewer Authority wastewater system customers in the context of a settlement of the base rate case.

(g) The rights of the Office of Consumer Advocate, the Commission's Bureau of Investigation and Enforcement, and the Office of Small Business Advocate shall be reserved to address Pennsylvania-American Water Company's rate proposals fully, and to make other rate proposals, recognizing the Commission's ultimate ratemaking authority to

set just and reasonable rates and, notwithstanding anything to the contrary contained in this Ordering Paragraph No. 10, the Joint Petitioners may enter into a settlement of the base rate case, whether full or partial, and whether unanimous or non-unanimous, on reasonable terms and conditions.

11. That the rate at the closing of the Pennsylvania-American Water Company's acquisition of the Butler Area Sewer Authority wastewater system for Butler Area Sewer Authority wastewater system residential wastewater customers with an average usage of 3,212 gallons per month is approximately \$45.50.

12. That the current rate for Pennsylvania-American Water Company residential Rate Zone 1 wastewater customers with an average usage of 3,212 gallons per month is approximately \$106.00.

13. That, pursuant to 66 Pa. C.S. § 1329(c), the ratemaking rate base of the Butler Area Sewer Authority wastewater system assets is \$228,000,000.

14. That Pennsylvania-American Water Company shall be permitted to record the acquisition at the net value of the assets (\$228,000,000), pursuant to 66 Pa. C.S. § 1702.

15. That Pennsylvania-American Water Company shall not include Butler Area Sewer Authority wastewater system-related investments in its distribution system improvement charge until Pennsylvania-American Water Company collects a distribution system improvement charge from Butler Area Sewer Authority wastewater system customers. Pennsylvania-American Water Company shall be permitted to collect a distribution system improvement charge from Butler Area Sewer Authority wastewater system customers upon:

(a) Pennsylvania-American Water Company's filing of an amended wastewater Long-Term Infrastructure Improvement Plan including the Butler Area Sewer Authority wastewater system, which does not re-prioritize other existing commitments in other service areas;

(b) the Commission's approval of the amended wastewater Long-Term Infrastructure Improvement Plan, as may be modified in the discretion of the Commission; and

(c) Pennsylvania-American Water Company's filing of a compliance tariff supplement which incorporates the Butler Area Sewer Authority wastewater system and all other systems included in the amended wastewater Long Term Infrastructure Improvement Plan into Pennsylvania-American Water Company's distribution system improvement charge tariff, including all customer safeguards applicable thereto, no later than the next quarterly distribution system improvement charge filing after Commission approval of the amended wastewater Long Term Infrastructure Improvement Plan.

16. That Pennsylvania-American Water Company shall be permitted to: (a) accrue Allowance for Funds Used During Construction for post-acquisition improvements not recovered through the distribution system improvement charge for book and ratemaking purposes; and (b) defer depreciation related to post acquisition improvements not recovered through the distribution system improvement charge for book and ratemaking purposes. Any claims for Allowance for Funds Used During Construction and deferred depreciation related to post-acquisition improvements not recovered through the distribution system improvement charge for book and ratemaking purposes will be addressed in Pennsylvania-American Water Company's first base rate case which includes the Butler Area Sewer Authority wastewater system assets. The

Joint Petitioners' rights to litigate their positions fully in future rate cases when these issues are ripe for review shall be reserved, and the Joint Petitioners' assent to this term shall not be construed to operate as their preapproval of Pennsylvania-American Wastewater Company's requests.

17. That Pennsylvania-American Water Company shall be permitted to claim transaction and closing costs associated with the acquisition of the Bulter Area Sewer Authority wastewater system in its first base rate case that includes the Butler Area Sewer Authority wastewater system assets. The Joint Petitioners' rights to litigate their positions fully in future rate cases when this issue is ripe for review are reserved, and the Joint Petitioners' assent to this term shall not be construed to operate as their preapproval of Pennsylvania-American Water Company's request. The inclusion of outside legal fees, if any, in Pennsylvania-American Water Company's transaction and closing costs under the Asset Purchase Agreement shall be separately identified in Pennsylvania-American Water Company's next base rate case, and the rights of the Office of Consumer Advocate, the Commission's Bureau of Investigation and Enforcement, and the Office of Small Business Advocate to challenge the reasonableness, prudence, and basis for such fees are reserved. Any claim by Pennsylvania-American Water Company to recover transaction and closing costs associated with the Pennsylvania-American Water Company's acquisition of the Butler Area Sewer Authority wastewater system shall not include costs incurred by Butler Area Sewer Authority.

18. That the Commission's Secretary shall issue a certificate of filing pursuant to 66 Pa. C.S. § 507 for the following agreements between Pennsylvania-American Water Company and a municipal corporation:

- (a) The Asset Purchase Agreement By and Among Butler Area Sewer Authority, as Seller, and Pennsylvania-American Water

Company, as Buyer, Dated as of October 11, 2022, and the First Amendment thereto, attached to the Application as Appendix A-24-A;

(b) The Water Pollution Control Agreement for Central Butler County between City of Butler, Township of Butler, Township of Center, Township of Summit, Borough of East Butler, Deshon Area Sanitary Disposal and Sewer Authority, East Butler Borough Sewer Authority, East Butler Borough Sewer Authority, Meridian Water and Sewer Authority, Municipal Water and Sewer Authority of Center Township and Butler Area Sewer Authority dated as of February 20, 1974, attached to the Application as Appendix A-25.1;

(c) The Service Agreement between the Township of Oakland and Butler Area Sewer Authority for the Service Area along Route 38 dated March 7, 1994, attached to the Application as Appendix A-25.2;

(d) The Service Agreement between the Township of Connoquenessing and Butler Area Sewer Authority for Cupps Road Service Area dated April 3, 1995, attached to the Application as Appendix A-25.3; and,

(e) The Service Agreement between the Township of Connoquenessing and Butler Area Sewer Authority for Winterwood Drive Service Area dated December 14, 2005, attached to the Application as Appendix A-25.4.

19. That, in the first base rate case that includes the Butler Area Sewer Authority wastewater system assets, Pennsylvania-American Water Company shall

submit a cost of service study that removes all costs and revenues associated with the operation of the Butler Area Sewer Authority wastewater system.

20. That, in the first base rate case that includes the Butler Area Sewer Authority wastewater system assets, Pennsylvania-American Water Company shall provide a separate cost of service study for the Butler Area Sewer Authority wastewater system consistent with typically filed ratemaking exhibits including, but not limited to, the following: Rate Base (Measures of 5 Value), Statement of Operating Income, Proof of Revenue, and Rate of Return, which correspond to the applicable test year, future test year, and fully projected future test year measurement periods.

21. That, when Pennsylvania-American Water Company provides customer notice in its first base rate case that includes the Butler Area Sewer Authority wastewater system, Pennsylvania-American Water Company shall provide notice to customers in the Butler Area Sewer Authority wastewater system, consistent with the rates agreed to be proposed in Ordering Paragraph No. (10)(e) above.

22. That, within the first billing cycle following closing of the Pennsylvania-American Water Company's acquisition of the Butler Area Sewer Authority wastewater system, Pennsylvania-American Water Company shall include a bill insert to Butler Area Sewer Authority wastewater system customers regarding its low income programs and include such information in a welcome letter to Butler Area Sewer Authority wastewater system 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 Pennsylvania-American Water Company's contact information. Pennsylvania-American Water Company shall also automatically enroll any Butler Area Sewer Authority wastewater system customers, who are Pennsylvania-American Water Company water customers enrolled in Pennsylvania-American Water Company's water low income programs, in Pennsylvania-American

Water Company's wastewater low-income programs following closing of the Pennsylvania-American Water Company's acquisition of the Butler Area Sewer Authority wastewater system.

23. That Pennsylvania-American Water Company shall send the welcome letter within the first thirty (30) days of closing of the Pennsylvania-American Water Company's acquisition of the Butler Area Sewer Authority wastewater system, and include information about payment options (including low-income programs, eligibility requirements, and Pennsylvania-American Water Company contact information), free places to pay, and in-person bill payment locations reasonably proximate to the areas served by the Butler Area Sewer Authority wastewater system.

24. That Pennsylvania-American Water Company shall work with community-based organizations with offices local to the areas served by the Butler Area Sewer Authority wastewater system for purposes of providing information and enrolling customers in Pennsylvania-American Water Company's customer-assistance programs. This information shall be included in the welcome letter referenced in Ordering Paragraph No. 22 above.

25. That Pennsylvania-American Water Company shall increase eligibility for hardship grants from 200% to 250% of Federal Poverty Income Guidelines for all existing Pennsylvania-American Water Company customers and all newly acquired customers from the Butler Area Sewer Authority wastewater system, effective on and after closing of the Pennsylvania-American Water Company's acquisition of the Butler Area Sewer Authority wastewater system. All parties' rights to re-evaluate the appropriate eligibility for hardship grants in a future base rate case filed after five (5) years following closing of the Pennsylvania-American Water Company's acquisition of the Butler Area Sewer Authority wastewater system are reserved.

26. That Pennsylvania-American Water Company shall contribute \$700,000 annually to Pennsylvania-American Water Company's hardship grant program for the five (5) years following closing of the Pennsylvania-American Water Company's acquisition of the Butler Area Sewer Authority wastewater system, totaling \$3,500,000, in addition to existing commitments and any commitments made in a future base rate case. These contributions shall not be recovered in rates. All unspent funds at the end of the program year shall be rolled over and added to the budget for the hardship grant program in the following year(s).

27. That Pennsylvania-American Water Company and the Butler Area Sewer Authority shall: (a) identify all missing easements including public rights-of-way and other property rights; and (b) take any and all necessary actions to obtain the missing easements and other property rights so that they may be conveyed to Pennsylvania-American Water Company at closing of the Pennsylvania-American Water Company's acquisition of the Butler Area Sewer Authority wastewater system. Butler Area Sewer Authority shall bear all costs and expenses for obtaining and conveying the missing easements and other property rights.

28. That, Pennsylvania-American Water Company and Butler Area Sewer Authority shall be permitted, at their discretion, to close the Pennsylvania-American Water Company's acquisition of the Butler Area Sewer Authority wastewater system without the transfer of all of the real property rights, including missing easements and other property rights, if for any circumstances beyond Butler Area Sewer Authority's control, it is unable to transfer all missing easements (including public rights-of-way and other property rights) before or at the closing of the Pennsylvania-American Water Company's acquisition of the Butler Area Sewer Authority wastewater system, provided that an escrow account is established from the purchase price as set forth in the Asset Purchase Agreement, in which Butler Area Sewer Authority will fund an easement

escrow fund in the amount of \$2,000 for each missing easement to be used to obtain any post-Closing transfer of the real property rights.

29. That, at the closing of the Pennsylvania-American Water Company's acquisition of the Butler Area Sewer Authority wastewater system, Pennsylvania-American Water Company shall implement a formal program for payment arrangements for commercial customers, including eligibility and payment terms.

30. That the Commission's Secretary, upon the receipt of written notice from Pennsylvania-American Water Company, filed with the Secretary's Bureau notifying the Commission of the closing of the Pennsylvania-American Water Company's acquisition of the Butler Area Sewer Authority wastewater system, pursuant to Ordering Paragraph No. 6 above, and upon the completion of Ordering Paragraph No. 8 above, mark this docket at A-2022-3037047 closed.

**BY THE COMMISSION,**



Rosemary Chiavetta  
Secretary

(SEAL)

ORDER ADOPTED: November 9, 2023

ORDER ENTERED: November 16, 2023