



December 14, 2023

**VIA E-FILING**

**David P. Zambito**

Direct Phone 717-703-5892  
Direct Fax 215-989-4216  
dzambito@cozen.com

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North St., Second Floor  
Harrisburg, PA 17120

**Re: Application of Pennsylvania-American Water Company Pursuant to Sections 1102 and 1329 of the Public Utility Code for Approval of the Transfer, by Sale, of Substantially All of the Assets, Properties and Rights Related to the Wastewater Collection and Conveyance System Owned by Borough of Brentwood; and the Rights to Begin to Offer or Furnish Wastewater Service to the Public in the Borough of Brentwood, Allegheny County, Pennsylvania; Docket No. A-2021-3024058, et al.**

**Reply Brief of Pennsylvania-American Water Company**

Dear Secretary Chiavetta:

Enclosed for filing with the Pennsylvania Public Utility Commission is the Reply Brief of Pennsylvania-American Water Company in the above-referenced matter.

Copies are being served in accordance with the attached Certificate of Service.

Thank you for your attention to this matter. Please contact me if you have any question or concern.

Sincerely,

Cozen O'Connor  
Counsel for *Pennsylvania-American Water Company*

DPZ/kmg  
Enclosure

cc: Administrative Law Judge Katrina L. Dunderdale  
Per Certificate of Service  
Elizabeth Rose Triscari, Esq.  
Erin Fure, Esq.

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Application of Pennsylvania-American Water Company :  
Pursuant to Sections 1102 and 1329 of the Public Utility :  
Code for Approval of the Transfer, by Sale, of :  
Substantially All of the Assets, Properties and Rights :  
Related to the Wastewater Collection and Conveyance : Docket No. A-2021-3024058 *et al.*  
System Owned by Borough of Brentwood; and the :  
Rights to Begin to Offer or Furnish Wastewater Service :  
to the Public in the Borough of Brentwood, Allegheny :  
County, Pennsylvania :

**CERTIFICATE OF SERVICE**

I hereby certify that I have this 14<sup>th</sup> day of December, 2023 served a true copy of the foregoing **Reply Brief of Pennsylvania-American Water Company** upon the parties, listed below and in the manner described below in accordance with the requirements of 52 Pa. Code §1.54 (relating to service by a party).

**VIA E-MAIL AND FIRST CLASS MAIL**

Aron J. Beatty, Esq.  
Christine Maloni Hoover, Esq.  
Andrew J. Zerby, Esq.  
Jacob D. Guthrie, Esq.  
Office of Consumer Advocate  
555 Walnut Street  
5<sup>th</sup> Floor, Forum Place  
Harrisburg, PA 17101-1923  
OCAPAWCBRENTWOOD@paoca.org  
Counsel for *Office of Consumer Advocate*

Sharon E. Webb, Esq.  
Office of Small Business Advocate  
555 Walnut Street  
Forum Place, 1<sup>st</sup> Floor  
Harrisburg, PA 17101  
swebb@pa.gov  
ra-sba@pa.gov  
Counsel for *Office of Small Business Advocate*

Carrie B. Wright, Esq.  
Pennsylvania Public Utility Commission  
Bureau of Investigation and Enforcement  
Commonwealth Keystone Building  
400 North Street, Second Floor West  
Harrisburg, PA 17120  
carwright@pa.gov  
Counsel for *Bureau of Investigation and Enforcement*

Thomas S. Wyatt, Esq.  
Matthew S. Olesh, Esq.  
Sydney N. Melillo, Esq.  
Obermayer Rebman Maxwell & Hippel LLP  
Centre Square West  
1500 Market St., Suite 3400  
Philadelphia, PA 19102-2101  
thomas.wyatt@obermayer.com  
matthew.olesh@obermayer.com  
sydney.melillo@obermayer.com  
Counsel for *Borough of Brentwood*

Scott T. Wyland, Esq.  
Elana D. Schnall, Esq.  
Salzmann Hughes, P.C.  
1801 Market St., Suite 300  
Camp Hill, PA 17011  
swyland@salzmannhughes.com  
eschnall@salzmannhughes.com  
Counsel for *Allegheny County Sanitary  
Authority*

Chester R. Babst, III, Esq.  
Robert Max Junker, Esq.  
Laura Stone, Esq.  
Babst Calland Clements & Zomnir, P.C.  
603 Stanwix Street  
Two Gateway Center, 6<sup>th</sup> Fl  
Pittsburgh, PA 15222  
cbabst@babstcalland.com  
rjunker@babstcalland.com  
lstone@babstcalland.com  
Counsel for *ALCOSAN*

Respectfully submitted,



---

David P. Zambito, Esquire (PA ID #80017)  
Jonathan P. Nase, Esquire (PA ID #44003)  
Cozen O'Connor  
17 North Second Street, Suite 1410  
Harrisburg, PA 17101  
(717) 703-5892  
dzambito@cozen.com  
jnase@cozen.com

Counsel for  
*Pennsylvania-American Water Company*

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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**Administrative Law Judge Katrina L. Dunderdale**

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In re: Application of Pennsylvania-American Water :  
Company for Approval of the Transfer, by Sale, of :  
Substantially all of the assets, properties and rights :  
related to the wastewater collection and conveyance :     Docket Nos. A-2021-3024058 et al.  
system Owned by Borough of Brentwood and the :  
rights to begin to offer or furnish wastewater :  
service to the public in The Borough of Brentwood, :  
Allegheny County, Pennsylvania :

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**REPLY BRIEF OF PENNSYLVANIA-AMERICAN  
WATER COMPANY**

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Elizabeth Rose Triscari, Esq. (PA ID 306921)  
Erin K. Fure, Esq. (PA ID 312245)  
Pennsylvania-American Water Company  
852 Wesley Drive  
Mechanicsburg, PA 17055  
Telephone: (717) 550-1574  
E-mail: Elizabeth.Triscari@amwater.com  
E-mail: Erin.Fure@amwater.com

David P. Zambito, Esq. (PA ID 80017)  
Jonathan P. Nase, Esq. (PA ID 44003)  
Cozen O'Connor  
17 North Second Street, Suite 1401  
Harrisburg, PA 17101  
Telephone: 717-703-5892  
Facsimile: 215-989-4216  
E-mail: dzambito@cozen.com  
E-mail: jnase@cozen.com

*Counsel for Pennsylvania-American  
Water Company*

December 14, 2023

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AND NOW COMES PAWC<sup>1</sup> to submit this Reply Brief pursuant to 52 Pa. Code §§ 5.501 and 5.502, and Prehearing Order #1 issued in this matter on October 18, 2023 by the ALJ. For the reasons set forth in PAWC's Main Brief and this Reply Brief, PAWC respectfully requests that the ALJ recommend that the Commission approve PAWC's Application to acquire the wastewater collection and conveyance system owned by Brentwood. The evidence introduced in this proceeding clearly demonstrates that the aggregate benefits of the Transaction outweigh the aggregate detriments of the Transaction. The evidence also establishes that all of Brentwood's plant in service is used and useful in providing service to Brentwood's customers and should be included in PAWC's rate base. PAWC has no objection to certain proposed conditions to the approval of the Acquisition, but asks that the ALJ recommend the rejection of other proposed conditions, as discussed further herein.

## **I. STATEMENT OF THE CASE**

### **A. PROCEDURAL HISTORY**

PAWC incorporates by reference the Procedural History in Section I.A. of its Main Brief. To update that Section: PAWC, Brentwood, OSBA, OCA, I&E and ALCOSAN all filed Main Briefs on November 30, 2023.

### **B. OVERVIEW OF THE PROPOSED TRANSACTION**

PAWC incorporates by reference the Overview of the Proposed Transaction in Section I.B. of its Main Brief. PAWC has no updates to that Section.

## **II. BURDEN OF PROOF**

In its Main Brief, the OCA claims that Section 315(c) of the Code, 66 Pa. C.S. § 315(c), applies to this case. That provision states:

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<sup>1</sup>Unless otherwise indicated, all capitalized terms and acronyms have the same meanings as set forth in PAWC's Main Brief. To avoid unnecessary repetition, PAWC incorporates by reference its entire Main Brief.

In any proceeding upon the motion of the commission, involving the service or facilities of any public utility, the burden of proof to show that the service and facilities involved are adequate, efficient, safe and reasonable shall be upon the public utility.

By its own terms, this provision does not apply to an application to acquire a municipally-owned utility system. This proceeding was not commenced by a Commission motion, nor does it involve the service or facilities of a public utility (a municipally-owned system such as Brentwood's, which is located entirely within the boundaries of the municipality, is not a "public utility," 66 Pa. C.S. § 102).

This case is governed by 66 Pa. C.S. § 332(a). PAWC, as the proponent of a rule or order, bears the burden of proof. The "burden of proof" is composed of two distinct burdens: the burden of production and the burden of persuasion. *Hurley v. Hurley*, 754 A.2d 1283 (Pa. Super. 2000).

The burden of production, also called the burden of producing evidence or the burden of coming forward with evidence, determines which party must come forward with evidence to support a particular proposition. This burden may shift between the parties during the course of a proceeding. If the party with the burden of production fails to introduce sufficient evidence, the opposing party is entitled to receive a favorable ruling. Once the party with the initial burden of production introduces sufficient evidence to make out a *prima facie* case, the burden of production shifts to the opposing party. If the opposing party introduces evidence sufficient to balance the evidence introduced by the party having the initial burden of production, the burden then shifts back to the party who had the initial burden to introduce more evidence favorable to its position. The burden of production goes to the legal sufficiency of a party's case.

Having passed the test of legal sufficiency, the party with the burden of proof must then bear the burden of persuasion to be entitled to a verdict in its favor. "[T]he burden of persuasion never leaves the party on whom it is originally cast, but the burden of production may shift during

the course of the proceedings.” *Riedel v. County of Allegheny*, 633 A.2d 1325, 1328 n. 11 (Pa. Cmwlth. 1993).

### **III. SUMMARY OF ARGUMENT**

In this case, PAWC clearly established a *prima facie* case that the Transaction passes the affirmative public benefits test. By comparing what would happen if the Transaction is approved to what would happen if the Transaction is disapproved (thereby maintaining the *status quo*), PAWC demonstrated that the net benefits of the Transaction outweigh the net detriments of the Transaction. This is true for each relevant stakeholder group and is therefore true in the aggregate.

In contrast, the OCA and I&E Main Briefs contend that the net detriments of the Transaction outweigh the net benefits. They do this partly by ignoring relevant evidence in the record. The primary argument of the OCA and I&E is that the rate impact of the Transaction for Brentwood’s customers outweighs any and all benefits of the Transaction. However, they fail to acknowledge that, if the Transaction is disapproved, the System’s rates (and possibly the Borough’s taxes) would increase. When the rate impact of the Transaction, if approved, is compared to the rate impact that Brentwood’s customers could experience if the Transaction is disapproved, the Transaction is likely not a detriment to Brentwood’s customers at all.

The OCA and I&E also contend that the Transaction should be disapproved because some of Brentwood’s assets are not used and useful, but they ignore testimony that all of Brentwood’s plant in service is used to provide wastewater collection and conveyance service *to Brentwood’s customers*. In addition, some plant in service is used to provide service to “non-customers,” which directly benefits Brentwood’s customers because it allows them to receive downstream conveyance and treatment service through the ALCOSAN regional system. If the System was not part of the ALCOSAN regional system, customers would not receive downstream conveyance and treatment service. No party contends that such service is not needed.

Additionally, both OCA and I&E speculate that the environmental problems in Brentwood are caused exclusively by Upstream Municipalities, ignoring testimony that Brentwood is responsible for pollution in Brentwood. The record simply does not support the speculation of OCA and I&E.

The OCA and I&E argue that Brentwood's service is "good enough for a municipal system." They claim that Brentwood's service is "adequate" even though the System is currently in violation of applicable environmental laws and regulations, and has been in violation of applicable environmental laws and regulations for 16 of the last 19 years. Such service would not be considered "adequate" for a public utility and should not be considered "adequate" for a municipal system. The OCA and I&E also claim that Brentwood's service is "adequate" even though the System has no program to replace its infrastructure, most of which is a century old. If that is considered "adequate" service, many public utilities should re-examine their long term infrastructure improvement plans that have been mandated by the Commission.

The System is a disaster waiting to happen – if it is not a disaster in progress. That is why all the witnesses from Brentwood who spoke at the public input hearing supported the Transaction. Will the Commission allow PAWC to acquire the System and address the situation, or will the Commission tell the 3,980 customers of Brentwood "You are on your own. Good luck."?

The OCA and I&E further argue that unrefuted evidence should simply be ignored. They claim that virtually every benefit of the Transaction should be ignored because it is only due to PAWC's fitness and size, or would result from any acquisition of a municipal system by a public utility. The OCA and I&E essentially argue that no Pennsylvania public utility can ever acquire a municipal utility system: no unfit public utility can acquire a municipal system because it is unfit,

and no fit public utility can acquire a municipal system because all the benefits of the acquisition are due to the utility's fitness or would occur whenever a public utility acquires a municipal system.

The OCA and I&E have twisted *Cicero v. Pa. Pub. Util. Comm'n*, 300 A.3d 1106 (Pa. Cmwlth. 2023), *pet. for alloc. pending*, into something the Commonwealth Court never intended.

In *Cicero*, the OCA argued:

[T]he Commission erroneously confined its analysis to whether Aqua was technically and financially fit to provide the proposed service and whether the acquisition supported the Commission's policy of promoting regionalization and consolidation of wastewater service in Pennsylvania. [The OCA] maintains that, unlike the ALJ, the Commission did not perform a fact-based analysis of this transaction, including a consideration of the rate impacts of this acquisition. Rather, according to [the OCA], the Commission erroneously relied on benefits that derive from Aqua's fitness, both financial and technical, as a large, investor-owned utility, which would be present in any acquisition by Aqua, and should have examined what benefits would result from the facts of the actual transaction at issue.

300 A.3d at 1116. The Commonwealth Court agreed, concluding that, in every Section 1329 case, "it must be shown that the affirmative public benefits that arise from and are specific to a transaction outweigh the harms of the transaction, such that approval of the transaction will 'affirmatively promote the service, accommodation, convenience or safety of the public in some substantial way.'" 300 A.3d at 1120.

The Commission and others have asked the Supreme Court of Pennsylvania to review the Commonwealth Court's decision in *Cicero*. In opposing that request, the OCA represented to the Supreme Court of Pennsylvania that, in its view, *Cicero* did not effect a "paradigm shift;" the Commonwealth Court simply applied prior appellate decisions to the record before it. OCA's Answer in Opposition to Petitions for Allowance of Appeal, *Cicero v. Pa. Pub. Util. Comm'n*, 568-570 MAL 2023 (filed November 9, 2023).

Consistent with that prior precedent, PAWC, Brentwood and the other parties to this case have introduced extensive, detailed evidence of the specific benefits and detriments that will flow

from this particular transaction. PAWC does not rely on its fitness to show that the Transaction satisfies the affirmative public benefits test. To the contrary, PAWC's Main Brief presented a fact-based analysis of this Transaction. PAWC asks that the ALJ and the Commission do the same.

PAWC has satisfied its burden of establishing a *prima facie* case that the Transaction's benefits outweigh its detriments, by comparing what will happen if the Transaction is approved to what will happen if the Transaction is disapproved (thereby maintaining the *status quo*). No party has presented evidence sufficient to rebut PAWC's *prima facie* case. Consequently, the ALJ should recommend that the Commission find that the preponderance of the evidence demonstrates that the Transaction passes the affirmative public benefits test.

#### **IV. ARGUMENT**

##### **A. SECTION 1102 AND 1103 ISSUES**

###### **1. FITNESS**

PAWC incorporates by reference Section IV.A.1. of its Main Brief. No party has disputed PAWC's legal, technical or financial fitness to own and operate the System. As a result, PAWC will not discuss this issue further in this Reply Brief.

###### **2. AFFIRMATIVE PUBLIC BENEFIT TEST**

In this case, PAWC must prove that the Transaction passes the affirmative public benefit test, which is a "net benefits assessment." An acquisition provides an affirmative benefit if the benefits of the transaction outweigh the adverse impacts of the transaction. *Application of CMV Sewage Co., Inc.*, 2008 Pa. PUC LEXIS 950. When looking at the benefits and detriments of a transaction, the focus of the analysis must be on all affected parties, not merely a particular group or a particular geographic area. *Middletown Township v. Pa. Pub. Util. Comm'n*, 482 A.2d 674 (Pa. Cmwlth. 1984)

To carry its burden, PAWC’s evidence must be more convincing, by even the smallest amount, than the evidence presented by the other parties. *Se-Ling Hosiery, Inc. v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950). In other words, if PAWC introduces a preponderance of the evidence showing that the net benefits of the Transaction outweigh the net detriments, the Transaction should be approved. The ALJ should reject any suggestion that PAWC must prove that the net benefits “substantially” outweigh the net detriments.

**a. THE TRANSACTION BENEFITS THE PUBLIC-AT-LARGE**

**(1) SUMMARY OF PAWC’S *PRIMA FACIE* CASE**

In PAWC’s Main Brief, pp. 15-21, PAWC established a *prima facie* case that the specific benefits flowing from this particular Transaction outweigh the detriments for the public-at-large (*i.e.*, all residents of the Commonwealth, whether or not they are customers of Brentwood or PAWC). PAWC did this by comparing what will happen if the Transaction is approved to what will happen if the Transaction is disapproved (thereby maintaining the *status quo*). The following chart summarizes these impacts of the Transaction:<sup>2</sup>

<b>If the Transaction is Approved</b>	<b>If the Transaction is Disapproved</b>
The General Assembly’s goals in enacting Section 1329 will be promoted by allowing a municipality to monetize an asset for its fair market value and exit the wastewater industry.	The General Assembly’s policy goals in enacting Section 1329 will be frustrated because a municipality that no longer wants to be in the wastewater business will be forced to continue to own and operate a wastewater system.
The wastewater industry will become more consolidated because PAWC will acquire the Brentwood System and Brentwood will cease to provide wastewater service	The Commission’s policy of promoting consolidation in the wastewater industry will be frustrated because there will be no reduction in the number of wastewater providers in the Commonwealth.
PAWC will step into the shoes of Brentwood as a member of the ALCOSAN regional interceptor system. The Commission’s policy of regionalization will be promoted because	There will be no change in the regionalization of wastewater services.

<sup>2</sup> Citations to the record supporting the information in the chart are contained in the referenced section of PAWC’s Main Brief, or elsewhere in this Reply Brief.

If the Transaction is Approved	If the Transaction is Disapproved
Brentwood is located near PAWC’s existing McKeesport wastewater system.	
The general public’s constitutional right to a clean environment will be promoted because PAWC, with a good compliance history and experience in turning around failing systems, will own the System. PAWC will not just comply with the present consent order and agreement, but will prevent the need for future regulatory orders. PAWC will invest \$8 million in the System during the first five years of ownership. In addition, PAWC will invest in the System through PAWC’s on-going program of infrastructure replacement.	Brentwood, with a lengthy record of environmental violations and a history of not investing in the System, will continue to own the System. The System will remain in violation of applicable environmental laws and regulations for the foreseeable future. Even if Brentwood could obtain the funding to address those environmental challenges, it lacks the technical expertise to do so.

**(2) NO PARTY HAS REBUTTED PAWC’S *PRIMA FACIE* CASE**

To rebut PAWC’s *prima facie* case, the OCA and I&E argue that Brentwood is providing “adequate” service. I&E Main Brief p. 8; OCA Main Brief p. 17. They essentially argue that a utility system does not need to provide perfect service, it only needs to provide adequate service. However, they do not explain their criteria for determining that a wastewater system is providing “adequate” service.

PAWC respectfully submits that the ALJ should reject any notion that customers of municipal systems are second class citizens. Instead, in an acquisition proceeding, the Commission should determine the “adequacy” of a municipal utility’s service by applying the same standards as apply to public utilities.

One such standard is compliance with applicable laws and regulations and the ability to promptly rectify incidents of non-compliance. *See, e.g.*, 66 Pa. C.S. § 529(a)(1) and (2). Brentwood has clearly failed to meet this standard. It is currently in violation of applicable environmental laws and regulations, and has been in violation of applicable environmental laws and regulations for 16 of the last 19 years. In contrast, if the Transaction is approved, PAWC will

bring the System into compliance with applicable environmental laws and regulations – as it has done at other systems it has acquired. PAWC St. No. 2-R p. 4.

The OCA and I&E try to claim that Brentwood is not in violation of applicable environmental laws and regulations; they speculate that the pollution is caused exclusively by Upstream Municipalities. I&E Main Brief pp. 8-9; OCA Main Brief p. 16. They fail to acknowledge the testimony of PAWC witness Hufton that, in the one Brentwood sewershed that is contributing to the sanitary sewer overflow (“SSO”), the ACHD identified Brentwood as the majority contributor. Brentwood, not the Upstream Municipalities, is responsible for this illegal SSO. Tr. 148-149. The Commission should defer to the judgment of the environmental regulators, who have deemed Brentwood’s performance so deficient that they have repeatedly needed to intervene and enter into regulatory agreements and orders that would force Brentwood to take action to rectify the situation. PAWC St. No. 2-R pp. 2-4; Tr. 146.

PAWC has clearly established that the Transaction has environmental benefits, which will benefit the public-at-large. Considering that this result promotes the public’s constitutional right to a clean environment, PAWC respectfully submits that the environmental benefits of the Transaction should be given considerable weight.

The OCA contends that the Transaction would somehow undermine the ALCOSAN regional interceptor system – despite the fact that ALCOSAN does not oppose the Transaction. OCA Main Brief p. 33. The ALJ should reject this argument. After Closing, PAWC would step into the shoes of Brentwood. ALCOSAN, Brentwood and PAWC have entered into a detailed Cooperation Agreement that ensures Brentwood’s obligations under the Z Agreement will continue to be fulfilled. Brentwood St. No. 1 p. 6.

The only evidence that OCA can cite, in support of its claim that the Transaction will undermine the ALCOSAN regional interceptor system, is that Brentwood and PAWC have declined the opportunity to donate two eligible trunklines to ALCOSAN. OCA Main Brief p. 35. This action, however, maintains the *status quo*; it does not establish that the Transaction would be a detriment to regionalization.

PAWC submits that the Transaction will promote regionalization in ways that do not affect ALCOSAN. PAWC is already the drinking water provider for Brentwood customers. The System will be managed from PAWC's nearby McKeesport wastewater operations center, allowing these proximate systems to share personnel and resources, and to support each other as needed. PAWC St. No. 2 p. 10; Tr. 156. In addition, the Transaction promotes regionalization because it would allow PAWC to establish a presence in the ALCOSAN regional interceptor system. In the future, PAWC is more likely than Brentwood to acquire other wastewater systems in the area than is Brentwood. Tr. 157.

Finally, I&E and the OCA argue that the Commission should disregard all benefits of the Transaction for the public-at-large based on an assertion that these benefits solely result from the size and fitness of PAWC, or would occur in any acquisition of a municipal system by a public utility. I&E Main Brief pp 10-11; OCA Main Brief pp. 13-15. The ALJ should not ignore record evidence.

PAWC has introduced extensive evidence of the specific benefits that will result from this particular Transaction. Many other fit public utilities could acquire the System without the benefits that PAWC has established for this Transaction. Not every fit public utility already provides drinking water to Brentwood's customers, nor does every fit public utility have a large wastewater operations center nearby to leverage existing personnel and equipment resources. Not every fit

public utility responds to customer requests more quickly than does Brentwood, especially after hours and during emergencies. Not every fit public utility has a record of resolving environmental issues at utilities it has acquired. Not every fit public utility would be willing to commit millions of dollars for post-acquisition improvements to address the System’s environmental issues. Not every fit public utility would be willing to spend almost two years negotiating the Cooperation Agreement to preserve and maintain the ALCOSAN regional interceptor system. PAWC St. No. 1 pp. 8-9. PAWC is legally, technically and financially fit to own and operate the System, but there is no basis for the Commission to conclude that all of the benefits of the Transaction are merely a result of PAWC’s fitness.

For all of the above reasons, PAWC respectfully submits that the ALJ should find that no party has rebutted PAWC’s *prima facie* case that the benefits of the Transaction (particularly the environmental benefits), outweigh the detriments for the public-at-large.

**b. THE TRANSACTION BENEFITS THE BOROUGH OF BRENTWOOD**

**(1) SUMMARY OF PAWC’S *PRIMA FACIE* CASE**

In PAWC’s Main Brief, pp. 21-23, PAWC established a *prima facie* case that the specific benefits flowing from this particular Transaction outweigh the detriments for the Borough. PAWC did this by comparing what will happen if the Transaction is approved to what will happen if the Transaction is disapproved (thereby maintaining the *status quo*). The following chart summarizes these unique impacts of the Transaction:

<b>If the Transaction is Approved</b>	<b>If the Transaction is Disapproved</b>
Brentwood will receive \$19,364,443. Although the Borough has not decided on the precise uses of the proceeds, the proceeds will certainly be used for public purposes.	Brentwood will not receive any proceeds from the sale, and may have to increase taxes.
Brentwood can reallocate field laborer and administrative resources to other initiatives.	The System will continue to be operated by eight members of Brentwood’s Public Works

	Department, who have multiple other responsibilities.
Brentwood's tax revenues will increase because the System will be subject to taxation.	Brentwood's tax revenues will stay the same.

**(2) NO PARTY REBUTTED PAWC'S *PRIMA FACIE* CASE**

Although I&E's Main Brief discussed the benefits and the detriments of the Transaction, it did not discuss the impacts of the Transaction on the Borough. As the current owner of the System, the Borough will certainly be impacted by the Transaction. These impacts should be considered in determining whether the net benefits of the Transaction outweigh the net detriments.

To rebut PAWC's *prima facie* case, the OCA argues that the financial benefits to the Borough will be outweighed by the rate impacts of the Transaction. OCA Main Brief p. 37. This argument should be rejected. The rate impacts of the Transaction are an adverse impact to the customers of the System, not the seller of the System. To the extent that the Borough is a customer of the System, the Transaction will have the same rate impacts on the Borough as it will have on other customers. These impacts will be considered below.

For all of the above reasons, PAWC respectfully submits that the ALJ should find that no party rebutted PAWC's *prima facie* case that the benefits of the Transaction significantly outweigh the detriments for the Borough.

**c. THE TRANSACTION BENEFITS THE CUSTOMERS OF THE BRENTWOOD SYSTEM**

**(1) SUMMARY OF PAWC'S *PRIMA FACIE* CASE**

In PAWC's Main Brief, pp. 23-30, PAWC established a *prima facie* case that the specific benefits flowing from this particular Transaction outweigh the detriments for Brentwood's existing customers. PAWC did this first by noting that Brentwood's customers are also members of the public-at-large, and will enjoy the same net benefits from the Transaction as will all other members

of the public-at-large. In addition, all of Brentwood’s customers are residents of the Borough, and will receive benefits from the Transaction in that capacity. Finally, PAWC discussed the benefits and detriments of the Transaction that are unique to the customers of Brentwood. PAWC compared what will happen if the Transaction is approved to what will happen if the Transaction is disapproved (thereby maintaining the *status quo*). The following chart summarizes these unique impacts of the Transaction:

<b>If the Transaction is Approved</b>	<b>If the Transaction is Disapproved</b>
Rates will not increase until two years after Closing ( <i>i.e.</i> , until about April 2026).	Brentwood could increase rates, without Commission oversight. Since rates have not increased since 2019 in anticipation of the Transaction, rates could increase 19.55% in the near term to reflect inflation from 2019 to 2023. This increase will not fund improvements in the System.
PAWC estimated that rates will increase 11% two years after Closing as a result of the Transaction. Rates will be set by the Commission at “just and reasonable” rates.	Brentwood could increase rates, without Commission oversight. Rates could increase by almost 29% by April 2026, compared to present rates, to reflect inflation from 2019 to 2026. This increase will not fund improvements in the System.
PAWC will act as a billing agent for ALCOSAN.	Brentwood will act as a billing agent for ALCOSAN.
ALCOSAN will continue to raise rates for treatment service.	ALCOSAN will continue to raise rates for treatment service.
PAWC will notify its customers of increases in ALCOSAN’s rates.	Brentwood will notify its customers of increases in ALCOSAN’s rates.
Brentwood will lose access to Grow Grants from ALCOSAN.	Brentwood will continue to have access to Grow Grants from ALCOSAN. To date, Brentwood has received \$232,000 through this program.
PAWC has access to a \$400 million line of credit, equity markets, and other sources of capital, but PAWC’s cost of capital is higher than Brentwood’s.	“If the Borough believed that it could raise the necessary capital to fund infrastructure improvements and address the environmental issues, then it would have.” Brentwood St. No. 1-R p. 5.
PAWC has 1,150 professionals with expertise in all areas of water and wastewater utility operations. The System would have access to them and to the resources of the broader American Water footprint.	The System will continue to be serviced by the eight members of Brentwood’s Public Works Department, who have multiple other responsibilities. Sewer service is not within their core competency.

<b>If the Transaction is Approved</b>	<b>If the Transaction is Disapproved</b>
Customers could reach PAWC for routine customer interactions from 7 am to 7 pm Monday through Friday, and could call PAWC 24/7/365 for emergencies. Customers could also contact PAWC by e-mail and could manage their accounts on-line.	Customers can call Brentwood from 8 a.m. through 4:30 Monday through Friday. After hours, customers could continue to leave a message or call 911.
Customers could participate in PAWC’s tiered customer assistance program. Water customers who are already enrolled in PAWC’s customer assistance program would automatically be enrolled in PAWC’s wastewater customer assistance program.	Customers would continue to lack access to any customer assistance program.
Customers could continue to participate in ALCOSAN’s customer assistance program for their treatment service. <sup>3</sup>	Customers could continue to participate in ALCOSAN’s customer assistance program for their treatment service.
PAWC offers payment arrangements and budget billing	Brentwood would continue to offer a standardized payment arrangement.
Customers would receive service from a provider that must follow the Public Utility Code and Commission regulations. They could contest rate and service issues at the Commission.	Customers would continue to receive service from a provider subject to the Borough Code. They would continue to contest rate and service issues in the civil courts.
Customers would have one provider for water and wastewater service.	Customers would have separate providers for water and wastewater service.

In addition, if the Transaction is approved, the customers of the System will benefit because they will become eligible for several important benefits for PAWC customers approved in *Application of PAWC to Acquire the Wastewater Collection and Treatment System Owned by the Butler Area Sewer Authority*, Docket No. A-2022-3037047 (Opinion and Order entered Nov. 16, 2023) (the “*BASA Order*”). According to that Order, after the closing on the BASA transaction, all PAWC customers (including current Brentwood customers, if the Transaction is approved) will be eligible for hardship grants if they are at or below 250% of Federal Poverty Income Guidelines (rather than at or below 200% of those guidelines). *BASA Order* at Ordering Paragraph 25. The amount of money available for hardship grants for PAWC customers will increase as a result of

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<sup>3</sup> The chart describes the Transaction, as proposed by PAWC. The OCA and others have proposed modifications that are not reflected in the chart.

the *BASA Order*; PAWC will contribute an additional \$3.5 million to the hardship grant program during the five years following closing on that transaction. *BASA Order* Ordering Paragraph 26. In addition, after the closing on the BASA transaction, all PAWC customers (including existing Brentwood customers, if the Transaction is approved) will be eligible for a new program allowing commercial customers to enter into payment arrangements with PAWC. *BASA Order* at Ordering Paragraph 29.

**(2) NO PARTY REBUTTED PAWC’S *PRIMA FACIE* CASE**

To rebut PAWC’s *prima facie* case, I&E and the OCA focus primarily on the alleged harm that Brentwood customers could experience from the rate impacts of the Transaction. I&E Main Brief p. 10; OCA Main Brief p. 25. They argue that the estimated 11% rate increase outweighs all of the benefits of the Transaction (for Brentwood’s customers *and* in the aggregate).<sup>4</sup>

I&E and the OCA, however, fail to consider what could happen if the Transaction is disapproved. The record clearly establishes that a rate hike will be necessary, regardless of whether the Transaction is approved or disapproved. Because rate hikes are certain if the Transaction is disapproved, the extent of any alleged harm from the rate impact of the Transaction is uncertain.

Using the methodology required by *Application of Pennsylvania-American Water Company Pursuant to Sections 1102 and 1329 of the Public Utility Code for Approval of its Acquisition of the Water System Assets of the Steelton Borough Authority*, Docket No. A-2019-3006880 (Opinion and Order entered Oct. 3, 2019) (“*Steelton Order*”), PAWC estimates that the

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<sup>4</sup> The OCA also opposes the Transaction because of its potential rate impact on PAWC’s existing customers. OCA Main Brief p. 20. This is because approving the Transaction would allow the costs of operating the System to be spread over PAWC’s large customer base. The OCA fails to acknowledge that, if the Transaction is disapproved, the 3,980 customers of Brentwood would continue to be exposed to the risk of a substantial rate hike in the event of a major expense, due to the inability to spread costs among a large customer base.

Transaction will result in an 11% increase to Brentwood's customers, which will take effect at the end of the rate freeze (two years after Closing, or approximately April 2026). In contrast, if the Transaction is disapproved, Brentwood would need to increase rates by more than 19% in the near future just to keep pace with inflation since the Borough last raised rates in 2019. PAWC Main Brief pp. 25-26.

The OCA argues that the two-year rate freeze will only delay harm, rather than being a benefit, because at the end of the rate freeze, Brentwood customers will experience a "catch-up" in rates since 2019. OCA Main Brief 26. Again, the OCA fails to consider what will happen if the Transaction is disapproved. Just to keep pace with inflation since the Borough last raised rates in 2019, by April 2026, Brentwood would need to raise rates by almost 29%. PAWC Main Brief pp. 25-26. This increase would merely maintain the *status quo*; Brentwood would not receive any of the benefits of the Transaction (such as the \$8 million in capital improvements during a five-year period that PAWC has promised). Comparing what would happen if the Transaction is approved to what would happen if the Transaction is disapproved, it is not at all certain that the estimated 11% rate increase two years after Closing is a detriment – let alone a significant detriment – for Brentwood's customers.

In this respect, the instant case is the opposite of *Cicero*. In that case, the Commonwealth Court found there were known harms because of the estimated 132.93% rate increase that would occur as a result of the proposed acquisition. The Court also found that the benefits did not outweigh those harms. 300 A.3d at 1119. In this case, in contrast, it is not known whether the estimated 11% rate increase will be a harm or a benefit – it would be a benefit to Brentwood customers if this rate increase is less than the rate increase they would experience if the Transaction is disapproved. Even if the estimated rate increase is a harm – in the sense that the rate increase if

the Transaction is approved is more than the rate increase if the Transaction is disapproved – the extent of the harm is unclear at this time; it could be much smaller than 11%. PAWC Main Brief pp. 25-26.

In contrast, the benefits of the Transaction for Brentwood’s customers (including but not limited to customers’ improved ability to reach the Company (especially after normal working hours), customers’ access to customer assistance programs, and PAWC’s enhanced ability to comply with the Underground Utility Line Protection Law, 73 P.S. § 176 *et seq.*, PAWC St. No. 2 p. 30) are certain. The certain benefits for Brentwood’s customers outweigh the uncertain alleged harm to Brentwood’s customers of the estimated rate increase that they could experience as a result of the Transaction.

The only other detriment of the Transaction that the OCA witnesses discuss in their testimony is Brentwood customers’ alleged loss of the ability to pay bills in person within the Borough. OCA St. No. 2R p. 5. Again, this detriment is uncertain; the record is not entirely clear that Brentwood customers presently have this option, or that any of them actually take advantage of it. Brentwood St. No. 1-R p. 3-4. Even if they lose this option, PAWC will provide them with the ability to pay their bills in person at locations within 15 miles of Brentwood, OCA St. No. 1 p. 6 (the same locations at which customers can currently pay their PAWC water bills). This small detriment of the Transaction should not be given much weight.

In contrast, PAWC introduced evidence that, in addition to being better able to address the System’s environmental challenges, it would be better able to operate the System on a daily basis than is Brentwood. PAWC has a large staff dedicated to and experienced in the operation of water and wastewater systems. PAWC St. No. 1 pp. 10, 19, 23; Brentwood St. No. 1-R p. 2, 4-5. I&E witness Kubas denied that PAWC’s superior operational capability is a benefit of the Transaction.

He testified that, if the Transaction is disapproved, Brentwood could spend additional money (*e.g.*, by hiring for-profit contractors) to improve its service, so that Brentwood's service in the future would match the service that PAWC would have provided if the Transaction had been approved. I&E St. No. 1 p. 7; I&E St. No. 1-R p. 4; Tr. 331. Mr. Kubas, however, does not explain why it is in the public interest for Brentwood to spend an untold amount of money to duplicate the expertise that it would have received if the Transaction had been approved. Rather than requiring Brentwood to spend money to receive the same benefits it would have received from the Transaction, the Commission should approve the Transaction and allow Brentwood to receive those benefits – plus a payment of over \$19 million.

The Main Briefs of OCA and I&E concede that the Transaction would benefit Brentwood's customers in many respects, but argue that, individually, many of these benefits are not significant. For example, they argue that the following are “not much of a benefit:”

- Brentwood's customers would now have access to PAWC's customer assistance programs, OCA Main Brief pp. 18-19;
- Brentwood's customers would now receive service from a Commission-regulated provider, OCA Main Brief p. 37;
- Brentwood's customers would have one entity as both water and wastewater provider, I&E Main Brief p. 11; and
- Brentwood's customers would now have telephonic access to a customer service center 24/7/365; I&E Main Brief p. 11, OCA Main Brief p. 18.

Since none of these benefits are individually significant, I&E and OCA argue, none of these benefits even qualify as a benefit of the Transaction and therefore should be ignored when the Commission determines whether the Transaction passes the affirmative public benefit test. *See, e.g.*, OCA Main Brief p. 37.

PAWC respectfully disagrees with the assertion that the Transaction's many benefits are not significant. There is clearly a public benefit in low income households being eligible for assistance in paying their utility bills – that is why the OCA advocates for an increase in PAWC's

wastewater discount for low income customers (to offset the loss of ALCOSAN’s low-income discount that would occur if the Commission approves another OCA proposal, *see* PAWC Main Brief pp. 54-55). The public clearly benefits from the improved safety that flows from compliance with the “PA One Call Law” – that is why the Commission fought so hard for so long to obtain the statutory authority to enforce that law. It is disappointing that the statutory advocates argue that these benefits should be completely disregarded in their effort to stop this Transaction.

Municipal customers should not be denied the benefits of a Transaction because the Commission disregarded those benefits when weighing the benefits and the detriments of a transaction. In *Cicero*, the Commonwealth Court affirmed that a proposed acquisition should be approved if the affirmative public benefits that arise from and are specific to that acquisition outweigh its harms. 300 A.3d at 1120. The Commonwealth Court did not instruct the Commission to “put its thumb on the scale” to determine the outcome of a case by ignoring benefits.<sup>5</sup>

PAWC and Brentwood have presented extensive evidence of the specific benefits that will arise from this particular Transaction. PAWC has not relied simply on its size and fitness. The ALJ should not ignore that evidence. The purpose of the net benefits assessment is to balance *all* the benefits of a transaction against *all* the detriments of the transaction to determine whether the net benefits outweigh the net detriments. *McCloskey v. Pa. Pub. Util. Comm’n*, 195 A.3d 1055 (Pa. Cmwlth. 2018), *alloc. denied*, 207 A.3d 290 (Pa. 2019) (“*New Garden Order*”). Large and small benefits should be considered, just like large and small detriments should be considered.

Comparing the uncertainty of the alleged harms identified by I&E and the OCA, and the certainty that Brentwood’s customers will receive many significant benefits from the Transaction,

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<sup>5</sup> *Compare*, OCA Main Brief p. 24, n.12 (arguing that the Commission should weigh all acknowledged or known harms of a transaction) to OCA Main Brief pp. 14-18 (arguing that the Commission should disregard certain acknowledged or known benefits of a transaction).

PAWC respectfully submits that the scale tips in favor of finding that the Transaction is a net benefit for Brentwood’s customers. Therefore, the ALJ should find that the Transaction benefits Brentwood’s existing customers.

**d. THE TRANSACTION BENEFITS PAWC’S EXISTING WASTEWATER CUSTOMERS**

**(1) SUMMARY OF PAWC’S *PRIMA FACIE* CASE**

In PAWC’s Main Brief, pp. 30-31, PAWC established a *prima facie* case that the specific benefits flowing from this particular Transaction outweigh the detriments for PAWC’s existing wastewater customers. PAWC did this first by noting that its existing wastewater customers are also members of the public-at-large, and will enjoy the same net benefits from the Transaction as all other members of the public-at-large. In addition, PAWC discussed the benefits and detriments of the Transaction that are unique to its existing wastewater customers. PAWC compared what will happen if the Transaction is approved to what will happen if the Transaction is disapproved (thereby maintaining the *status quo*). The following chart summarizes these unique impacts of the Transaction:

<b>If the Transaction is Approved</b>	<b>If the Transaction is Disapproved</b>
The Transaction will have no immediate rate impact.	Customers will experience no rate impact as a result of the Transaction.
The Commission will set just and reasonable rates in future rate proceedings. PAWC estimated that rates will increase 0.3% as a result of the Transaction.	Customers will experience no rate impact as a result of the Transaction.
PAWC will add approximately 3,980 customers to its system (an increase of about 4%), allowing it to spread costs among a greater number of customers in every future rate case.	All costs of operating the PAWC system will need to be spread among PAWC’s existing customer base.

**(2) NO PARTY REBUTTED PAWC'S *PRIMA FACIE* CASE**

In an effort to rebut PAWC's *prima facie* case, I&E and the OCA argued that PAWC's existing wastewater customers will experience a rate increase as a result of the Transaction. They argue that PAWC's existing wastewater customers will subsidize Brentwood. I&E Main Brief, p. 10; OCA Main Brief p. 20. This argument should be rejected because it only tells part of the story.

In the short-term, PAWC's existing wastewater customers are estimated to experience a 0.3% increase in rates due to the Transaction. *In every future rate case*, however, PAWC's existing wastewater customers will be able to share the costs of operating PAWC's wastewater system with approximately 4% more wastewater customers. "Customers who benefit from near-term improvements will one day help pay for improvements on behalf of other customers on other parts of the PAWC system." PAWC St. No. 1 p. 18. This means that, over time, Brentwood's current customers and PAWC's existing customers will subsidize each other – which will be a mutual benefit to all of PAWC's wastewater customers. In addition, spreading costs among a larger number of customers helps reduce price volatility for all customers, including PAWC's existing customers.

In an effort to bolster its argument, the OCA tries to inflate the estimated impact of the Transaction on PAWC's existing wastewater customers by including the costs of other acquisitions and PAWC's post-closing improvements to the Brentwood System. OCA Main Brief, pp. 20, 22, 24. This argument should be rejected – as it was in the Commission's order approving PAWC's acquisition of the Butler Area Sewer Authority. *BASA Order*, p. 62. The only question before the Commission at this time is whether to approve the instant Transaction. Therefore, the Commission should only consider the impact of the instant Transaction on rates of PAWC's existing wastewater customers. The Commission will consider the rate impacts of other acquisitions in other

application proceedings, and the Commission will address the cost of post-acquisition improvements in rate proceedings.

Significantly, the OCA advocates spreading the cost of ALCOSAN's treatment service to all of PAWC's customers, OCA Main Brief p. 55, which will increase the cost of the Transaction for PAWC's existing wastewater customers. PAWC opposes this proposed condition, which will increase the detriments of the Transaction, not the benefits. *See* Section IV.E.5 ("ALCOSAN Charges and Discounts"), below.

The above benefits and detriments are specific benefits and detriments of this particular Transaction. The benefits do not flow merely from PAWC's fitness or size, nor do they necessarily flow from any acquisition by a public utility.

For all of the above reasons, PAWC respectfully submits that the ALJ should find that no party rebutted PAWC's *prima facie* case that the benefits of the Transaction outweigh the detriments for PAWC's existing wastewater customers.

**e. THE TRANSACTION BENEFITS PAWC'S EXISTING WATER CUSTOMERS**

**(1) SUMMARY OF PAWC'S *PRIMA FACIE* CASE**

In PAWC's Main Brief, pp. 31-32, PAWC established a *prima facie* case that the specific benefits flowing from this particular Transaction outweigh the detriments for PAWC's existing water customers. PAWC did this first by noting that its water customers are also members of the public-at-large, and will enjoy the same net benefits from the Transaction as all other members of the public-at-large. In addition, PAWC discussed the benefits and detriments of the Transaction that are unique to PAWC's existing water customers. PAWC compared what will happen if the Transaction is approved to what will happen if the Transaction is disapproved (thereby maintaining the *status quo*). The following chart summarizes these unique impacts of the Transaction:

<b>If the Transaction is Approved</b>	<b>If the Transaction is Disapproved</b>
The Transaction will have no immediate rate impact.	Customers will experience no rate impact as a result of the Transaction.
The Commission will set just and reasonable rates in future rate proceedings. PAWC estimated that rates will increase 0.0% as a result of the Transaction.	Customers will experience no rate impact as a result of the Transaction.
The Transaction will have no rate impact whatsoever unless the Commission finds that it is in the public interest to allocate a portion of the wastewater revenue requirement to water customers.	The costs of operating PAWC's existing wastewater system could be spread to PAWC's existing water customers in future rate cases if the Commission finds that it is in the public interest to allocate a portion of the wastewater revenue requirement to water customers.

**(2) NO PARTY REBUTTED PAWC'S *PRIMA FACIE* CASE**

No party specifically addressed the impact of the Transaction on PAWC's existing water customers in their Main Briefs. Therefore, PAWC respectfully submits that I&E and the OCA failed to rebut PAWC's *prima facie* case.

PAWC respectfully submits that, pursuant to Section 1311(c) of the Code, 66 Pa. C.S. § 1311(c), the Transaction cannot be found to be contrary to the public interest because of its rate impact on water customers. The Transaction will only have a rate impact on water customers if the Commission decides that such a result is in the public interest. Given the lack of any other identified adverse impact on PAWC's existing water customers, and because PAWC's water customers (like all other members of the public-at-large) will benefit from the environmental benefits of the Transaction, PAWC respectfully submits that the ALJ should find that the Transaction is a net benefit to PAWC's water customers.

**f. THE TRANSACTION BENEFITS PAWC**

In discussing PAWC's proposal to serve as the billing agent for ALCOSAN, the OCA's Main Brief states:

Importantly, PAWC would also receive a refund from ALCOSAN as an annual credit for the savings in billing expense resulting from PAWC's election to pay quarterly instead of requiring ALCOSAN to bill customers directly. App'x A-25.3 at 4. While a "billing agent" may normally expect to receive compensation for collecting from customers on behalf of a third-party, the cost to PAWC to do so is nominal. As PAWC continues to emphasize, as the water provider for Brentwood customers, wastewater and water billing would occur at the same time, should the instant Application be approved; the cost for PAWC to provide billing services for ALCOSAN, as a result, would be an infinitesimal increase over the cost PAWC is already paying to bill Brentwood customers for their water service. PAWC St. [1-R] at 14.

OCA Main Brief p. 49. In other words, OCA admits that PAWC's becoming the billing agent for ALCOSAN is a good deal for PAWC.

This point raises a larger point: In weighing the benefits/detriments of an acquisition, the Commission should consider the impact of the acquisition on the acquiring company. Pennsylvania's appellate courts have approved the consideration of a transaction's impact on the acquiring entity. For example, in *City of York v. Pa. Pub. Util. Comm'n*, 295 A.2d 825, 829, the Supreme Court quoted with approval the Commonwealth Court's summary of the evidence of record, which noted that the acquisition would result in a stronger company, that investors would be more likely attracted to a larger company, that business relations with other businesses and government agencies would be simplified, and that the merger would be helpful in labor relations. Ratepayers would be the ultimate beneficiaries of these improvements. *Id.*

PAWC did not explicitly address the Transaction's impact on PAWC in its Main Brief. That is rectified here.

The Transaction benefits PAWC because PAWC will acquire the System and its 3,980 additional customers for 11% less than its value, based on the average of the two appraisals. PAWC Main Brief p. 25. As discussed above, even the OCA admits that the Transaction benefits PAWC because serving as ALCOSAN's billing agent is a good deal for the Company.

The Transaction will not have any material adverse impacts on PAWC. PAWC is a financially-sound business that can financially support the acquisition of the System as well as the ongoing operating and investment commitments that will be required to operate, maintain and improve those assets in serving the public. PAWC St. No. 3 p. 3. PAWC does not anticipate that the Transaction will have a negative impact on PAWC's cash flows, credit ratings or access to capital. Therefore, the Transaction will not deteriorate in any manner PAWC's ability to continue to provide safe, adequate and reasonable service to its customers at just and reasonable rates. PAWC St. No. 3 p. 5.

The above benefits and detriments are specific benefits and detriments of this particular Transaction. The benefits do not flow merely from PAWC's fitness or size, nor do they necessarily flow from any acquisition by a public utility. PAWC has therefore established a *prima facie* case that the Transaction is a net benefit for the buyer of the System.

No party argues that the Transaction would be a net detriment for PAWC. As a result, no party has rebutted PAWC's *prima facie* case with respect to this stakeholder group.

For all of the above reasons, PAWC respectfully submits that the ALJ should find that the benefits of the Transaction outweigh the detriments for PAWC.

#### **g. SUMMARY**

The affirmative public benefit test is a net benefits assessment. By comparing what would happen if the Commission approves the Transaction to what would happen if the Commission maintains the *status quo* by disapproving it, PAWC has demonstrated that the Transaction has benefits that outweigh the detriments *for each affected stakeholder group*. Consequently, the aggregate benefits of the Transaction outweigh the aggregate detriments.

Even if the ALJ finds that the detriments outweigh the benefits for one particular stakeholder group, the ALJ should still recommend that the Commission approve the Transaction.

When all the benefits for all stakeholder groups are weighed against all the detriments for all stakeholder groups, the aggregate benefits outweigh the aggregate detriments. Consequently, the ALJ should recommend, and the Commission should find, that the Transaction satisfies the affirmative public benefit test.

## **B. SECTION 1329 ISSUES**

### **1. FAIR MARKET VALUE FOR RATEMAKING PURPOSES**

At page 41 of its Main Brief, the OCA argues that PAWC's proposed rate base is "possibly" overstated due to the appraisals' inclusion of plant that is not entirely used and useful in the public service. This speculative argument should be rejected for the reasons stated in Section IV.B.1. ("Fair Market Value for Ratemaking Purposes") of PAWC's Main Brief. Specifically, all of the assets that PAWC is acquiring are used and useful in providing service to Brentwood's customers. To avoid redundancy, this Reply Brief addresses the OCA's arguments together with I&E's related arguments in Section IV.B.6.a. ("Plant in Service used to Serve 'Non-Customers'") of this Reply Brief.

### **2. TARIFF AND RATES**

In this section of the OCA's Main Brief, the OCA argues that PAWC should be required to incorporate the ALCOSAN rate schedule into its Brentwood tariff, rather than showing treatment rates "as determined by ALCOSAN." This proposal is intended to provide fair notice to PAWC's conveyance customers when Brentwood increases its treatment charges. OCA Main Brief p. 42. To avoid repetition, this issue will be discussed in Section IV.E.4 ("Customer Notice") of this Reply Brief.

### **3. DSIC**

OCA witness DeMarco recommended that PAWC be required to file a revised LTIP including Brentwood within ninety days of Closing. OCA St. 1 p. 21. PAWC opposes this

recommendation because there are many factors to consider regarding the timing of an LTIP modification. Every single acquisition should not automatically require an LTIP modification. This is particularly true for the acquisition of a relatively small system, such as Brentwood's System. PAWC Main Brief p. 34.

In its Main Brief, the OCA argues that its recommendation should be adopted because PAWC has a number of other acquisitions presently pending before the Commission. According to the OCA, "[w]ithin 90 days of the closing of the proposed transaction in this case, PAWC could close on any number of other pending acquisitions, allowing for the Company to include several new systems in its amended LTIP at one time." OCA Main Brief p. 43.

The OCA's argument actually supports PAWC's call for flexibility. Although it is conceivable that PAWC could close on other acquisitions within 90 days of Closing on the Transaction, it is also conceivable that PAWC would not close on any other acquisitions within that time period. The Commission is not a super board of directors with the authority to micromanage the affairs of public utilities. *Bell Tel. Co. v. Driscoll*, 343 Pa. 109 (1941); *Metropolitan Edison Co. v. Pa. Pub. Util. Comm'n*, 437 A.2d 76 (Pa. Cmwlth. 1981). The Commission should give the Company the discretion to determine when the cost of filing a revised LTIP is warranted.

#### **4. CLAIMS FOR AFUDC AND DEFERRED DEPRECIATION**

Section 1329 appears to allow an acquiring public utility to accrue AFUDC for post-acquisition improvements, and to defer depreciation of post-acquisition improvements, for book and ratemaking purposes. Out of an abundance of caution, PAWC specifically requested that the Commission grant permission for PAWC to accrue AFUDC and to defer depreciation. Contrary to the OCA's Main Brief, p. 43, PAWC did not ask the Commission to preapprove the amounts accrued or deferred. That issue will be resolved in a rate case.

## **5. TRANSACTION AND CLOSING COSTS**

PAWC is obligated by the APA to reimburse Brentwood for up to \$70,000 in legal and engineering fees. PAWC's rebuttal testimony noted that PAWC's recently-filed base rate case included this amount in its claim for recovery of transaction and closing costs relating to the Transaction. PAWC contends that any ratemaking determination about the recoverability of this cost should be made in that case. PAWC St. No. 3-R. p. 10. I&E witness Kubas accepted PAWC's commitment to resolve the issue of the recoverability of this amount in the rate case. I&E St. No. 1-R p. 31.

Nevertheless, I&E's Main Brief attempts to resurrect this issue by asking the ALJ and the Commission to prevent "confusion regarding the fact that ratepayers are not to be responsible for these particular transaction and closing costs." I&E Main Brief p. 15. PAWC respectfully submits that the recoverability of this amount should be treated as any other claim for transaction and closing costs arising out of a Section 1329 acquisition; it should be decided in PAWC's next base rate case rather than in the application proceeding.

## **6. ADDITIONAL ISSUES**

### **a. PLANT IN SERVICE USED TO SERVE "NON-CUSTOMERS"**

#### **(1) REPLY TO I&E's MAIN BRIEF**

I&E's Main Brief contends that the amount that should be incorporated in PAWC's rate base, as a result of the Transaction, cannot be determined at this time because the purchase price for the System includes plant that is used to provide service to "non-customers." I&E Main Brief p. 13. I&E's Main Brief, however, nowhere acknowledges the testimony of PAWC witness Hufton at the hearing, where he stated that all of the System's assets are used to provide public utility service to Brentwood's customers. Tr. 152, 372.

I&E did not introduce any evidence showing that any Brentwood assets are not used to provide public utility service to customers of Brentwood. Consequently, the preponderance of the evidence demonstrates that those assets are used and useful in providing public utility service to customers of the System.

Moreover, to the extent that System assets are *also* used to provide public utility service to “non-customers,” those assets are also used and useful in providing public utility service to Brentwood’s customers. The use of these assets by “non-customers” provides a direct and immediate benefit to System customers because it permits Brentwood’s customers to receive downstream conveyance and treatment service through the ALCOSAN regional system. Brentwood’s customers need downstream conveyance and treatment service, and would not have it if the System did not participate in the comprehensive ALCOSAN regional interceptor and treatment system. PAWC St. No. 2-R p. 11; Tr. 152. If Brentwood did not participate in the ALCOSAN system, it would need to construct its own wastewater treatment plant, which would be contrary to the Commission’s policy promoting the regionalization of water and wastewater systems. 52 Pa. Code § 69.721 (“water and wastewater system acquisitions”).

As argued in PAWC’s Main Brief, pp. 38-40, “used and useful” is a flexible concept and the Commission should exercise its discretion to find that, to the extent Brentwood’s assets are *also* used to provide public utility service to “non-customers” through the ALCOSAN regional interceptor system, those assets are used and useful in providing service to Brentwood’s customers.

In support of its position, I&E cites a 1981 Commission decision involving an electric generating unit that had been closed. *Pa. Pub. Util. Comm’n v. West Penn Power Co.*, 1981 WL 178828 (Dec. 12, 1981). That case is clearly factually distinguishable from the present case. The *West Penn Power* case involved a facility that was not providing public utility service to anyone.

That case provides no guidance for the instant case, in which (a) assets are used to provide collection and conveyance service directly to Brentwood customers *and* (b) those same assets also benefit Brentwood's customers by allowing them to receive downstream conveyance and treatment service through a mutual assistance network. Consequently, the ALJ should reject I&E's position.

## (2) REPLY TO THE OCA'S MAIN BRIEF

The OCA states:

The utility attempting to claim property as used and useful bears the burden of proving that such property is actually used and useful in the public service, and whether utility property is used and useful is committed to the discretion of the Commission. *Bell Tel. Co. v. Pa. [Pub. Util. Comm'n]*, 408 A.2d 917, 925 (Pa. Cmwlth. Ct. 1979).

As explained above, PAWC has introduced evidence to demonstrate that all of Brentwood's assets are in fact used and useful in providing public utility service to Brentwood's customers. The OCA, like I&E, has introduced no evidence to rebut PAWC's *prima facie* case. Consequently, the Commission should exercise its discretion to find that all of Brentwood's assets are used and useful in the public service.

The OCA responds with a legal argument. The OCA contends that a public utility cannot provide free service to any member of the public, including the Upstream Municipalities. The OCA argues that, where a utility provides free service, the portion of its plant dedicated to providing free service should not be considered used and useful because ratepaying consumers would bear the burden of paying for free service. OCA Main Brief p. 46.

The OCA's argument should be rejected. First, the OCA's argument overlooks the fact that all of the assets in the Brentwood System are in fact used to provide wastewater collection and conveyance service to Brentwood's customers. In addition, some assets are *also* used to provide service to non-customers, which directly benefits Brentwood's customers by enabling them to

receive downstream conveyance and treatment service through the ALCOSAN interceptor system. Under these circumstances, it is reasonable for Brentwood's customers to bear the burden of paying for the assets that are used and useful in providing them with public utility service.

Second, the OCA's argument overlooks the fact that PAWC has no authority to charge Upstream Municipalities a rate. All municipalities in the ALCOSAN regional interceptor system are subject to uniform Other Z Agreements that have been executed between ALCOSAN and the municipalities and have been in effect since 1949. The Other Z Agreements do not contemplate charges for the use of intermunicipal trunk lines. PAWC St. No. 2-R p. 9. The cases cited by the OCA are inapposite because they involved a situation in which the utility had the authority to charge a rate.

Third, the Commission has a statement of policy regarding guidelines for determining public utility status. 52 Pa. Code § 69.1401. According to this statement of policy, the Commission will make a fact-based determination in every case, considering the following criteria (among others):

- the facility is designed and constructed only to serve a specific group of individuals or entities, and others cannot feasibly be served without a significant revision to the project; and,
- the service is provided to a defined, privileged and limited group.

52 Pa. Code § 69.1401(b)(2) and (3).

To the extent that Brentwood's facilities are used by "non-customers," Brentwood's facilities certainly meet these criteria. Brentwood's facilities are designed and constructed only to serve the three existing Upstream Municipalities and others cannot feasibly be served without a significant revision to the project. The existing three Upstream Municipalities, which are part of the ALCOSAN regional system and receive treatment service from ALCOSAN, certainly constitute a defined, privileged and limited group.

Considering the unique facts of this particular case, the Commission should find that PAWC would not be providing jurisdictional public utility service to the Upstream Municipalities. This result would be comparable to the Commission finding that a municipality’s provision of water or wastewater service to a handful of households outside its municipal boundaries is not jurisdictional public utility service. *See, e.g., Petition of Valley Township for a Declaratory Order Regarding the Provision of Water Service to 22 Residents of West Caln Township and East Fallowfield Township*, Docket Nos. P-2020-3019476 (Water Service) and P-2020-3019477 (Wastewater Service) (Opinion and Order entered Aug. 6, 2020); *Petition of the Borough of Royersford for a Declaratory Order Regarding the Provision of Wastewater Treatment Service to 16 Residents of Upper Providence Township*, Docket No. P-2020-3019398 (Opinion and Order entered Jul. 23, 2020).

The OCA’s argument leads to the conclusion that none of the 83 municipalities in the ALCOSAN regional interceptor system could ever take advantage of Section 1329. The Commission should not adopt such an interpretation. The General Assembly’s intent in enacting Section 1329 to benefit all municipalities in the Commonwealth (and their citizens) should control over a technical ratemaking concept like “used and useful.”

**b. IS THE RATE FREEZE A RATE STABILIZATION PLAN?<sup>6</sup>**

The OCA’s Main Brief argues that PAWC’s proposed two-year rate freeze constitutes a “rate stabilization plan” as defined in Section 1329(g). PAWC’s Main Brief at page 41 explained that this is not true because nothing in the APA purports to restrict the Commission’s authority to set rates that it considers to be “just and reasonable” in the context of a base rate proceeding or otherwise. PAWC St. No. 3-REV p. 9. PAWC is not asking the Commission in this Application

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<sup>6</sup> I&E’s Main Brief argues that PAWC’s rate freeze should be disapproved in both Sections IV.B.6.b and IV.E.3. For ease of reference, PAWC’s Reply Brief will address this argument only in Section IV.E.3.

proceeding to maintain rates for a period of time beyond the next base rate case. In PAWC's recently-filed base rate case, PAWC proposed that rates for Brentwood customers increase in August 2024, subject to Commission approval. Docket No. R-2023-3043190, *pro forma* tariff. Rates should be determined in that base rate case, not in this Application proceeding.

As PAWC witness Everette discussed in her Direct Testimony, the Commission addressed this issue in

*Application of Aqua Pennsylvania Wastewater, Inc. to Acquire the Wastewater System Assets of New Garden Township and the New Garden Township Sewer Authority*, Docket No A-2016-2580061 (Opinion and Order entered Jun. 29, 2017) p. 41 (note omitted), reversed on other grounds, *New Garden Order, supra*, where it said:

The ALJ determined that the rate commitment provision contained in the APA does not trump the Commission's ultimate authority to set and allocate rates. We agree. Here, the APA provides firm, unqualified guarantees to the seller as a term of the APA. However, it does not purport to hold rates constant or phase rates in over a period [of] time after the next base rate case. It offers no tariff language for us to approve. Thus, we decline to hold that the rate commitment constitutes a rate stabilization plan pursuant to Section 1329(g) of the Code.

At the hearing, OCA witness DeMarco (who was presented as an expert on policy) admitted that he was not familiar with this decision, even though Ms. Everette had discussed it in her Direct Testimony. Tr. 192. Surprisingly, OCA's Main Brief did not mention this case either. *See* Rules of Professional Conduct, Rule 3.3 ("Candor Toward the Tribunal") at Comment 4 ("A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities.").

There is no reason for the Commission to modify its decision from six years ago, nor is there any basis for the Commission to distinguish this decision on the facts. When negotiating the APA, PAWC was careful to respect the statutory authority of the Commission to set just and reasonable rates. PAWC respectfully requests that the ALJ recommend that the Commission

follow its well-established precedent and find that the two-year rate freeze in the APA is not a rate stabilization plan.

**c. SHOULD FUTURE CUSTOMER NOTICES SHOW A RANGE OF IMPACTS?**

As the OCA frames the issue,<sup>7</sup> the question is whether the Commission should modify its decision approving a form of customer notice in the *Steelton Order* to require PAWC to present three versions of the potential rate impact for each class of customer (one for a customer using the average water usage, one for a customer using 150% of the average water usage, and another for a customer using 200% of the average water usage). The OCA's Main Brief argues that there is no impediment to PAWC showing a range of impacts on the customer notice "other than the Company's own unwillingness." OCA Main Brief p. 48. PAWC takes exception to this statement.

In the *Steelton Order*, the Commission approved a settlement in which the parties (including the OCA) proposed a form of customer notice for PAWC to use in future Section 1329 proceedings. This case, however, does not involve a settlement. In the absence of PAWC's agreement to a form of customer notice going forward, the Commission's authority to adopt this proposal is doubtful. Section 1103 of the Code allows the Commission to impose a condition on its approval of an application, but this is not a condition of approving the Application. This proposal has nothing to do with the Application. This proposal would establish a rule for future Section 1329 proceedings, which would only apply to PAWC. The Commission should not impose customer notice requirements on a company-by-company basis; this would violate PAWC's right to equal protection under the law. U.S. CONST. Am. XIV § 1. Instead, if the Commission is going to establish rules governing how acquiring utilities give customers notice in

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<sup>7</sup> I&E's arguments regarding future customer notices will be addressed in Section IV.E.4 ("Customer Notice"), below, because I&E frames the issue differently than does the OCA.

future Section 1329 proceedings, it should do so for all acquiring utilities in an Implementation Order.

The OCA's proposal is unnecessary and, in fact, counterproductive. It is unnecessary because PAWC estimates the impact on a customer's rates using a percentage. Any customer can quickly estimate the Transaction's impact on his own bill by multiplying his bill by that percentage. It is counterproductive because the OCA's proposal would result in PAWC showing a total of nine scenarios (three scenarios for residential customers, three scenarios for commercial customers, and three scenarios for industrial customers). When this is replicated for PAWC's water customers and its wastewater customers, there would be eighteen scenarios on the customer notice. This is likely to cause confusion.

For all of the above reasons, the ALJ should recommend that the Commission deny the OCA's requested modification of the form of customer notice approved in the *Steelton Order*.

### **C. SECTION 507 APPROVALS**

The OCA argues that the Commission should not approve the Cooperation Agreement because that contract does not contain a host of provisions that the OCA believes are desirable, such as requiring PAWC to provide notice to Brentwood customers of an ALCOSAN rate increase. The OCA even contends that the Commission should exercise its discretion pursuant to 66 Pa. C.S. § 508 to reform the Cooperation Agreement to include its "wish list" of provisions. OCA Main Brief pp. 49-53.

The OCA does not cite any pleading or testimony where it raised the issue that the Cooperation Agreement should be modified pursuant to Section 508. "The Commission ... is bound by the due process provisions of constitutional law and by the principles of common fairness. Among the requirements of due process are notice and an opportunity to be heard on the issues, to be apprised of the evidence submitted, and to offer evidence in explanation or rebuttal."

*Smith v. Pa. Pub. Util. Comm'n*, 162 A.2d 80, 83 (Pa. Super. 1960). “The allowance of new claims late in a case raises significant due process concerns. Such concerns arise from the lack of adequate time to respond adequately to adverse positions.” *Pa. Publ. Util. Comm’n, et al. v. UGI Utilities*, 1994 Pa. PUC LEXIS 138, \*82-83 (May 23, 1984).

PAWC had no notice of, and no opportunity to respond to, the claim that the Cooperation Agreement should be reformed pursuant to Section 508 to include the OCA’s “wish list” of provisions. If it had notice, PAWC could have provided testimony as to why the OCA’s desired provisions (such as requiring PAWC to include ALCOSAN’s rates in PAWC’s tariff) are not appropriate in the Cooperation Agreement. It is one thing for the OCA to argue that the Commission should impose a condition on its approval of the Transaction pursuant to 66 Pa. C.S. § 1103; it is quite another thing for the OCA to argue that a specific contract should be reformed to include specific provisions pursuant to 66 Pa. C.S. § 508. The ALJ should not allow the OCA’s claims to “morph” from a Section 1103 issue to a Section 508 issue in briefs.

If the ALJ does address this issue on its merits, she should reject the OCA’s position. The Cooperation Agreement was carefully drafted by Brentwood, ALCOSAN and PAWC over two years. It is necessary to preserve ALCOSAN’s status as “the exclusive wastewater treatment and conveyance provider within its service area, which in turn preserves its ability to continue to meet its obligations under the Modified Consent Decree and bond and trust indentures.” ALCOSAN Main Brief pp. 17-18. The OCA’s proposed changes would undermine that objective. They are not necessary to make the Cooperation Agreement valid, reasonable and legal. 66 Pa. C.S. § 508.

The purpose of the Cooperation Agreement was to allocate certain rights and obligations of Brentwood under the Z Agreement to PAWC, while Brentwood remained primarily responsible for its municipal rights and obligations under the Z Agreement. PAWC St. No. 1 p. 8. Most of

the OCA's desired provisions were not in the Z Agreement. Consequently, there is no reason why the Cooperation Agreement should shift those rights and obligations from Brentwood to PAWC.

One responsibility that the Cooperation Agreement did shift from Brentwood to PAWC was the obligation to serve as ALCOSAN's billing agent. The OCA claims that PAWC's proposal to act as ALCOSAN's billing agent is "akin to a pass-through under section 1307(a) of the Public Utility Code; yet, PAWC has not met its burden to show that such a pass-through is warranted." OCA's Main Brief p. 51. The ALJ should reject this argument. PAWC proposes to act as a billing agent for ALCOSAN, collecting amounts that ALCOSAN's treatment customers owe to ALCOSAN. PAWC is not asking the Commission to allow PAWC to "pass through" an ALCOSAN charge to PAWC customers. The Section 1307 requirements for a pass-through charge do not apply where, as here, a utility is simply using a consolidated bill to offer customers the convenience of simultaneously paying two utility bills. *See also*, Section IV.E.5. ("ALCOSAN Charges and Discounts"), below (arguing that the OCA's position is based on a fundamental misunderstanding of the Z Agreement).

The OCA also complains that the Cooperation Agreement is unreasonable because PAWC will receive a payment from ALCOSAN that is more than the costs incurred by PAWC to serve as ALCOSAN's billing agent. It is hardly unreasonable for PAWC to negotiate an agreement that is to its financial advantage. To the contrary, PAWC has a fiduciary duty to the company's shareholders to attempt to earn a reasonable return on their investments while, at the same time, PAWC has a statutory duty to ratepayers to provide adequate, safe, efficient and reliable service at just and reasonable rates. *See* 66 Pa. C.S. §§ 1301, 1501.

The OCA also argues that the Cooperation Agreement is unreasonable because "PAWC ratepayers system-wide will bear the burden of funding any difference between ALCOSAN

charges collected by PAWC and the amount the Company actually owes ALCOSAN.” OCA Main Brief p. 51. This argument is puzzling when compared to other OCA arguments in this proceeding. The OCA advocates accounting for all of ALCOSAN’s charges as operations and maintenance expenses in PAWC’s rates – thereby spreading these costs among PAWC ratepayers system-wide. OCA St. 1 pp. 18, 23. Here, in contrast, the OCA complains that PAWC is spreading a much smaller amount among its ratepayers system-wide. When viewed in this context, it is the OCA – not the Cooperation Agreement – that is unreasonable.

The ALJ should reject the OCA’s request to modify the Cooperation Agreement to include its “wish list” of desired provisions. Instead, the ALJ should recommend that the Commission issue a Certificate of Filing or approval for the Cooperation Agreement, pursuant to Section 507 of the Code.

**D. PRESERVATION OF THE Z AGREEMENT AND OTHER Z AGREEMENTS**

PAWC incorporates by reference Section IV.D. of its Main Brief. In addition, PAWC supports the position of ALCOSAN in Section IV.D. of its Main Brief.

**E. RECOMMENDED CONDITIONS FOR APPROVAL**

**1. MISSING EASEMENTS AND OTHER PROPERTY RIGHTS**

PAWC incorporates by reference Section IV.E.1. of its Main Brief. Based on the Main Briefs submitted by the other parties, there does not appear to be any dispute among the parties on this issue.

**2. COST OF SERVICE STUDIES**

At page 22 of its Main Brief, I&E argues that “[j]urisdictional customers should not be required to pay for a return of and a return on plant that serves non-customers.” I&E therefore recommends that, if the Transaction is approved, PAWC be required to complete a cost of service

study in every subsequent rate case that would determine the value of the plant that serves “non-customers.” The OCA joins in this proposal. OCA Main Brief p. 54.

According to I&E, PAWC objects to this proposal based on the cost of the study. *Id.* This is just one reason for PAWC’s objection. PAWC also objects on the grounds that there is no reason to exclude the assets used to provide service to “non-customers.” These assets are used and useful in providing service to Brentwood customers. As discussed above, all of Brentwood’s assets are directly used to provide collection and conveyance service to Brentwood customers. *In addition*, to the extent these assets also serve “non-customers,” System customers benefit because Brentwood’s participation in the ALCOSAN regional interceptor system ensures that System customers receive downstream conveyance and treatment service.

Since all of the assets that PAWC is acquiring are used and useful in providing wastewater service to Brentwood’s customers, there is no reason to exclude any of those assets from PAWC’s rate base. Consequently, there is no need for a cost of service study to identify the assets that should be excluded from rate base. The ALJ should recommend that the Commission reject the condition proposed by I&E and the OCA.

### **3. RATE FREEZE**

In his Direct Testimony, I&E witness Kubas recommended that the Commission disapprove the two-year rate freeze in the APA. I&E St. No. 1 pp. 21-22. PAWC responded by committing that, if it files a base rate case that will be effective prior to the second anniversary of Closing, PAWC would propose an increase for Brentwood customers that would become effective on the second anniversary of Closing and PAWC would calculate its proof of revenues as if the

increase to Brentwood revenues had not been delayed. PAWC St. No. 3-R p. 4.<sup>8</sup> In his Surrebuttal Testimony, Mr. Kubas was asked if this proposal was acceptable, and his response was: “Yes. Therefore, I will withdraw my recommendation that the Commission reject PAWC’s proposed two-year rate freeze for the Brentwood system.” I&E St. No. 1-SR p. 31.

Similarly, in her Direct Testimony, OCA witness Alexander testified “[t]he costs associated with the offered two-year freeze in tariffed rates for Brentwood’s customers should not be shifted to other PAWC customers.” OCA St. 2 p. 11. When asked during Surrebuttal whether PAWC had accepted her recommendation, she said: “Yes. I appreciate this agreement.” OCA St. 2SR p. 1.

In his Direct Testimony, OSBA witness Kalcic made a recommendation similar to that of Ms. Alexander. Following the concession made in PAWC’s Rebuttal Testimony, Mr. Kalcic did not submit surrebuttal testimony.

PAWC therefore believed the concerns of I&E, the OCA and the OSBA had been resolved. Consistent with that belief, the OSBA’s Main Brief argued that, if the Commission approves the Transaction, that approval:

. . . should be conditioned on PAWC’s requirement to impute the revenues to its Brentwood service area to make up for any revenue shortfall associated with the rate increase that would otherwise be attributable to Brentwood customers in the Company’s first Base rate case following the Closing Date of the acquisition.

OSBA Main Brief pp. 6, 9.

In their Main Briefs, however, I&E and the OCA both argue that the rate freeze should be disapproved. I&E Main Brief pp. 16-17; OCA Main Brief p. 54. This change of position is particularly egregious for the OCA, whose witness never advocated that the rate freeze should be

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<sup>8</sup> PAWC followed-through on these commitments in its recently-filed base rate case. PAWC proposed that rates for Brentwood’s customers increase in August 2024, but calculated PAWC’s proof of revenues as if the effective date was not delayed. See, Docket No. R-2023-3043190 *pro forma* tariff and PAWC Exhibit 10-D.

disapproved. The ALJ should not allow I&E and the OCA to advocate a position in their briefs that is contrary to the testimony of their own witnesses. Instead, the ALJ should consider the issue resolved based on the concession in PAWC's rebuttal testimony.

If the ALJ does address the issue on the merits, she should reject the position of I&E and the OCA. I&E takes the broad position that rate freezes "in general, are simply not in the public interest." I&E Main Brief p. 25. This position is difficult to take seriously. I&E represents the public interest in ratemaking and service matters, and enforcing compliance with the Code and Commission regulations, *Implementation of Act 129 of 2008; Organization of Bureaus and Offices*, Docket No. M-2008-2071852 (Order entered Aug. 11, 2011). I&E has joined a number of settlements that asked the Commission to approve a rate freeze in a Section 1329 acquisition. *See, e.g., BASA Order; Application of PAWC to Acquire the York City Sewer Authority's Wastewater Collection and Treatment System*, Docket No. A-2021-3024681 (Order entered April 14, 2022); *Application of PAWC to Acquire Royersford Borough's Wastewater System Assets*, Docket No. A-2020-3019634 (Opinion and Order entered May 7, 2021). If rate freezes were generally not in the public interest, it is highly unlikely that I&E would have joined those settlements – or that the Commission would have approved them.

Significantly, in the recent matter of *FirstEnergy Pennsylvania Electric Company*, Docket No. M-2023-3038771 (Opinion and Order entered Dec. 7, 2023), Vice Chairman Barrow criticized the proposed settlement of a merger of several existing Pennsylvania utilities on the grounds that the settlement did not include a rate case stayout provision. "A rate case stayout is typically used to embed the gradualism principle so that ratepayers do not experience rate shock" Statement of Vice Chairman Barrow p. 2. The two-year rate freeze provision included in the APA achieves the same result; it ensures that Brentwood's customers will experience no rate increase for two years.

After that, they are estimated to experience an increase of approximately 11% as a result of the Transaction.

The Commission is not a super board of directors with the authority to micromanage the affairs of public utilities. *Driscoll, Metropolitan Edison Co., supra*. The Commission should allow a public utility to negotiate its best deal possible with the municipal seller of the utility system and then submit the asset purchase agreement to the Commission for a determination of whether (a) the agreement is reasonable, legal and valid, as required by Section 507, and (b) the transaction as a whole is in the public interest, as required by Sections 1102 and 1103. This approach would be preferable to a blanket prohibition of rate freezes.

On the facts of this case, the Commission should conclude that the APA containing the two-year rate freeze is reasonable and legal, as required by Section 507, and that the Transaction as a whole is in the public interest, as required by Sections 1102 and 1103.

#### **4. CUSTOMER NOTICE**

##### **a. REPLY TO I&E'S MAIN BRIEF**

I&E contends that “PAWC has a history of under-projecting the increases necessary for systems acquired under Section 1329.” I&E Main Brief p. 18. I&E argues that customer notices in Section 1329 acquisitions should not be misleading and should include a more accurate range of potential rate increases. *Id.*

PAWC agrees with I&E that customer notices should not be misleading, but disagrees with I&E that PAWC's customer notices are misleading. The purpose of the customer notice is not to be a “crystal ball” predicting the future. As explained in PAWC's Main Brief at page 49, the customer notice in a Section 1329 application proceeding serves a very limited purpose. The *New Garden Order* requires that notice be given to advise customers *of the rate impact of the Commission's decision in the application proceeding* – nothing more. The *New Garden Order*

states: “[W]hether individualized notice is required depends on whether the outcome of the proceeding binds the Commission to increase rates.” 195 A.3d at 1069. The *New Garden Order* further states: “Because a rate base determination is fundamental to a determination of rates, under [*Barasch v. Pa. Pub. Util. Comm’n*, 546 A.2d 1296, 1305-1306 (Pa. Cmwlth. 1988)], individualized notice has to be given to all ratepayers of the proposed sale as well as an opportunity for them to participate in the Section 1329 proceeding.” 195 A.3d at 1069.

Following the *New Garden Order*, PAWC entered into a settlement with I&E, OCA, the OSBA and others on a format and method for calculating the customer notice. That settlement was approved by the Commission in the *Steelton Order*. PAWC’s notice in this case complied with that order. It is disingenuous for I&E to contend that PAWC’s customer notice was deficient, even though it complied with the Commission’s directive on how PAWC should give customers notice of a Section 1329 application.

The ALJ should reject I&E’s vague recommendation that PAWC’s future customer notices should provide a more accurate range of potential increases. I&E makes no specific proposal as to how PAWC should carry out this directive. The ALJ should not recommend that the Commission give PAWC ambiguous instructions on how to give customers notice in a future case; such an order would give rise to litigation in the future over whether PAWC complied with the Commission’s order. Additionally, as discussed above, in the absence of a settlement, establishing a rule for giving customer notice going forward, which only applies to PAWC, raises equal protection concerns.

For all of the above reasons, the Commission should continue to require that PAWC comply with the agreement that the Commission approved in the *Steelton Order*.

**b. REPLY TO THE OCA’S MAIN BRIEF**

In its Main Brief, the OCA describes its position regarding customer notice as follows:

If PAWC is permitted to pass-through ALCOSAN charges, PAWC should be required to provide Brentwood customers with notice of ALCOSAN rate increases before paying increased rates, include ALCOSAN rate increases in its tariff, and provide annual reports and submit to public hearings on its pass-through adjustment in compliance with Section 1307(e) of the Public Utility Code.

This statement of the issue is quite different from PAWC's understanding of the customer notice issue, based on the testimony of the OCA's witnesses. *See* PAWC's Main Brief pages 47-50. PAWC understood the issue to involve the adequacy of the notice that PAWC gave customers in this Application proceeding, rather than notices pertaining to ALCOSAN that OCA believes PAWC should be required to provide in the future.

PAWC objects to the introduction of new issues in Main Briefs as a violation of PAWC's due process rights. *Smith, UGI Utilities*. OCA's witnesses never discussed Section 1307(e) of the Code, they never recommended that PAWC be required to file annual reports, and they never mentioned holding public hearings about the ALCOSAN charges. In fact, they argued that PAWC's billing arrangement with ALCOSAN should not be treated as a pass-through. OCA St. 1 p. 24. PAWC agrees. It is a violation of PAWC's due process rights to introduce these proposals in briefs after the record has closed, when PAWC cannot introduce testimony explaining why those proposals are inappropriate based on the facts of this case. The ALJ should not consider these requests.

If the ALJ does consider these requests, she should deny most of them. PAWC proposes to act as a billing agent for ALCOSAN, collecting amounts that ALCOSAN's treatment customers owe to ALCOSAN. PAWC is not asking the Commission to allow PAWC to "pass through" an ALCOSAN charge to PAWC customers. The Section 1307(e) requirements for a pass-through charge do not apply where, as here, a utility is simply using a consolidated bill to offer customers the convenience of simultaneously paying two utility bills.

With respect to the OCA's request that PAWC provide Brentwood customers with notice of ALCOSAN rate increases, PAWC has committed to giving customers this notice. PAWC St. No. 2-R p. 17; Brentwood St No. 1-R p. 13.

Finally, with respect to the OCA's proposal that PAWC include ALCOSAN's charges in its tariff,<sup>9</sup> the OCA claims that its proposal is intended to provide fair notice to PAWC's conveyance customers when ALCOSAN increases its treatment charges. OCA Main Brief p. 42. PAWC has already agreed to give customers notice of the increase; putting that increase in PAWC's tariff rates goes well beyond what is necessary to provide ALCOSAN's customers with notice of its proposed increase. The OCA's proposal could also cause confusion for customers, who might believe the rate charged by ALCOSAN is in fact a rate charged by PAWC.

For all of the above reasons, PAWC respectfully requests that the ALJ recommend that the Commission reject the OCA's position on customer notice.

## **5. ALCOSAN CHARGES AND DISCOUNTS**

At page 55 of its Main Brief, the OCA argues that ALCOSAN's treatment costs should be treated as an operations expense of PAWC for ratemaking purposes. PAWC opposes this proposed condition because it is not necessary to make the Transaction pass the affirmative public benefit test. In fact, the proposed condition would make the Transaction more detrimental, rather than more beneficial, because it will "socialize" the cost of ALCOSAN's treatment service for customers in Brentwood to all of PAWC's wastewater customers, rather than continuing to impose those costs on the cost causers.

The OCA's position is based on a fundamental misunderstanding of the Z Agreement. According to the OCA, Brentwood is the customer of ALCOSAN. OCA Main Brief p. 31. The

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<sup>9</sup> The OCA's Main Brief also discusses this proposal in Section IV.B.2.

Z Agreement clearly provides that sewage service charges are imposed upon the owner, tenant or occupant of parcels in the Borough (called “Water Users” in the Z Agreement). Z Agreement, PAWC St. No. 1, PAWC Exhibit MS-2 Appendix A-25.3 ¶¶ 10-15. The Z Agreement gives the Borough the option of acting as ALCOSAN’s billing agent, which the Borough elected to do. Under this arrangement, the Borough pays the aggregate amount of all sewage service charges payable by its Water Users in return for an annual credit from ALCOSAN. *Id.* at ¶ 16.

After Closing, PAWC will not be the customer of ALCOSAN; it will be the billing agent for ALCOSAN. PAWC will bill ALCOSAN’s customers for amounts they owe ALCOSAN in return for its provision of wastewater treatment service. As explained in PAWC’s Main Brief, pp. 52-53, this fact distinguishes the Brentwood System from PAWC’s other collection-only systems, where PAWC is a bulk customer of the treatment provider. There is no reason why the customers of ALCOSAN should not pay ALCOSAN for services provided to them, nor is there any reason why PAWC’s existing customers should pay for the services that ALCOSAN provides to its treatment customers.

The OCA suggests that PAWC’s proposal “requires too many adjustments and modifications to PAWC accounting.” OCA Main Brief p. 50). This argument should be rejected as unsupported by the evidence. PAWC witness Everette explained that charges collected on behalf of ALCOSAN will be recorded to a “collection for others” liability account and will not be revenue to PAWC. PAWC St. 3-R p. 6. She also testified that any shortfall between what PAWC bills its customers related to ALCOSAN charges and what PAWC collects from customers may be a component of uncollectible expense in future rate cases. PAWC St. 3-REV p. 8. The OCA failed to identify any accounting issue that has not been addressed.

At page 54 of its Main Brief, PAWC explained that its proposed billing agent relationship with ALCOSAN is similar to the arrangement that the Commission approved for the Pittsburgh Water and Sewer Authority (“PWSA”). At page 32 of its Main Brief, the OCA contends that the PWSA tariff is distinguishable because PWSA’s billing arrangement was contained in a Cooperation Agreement that was subsequently granted the force and effect of law by the General Assembly. 71 P.S. § 720.212.

PAWC respectfully submits that the General Assembly’s action supports PAWC’s position that the Commission should approve PAWC’s proposal, just as it approved a similar arrangement for PWSA. The General Assembly would not have given PWSA’s billing arrangement the force and effect of law unless the Legislature found that arrangement in the public interest. *Cf.*, 1 Pa. C.S. § 1922(5) (“In ascertaining the intention of the General Assembly in the enactment of a statute the following presumptions, among others, may be used: . . . (5) That the General Assembly intends to favor the public interest as against any private interest.”). Since the General Assembly found that it is in the public interest for PWSA to act as a billing agent for ALCOSAN, the Commission should similarly find that it is in the public interest for PAWC to act as a billing agent for ALCOSAN.

**6. SPECIFIC NOTICE FOR BRENTWOOD CUSTOMERS PRIOR TO CLOSING**

**a. REPLY TO I&E’S MAIN BRIEF**

I&E contends that, if the Commission requires a further notice be provided to Brentwood customers prior to Closing, the notice should provide the most accurate information related to how much of a potential rate increase Brentwood customers face. I&E Main Brief p. 27. If the Commission approves the Transaction, PAWC should not be required to provide customers with another, recalculated notice of the Transaction’s rate impact. The purpose of the notice, under the

*New Garden Order*, is to provide customers with notice of and an opportunity to be heard on the application that will impact their rates. Once the Transaction is approved, providing the customers with a recalculated notice would serve no purpose. It would not protect customers' due process rights. Moreover, it could cause customer confusion, because customers could believe it is a notice of a new Section 1329 proceeding in which they could participate, rather than a second notice about a now-concluded Commission proceeding. The ALJ therefore should recommend that the Commission reject this proposal.

**b. REPLY TO THE OCA'S MAIN BRIEF**

The OCA makes a similar, but different, recommendation. The OCA recommends that, if the Transaction is approved, PAWC should be required to provide another notice to current Brentwood customers, based on PAWC's recently-filed rate case. OCA Main Brief p. 56.

PAWC disagrees for three reasons. First, as stated above, providing customers with a recalculated notice of the Transaction's rate impact, after the Commission approves the Transaction, serves no purpose. Second, PAWC gave Brentwood's existing customers notice of the rate case. Docket No. R-2023-3043189 *et al.*, Volume 1, p. 36 of 232. Third, PAWC provided customers with notice of the Application proceeding from late July to early September, 2023, whereas PAWC did not file its rate case until early November, 2023. Nothing in Section 1329 requires that an acquiring utility provide customers with a second notice, based on subsequent events.

In addition, the OCA contends that:

In future applications under Section 1329, PAWC should be required to update its notices to potentially-acquired customers when a new acquisition application becomes pending to ensure that potentially acquired customers are noticed as if they were current PAWC customers during the pendency of the acquisition application.

OCA Main Brief p. 56.

PAWC opposes this proposal. The Commission's authority to adopt this proposal is doubtful. Section 1103 of the Code allows the Commission to impose a condition on its approval of an application, but this is not a condition of approving the Application. This proposal has nothing to do with the Application. This proposal would establish a rule for future Section 1329 proceedings, which would only apply to PAWC. In the absence of a settlement, the Commission should not impose customer notice requirements on a company-by-company basis; this would violate PAWC's right to equal protection under the law. U.S. CONST. Am. XIV § 1. Instead, if the Commission is going to establish rules governing how acquiring utilities give customers notice in future Section 1329 proceedings, it should do so for all acquiring utilities in an Implementation Order.

For all of the above reasons, the ALJ should deny the proposals of I&E and the OCA concerning specific notice for Brentwood customers.

#### **7. PAYMENT AGENT IN BRENTWOOD**

If the Transaction is approved, the OCA argues that PAWC should be required to maintain a payment agent in Brentwood. OCA Main Brief p. 57. As discussed above, it is uncertain whether Brentwood customers presently have the option of paying bills in person in Brentwood, or that any Brentwood customers take advantage of that option (if it exists). Brentwood St. No. 1-R p. 3-4. Even if they would lose this benefit, PAWC will provide Brentwood's customers with the ability to pay their bills in person at locations proximate to Brentwood. OCA St. No. 1 p. 6.

The benefits of the Transaction outweigh the detriments of the Transaction. The OCA's proposed condition is not necessary to make the Transaction pass the affirmative public benefit test. In fact, granting the OCA's proposed condition would make the Transaction more detrimental because it would certainly increase the cost of the Transaction for all PAWC customers in order

to replace an uncertain detriment. Consequently, the ALJ should recommend that this proposed condition be denied.

## **8. ADDITIONAL CONDITIONS**

The common brief outline agreed-to by the parties did not contain a Section IV.E.8. The OCA's Main Brief included a Section IV.E.8, which recommended that the Commission adopt two conditions that were not discussed in the testimony of any witness. PAWC objects to the introduction of these issues in Main Briefs. As discussed several times above, it is a violation of PAWC's due process rights because PAWC did not have notice and an opportunity to be heard by presenting evidence on these proposals at the hearing. *Smith, UGI Utilities*. If the ALJ considers these proposals on the merits, she should recommend that they be denied for the reasons set forth below.

### **a. THE OCA'S RECOMMENDATION THAT THE COMMISSION REQUIRE PAWC AND BRENTWOOD TO OBTAIN NEW UVE APPRAISALS**

The OCA contends that the UVE appraisals included plant that is not used and useful, which should be excluded from rate base. The OCA contends that, if the Application is approved, new UVE appraisals should be required so the Commission can determine whether the negotiated purchase price is lower than the average of the two UVE appraisals that exclude the plant that is not used and useful. OCA Main Brief p. 57.

The OCA's proposed condition is a variation of Mr. Kubas' proposal that, if the Commission approves the Transaction, the Commission should require a cost of service study in every future rate proceeding to remove the plant used by "non-customers." *See* Section IV.E.2 ("Cost of Service Studies"), above. It should be rejected for many of the same reasons – plus some additional reasons.

As explained in PAWC's Main Brief at pages 38-40, in Section IV.B.6.a above, and in Section IV.E.2 above, the Engineer's Assessment and the UVE appraisals properly included all assets of the System because all assets are used and useful for providing public utility service to Brentwood's customers. There is no reason that any assets should be excluded from the System's rate base. Therefore, there is no reason to require PAWC and Brentwood to complete new UVE appraisals.

Additionally, revising the UVE appraisals after the Commission approves the Transaction would serve no purpose. The UVE appraisals are used by the Commission *in its decision on a Section 1329 application* to determine the amount that can be included in rate base as a result of the acquisition. 66 Pa. C.S. § 1329(c)(2); *New Garden Order, supra*. Once the Commission decides to approve the application, and establishes the rate base in its decision, there is no further use for the UVE appraisals. Therefore, conditioning the Commission's approval on the buyer and the seller obtaining new UVE appraisals would be a waste of time and money.

For all of the above reasons, the ALJ should recommend that the Commission reject this proposed condition.

**b. THE OCA'S RECOMMENDED CONDITION REGARDING PAWC'S REVISED LTIP**

When PAWC submits a new LTIP that includes Brentwood, the OCA asks the Commission to require that the projects proposed in the revised LTIP be in addition to, and not reprioritize, any capital improvements that PAWC was already committed to undertake for existing customers. OCA Main Brief p. 57. This proposed condition is not supported by any evidence of record. The OCA cites page 21 of its Statement 1 as record support for its assertion that the reprioritization of capital improvements would disadvantage existing PAWC customers, but OCA witness DeMarco said no such thing.

The Commission has approved numerous settlements containing a provision similar to the OCA's proposed condition, but no settlement has been presented for the Commission's approval in this case. The OCA has provided no compelling reason why the Commission should give it what it could not achieve at the bargaining table – particularly when the issue was not raised prior to the OCA filing its Main Brief.

The Commission is not a super board of directors with authority to micromanage public utilities. *Driscoll, Metropolitan Edison Co., supra*. The Commission should allow PAWC to prepare its LTIP as it sees fit, and all parties should have the right to advocate their respective positions in the proceedings on PAWC's revised LTIP.

## **V. CONCLUSION AND REQUEST FOR RELIEF**

WHEREFORE, for all of the foregoing reasons, Pennsylvania-American Water Company continues to request that:

1. The Honorable Administrative Law Judge Katrina L. Dunderdale recommend approval of, and the Commission approve, the Application filed by PAWC on March 31, 2023 (as amended), and order that:

2. The Commission issue such Certificates of Public Convenience as may be necessary to evidence its approval under 66 Pa. C.S. § 1102(a) of (i) the transfer, by sale, of substantially all of the assets, properties and rights related to the wastewater collection system owned by Brentwood to Pennsylvania-American Water Company, and (ii) the right of Pennsylvania-American Water Company to begin to offer, render, furnish and supply wastewater service in the areas served by the wastewater collection system owned by Brentwood.

3. The Commission permit PAWC to issue compliance tariff supplements, consistent with the *pro forma* tariff supplement attached to the Application as Second Amended Appendix

A-12, including all rates, rules and regulations regarding conditions of PAWC's wastewater service as revised herein, to become effective immediately upon Closing.

4. The Commission approve, under 66 Pa. C.S. § 1329(c), a rate base addition of \$19,364,443 associated with the acquisition of the System.

5. PAWC be permitted to record the acquisition at the net value of the assets, pursuant to 66 Pa. C.S. § 1702.

6. In the first base rate case that includes Brentwood's wastewater system assets:

a. PAWC will submit a cost of service study that removes all costs and revenues associated with the operation of Brentwood's system.

b. PAWC will provide a separate cost of service study for the Brentwood System.

c. If PAWC files a base rate case that will be effective prior to the second anniversary of Closing, PAWC will propose an increase for Brentwood customers that will become effective on the second anniversary of Closing and PAWC will calculate its proof of revenues as if the Brentwood customers were paying proposed rates without any delay to the effective date.

7. PAWC be permitted to collect a DSIC prior to the first base rate case in which the Brentwood service area plant-in-service is incorporated into rate base. However, PAWC shall not include System-related investments in its 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 LTIP including the System, (ii) the Commission's approval of the amended LTIP, as may be modified in the discretion of the Commission, and (iii) PAWC's filing of a compliance tariff supplement which incorporates the System into PAWC's DSIC tariff, after Commission approval of the amended LTIP.

8. PAWC be permitted to (i) accrue AFUDC for post-acquisition improvements not recovered through the DSIC for book and ratemaking purposes and (ii) defer depreciation related to post-acquisition improvements not recovered through the DSIC for book and ratemaking purposes. Any claims for AFUDC and deferred depreciation related to post-acquisition improvements not recovered through the DSIC for book and ratemaking purposes will be addressed in PAWC's first base rate case which includes Brentwood's System assets.

9. PAWC shall be permitted to claim transaction and closing costs associated with the Transaction in its first base rate case that includes the System.

a. The inclusion of outside legal fees, if any, in PAWC's transaction and closing costs under the APA shall be separately identified in PAWC's next base rate case.

b. Any claim by PAWC to recover transaction and closing costs associated with the Transaction will be resolved in a base rate case.

10. That PAWC issue a notice to Brentwood customers prior to Closing to explain their new customer service options, bill payment options, how to qualify and enroll in low income programs available from both PAWC and ALCOSAN, as well as the change in policies and rights governing collection practices compared to prior Brentwood practices and policies.

11. The Commission not permit Closing to occur until Brentwood has (a) identified all missing easements and other property rights; (b) taken all necessary actions to obtain the missing easements and other property rights so that they may be conveyed to PAWC at Closing; and (c) borne all costs for obtaining and conveying the missing easements and property rights.

12. The Commission permit PAWC and Brentwood to Close on the Transaction without the transfer of all missing easements and other property rights, if due to circumstances beyond Brentwood's control, Brentwood is unable to transfer all missing easements and other

property rights before or at Closing, provided that an escrow account be established as set forth in the APA.

13. The Commission issue Certificates of Filing or approvals, pursuant to 66 Pa. C.S. § 507, for the following agreements between PAWC and a municipal corporation:

a. Asset Purchase Agreement and First Amendment to the Asset Purchase Agreement By and Between Brentwood Borough, as Seller, and Pennsylvania-American Water Company, as Buyer, Dated as of December 22, 2020 and amended March 2, 2023;

b. Agreement between Borough of Brentwood and City of Pittsburgh, dated October 14, 1936;

c. Streets Run Sewer Joint Management Agreement between Boroughs of Brentwood, Baldwin and Whitehall and the Western Mifflin Sanitary Sewer Authority dated July 19, 2000;

d. Cooperation and Allocation of Responsibilities Agreement between Borough of Brentwood and Pennsylvania-American Water Company dated March 2, 2023;

e. Bulk Wastewater Conveyance Agreements (The Borough of Brentwood Ordinances No. 188 and 189) for Fairhaven Road, Stewart Avenue, Saw Mill Run between the Borough of Brentwood, Baldwin Township, Carrick Borough and Overbrook Borough Dated as of September 30, 1926; and

f. Bulk Wastewater Conveyance Agreement (Saw Mill Run) between the City of Pittsburgh, Borough of Brentwood, Carrick Borough, Castle Shannon Borough, Dormont Borough, Knoxville Borough, Mt. Lebanon Township, Mt. Oliver Borough and Overbrook Borough dated October 31, 1925.

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

Respectfully submitted,



Elizabeth Rose Triscari, Esq. (PA ID 306921)  
Erin K. Fure, Esq. (PA ID 312245)  
Pennsylvania-American Water Company  
852 Wesley Drive  
Mechanicsburg, PA 17055  
Telephone: (717) 550-1574  
E-mail: Elizabeth.Triscari@amwater.com  
E-mail: erin.fure@amwater.com

David P. Zambito, Esq. (PA ID 80017)  
Jonathan P. Nase, Esq. (PA ID 44003)  
Cozen O'Connor  
17 North Second Street, Suite 1401  
Harrisburg, PA 17101  
Telephone: 717-703-5892  
Facsimile: 215-989-4216  
E-mail: dzambito@cozen.com  
E-mail: jnase@cozen.com

Counsel for *Pennsylvania-American Water Company*

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