

COMMONWEALTH OF PENNSYLVANIA



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December 14, 2023

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street  
Harrisburg, PA 17120

Re: Application of Pennsylvania-American Water Company under Sections 1102(a) and 1329 of the Pennsylvania Public Utility Code to acquire the wastewater collection and conveyance system owned by the Borough of Brentwood and to provide wastewater service to the public in the Borough of Brentwood in Allegheny County, Pennsylvania Docket No. A-2021-3024058

Dear Secretary Chiavetta:

Attached for electronic filing please find the Office of Consumer Advocate's Reply Brief in the above-referenced proceeding.

Copies have been served on the parties as indicated on the enclosed Certificate of Service.

Respectfully submitted,

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Certificate of Service

\*4893-7046-5429

CERTIFICATE OF SERVICE

Application of Pennsylvania-American Water :  
Company under Sections 1102(a) and 1329 of :  
the Pennsylvania Public Utility Code to acquire : Docket No. A-2021-3024058  
the wastewater collection and conveyance system :  
owned by the Borough of Brentwood and to provide:  
wastewater service to the public in the Borough of :  
Brentwood in Allegheny County, Pennsylvania :

I hereby certify that I have this day served a true copy of the following document, the Office of Consumer Advocate's Reply Brief, upon parties of record in this proceeding in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant), in the manner and upon the persons listed below:

Dated this 14<sup>th</sup> day of December 2023.

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**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 : Docket No. A-2021-3024058  
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 :

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REPLY BRIEF  
OF THE  
OFFICE OF CONSUMER ADVOCATE

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

### **A. Procedural History**

The Office of Consumer Advocate (OCA) submits this Reply Brief in response to the Briefs of Pennsylvania-American Water Company (PAWC or the Company), Brentwood Borough (Brentwood or the Borough), and the Allegheny County Sanitation Authority (ALCOSAN). On November 30, 2023, the OCA, the Bureau of Investigation and Enforcement (I&E), the Office of Small Business Advocate (OSBA), PAWC, the Borough, and ALCOSAN filed Main Briefs. The OCA's Main Brief contained a comprehensive discussion of the evidence and its position on all issues. Thus, in this Reply Brief, the OCA only responds to those matters raised by PAWC, the Borough, and ALCOSAN that were not previously addressed or that require clarification or response.

### **B. Overview of the Proposed Transaction**

The OCA's overview of the proposed transaction is contained in the OCA's Main Brief. OCA M.B. at 3, 4.

## **II. BURDEN OF PROOF**

The burden of proof applicable in this matter is addressed in detail in the OCA's Main Brief. OCA M.B. at 4-7. The OCA further notes, however, that as the party with the burden of proof, PAWC must conclusively demonstrate how its claims are justified under the facts and law. The Pennsylvania Supreme Court has stated:

[T]he appellants did not have the burden of proving that the plant additions were improper, unnecessary or too costly; on the contrary, that burden is, by statute, on the utility to demonstrate the reasonable necessity and cost of the installations and that is the burden which the utility patently failed to carry.

*Berner v. Pa. P.U.C.*, 116 A.2d 738, 44 (Pa. 1955). The Commission has also addressed this standard in its rate determinations:

The Respondent, Equitable, has the burden of persuasion in the issue of the reasonableness of an expense level. Respondent must affirmatively establish, on the record, that the test year claim is a reasonable and appropriate amount.

*Pa. P.U.C. v. Equitable Gas Co.*, 57 PaPUC 423, 71 (1983); *accord*, *University of Pennsylvania v. Pa. P.U.C.*, 485 A.2d 1217 (Pa. Cmwlth. Ct. 1984). As discussed below and in the OCA's Main Brief, the OCA's comprehensive analysis demonstrates, and the record supports, that PAWC has failed to demonstrate that its application to acquire Brentwood would provide an affirmative public benefit. In fact, the record shows the opposite: customers will experience substantial harm that is outweighed by any purported benefits. As such, PAWC has not met its burden of proof under Section 1102 and 1103. Further, PAWC has not met its burden of showing that its valuations pursuant to Section 1329 are reasonable under Chapter 13 of the Public Utility Code and accepted financial and ratemaking principles. Thus, pursuant to applicable law, the Commission must deny the application.

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

The proposed transaction should not be approved under Section 1102 because PAWC has not established that there are affirmative public benefits. The OCA presented credible and persuasive testimony that details why the harms that would result from the transaction outweigh the claims regarding long-term benefits. The same concerns were raised in the testimony of I&E and the two consumers who testified against the sale to PAWC. Further, PAWC's Utility Valuation Expert (UVE) appraisals include plant which is not used and useful in the provision of public utility service; thus, even if the Commission believes there is evidence of an affirmative public benefit, the Company must be required to resubmit accurate appraisals if the instant Application is approved so as to accurately determine the utility plant that can lawfully be added to rate base. However, even if accurate appraisals would reduce the amount of ratemaking rate base

incorporated under Section 1329, the OCA emphasizes that this transaction will not result in substantial affirmative public benefits. PAWC's arguments to the contrary are without merit.

#### IV. REPLY ARGUMENT

##### A. Section 1102 and 1103 Issues

##### 1. Fitness

While OCA did not present evidence which contested PAWC's fitness as a certificated public utility. Under *Cicero*, PAWC is required to present evidence that any benefits which derive from its technical, managerial, or financial fitness provide a substantial benefit *over and above* the fitness of the acquired utility. *Cicero v. Pa. P.U.C.*, 300 A.3d 1106, 1119 (Pa. Cmwlth. Ct. 2023) *petitions for allowance of appeal filed*, Nos. 568 MAL 2023 (Commission), 569 MAL 2023 (East Whiteland Township), 570 MAL 2023 (Aqua Pennsylvania) (all filed Oct. 26, 2023) (*Cicero*). PAWC relied on its fitness when requesting approval of the instant Application, instead of any alleged benefits; as a result, the OCA submits that the Application should be denied, as little to no benefit to consumers has been supported by record evidence and this case is effectively indistinguishable from that which was rejected by the Commonwealth Court in *Cicero*.

##### 2. Substantial Public Benefits Test

##### a. Despite the Requirements of Sections 1102 and 1103, PAWC Failed to Establish that There Will Be Substantial Affirmative Public Benefits Resulting from This Application.

Under Sections 1102 and 1103 of the Public Utility Code, the standard for reviewing the benefits of an application is whether the transaction will provide substantial, affirmative benefits to the public. *See City of York v. Pa. P.U.C.*, 295 A.2d 825, 828 (Pa. 1972) (*City of York*); 66 Pa. C.S. §§ 1102, 1103. The transaction must affirmatively promote the service, accommodation, convenience or safety of the public in some substantial way; mere absence of any adverse effect is not sufficient. *City of York* at 828. An acquisition provides an affirmative benefit if the benefits of

the transaction outweigh the adverse impacts of that transaction. *Application of CMV Sewage Co., Inc.*, 2008 Pa. PUC LEXIS 950, \*30 (Order Dec. 23, 2008). Further, when the “public interest” is considered, the benefits and detriments to all affected parties must be considered. *See Middletown Twp. v. Pa. P.U.C.*, 482 A.2d 674, 682 (Pa. 1984). The benefits of a transaction must be specific to the transaction itself; where the benefits alleged do not differ significantly from those the acquired utility is either providing or capable of providing, then no substantial benefits would result from the transaction. *Cicero*, 300 A.3d at 1119.

PAWC alleged several benefits would result from approval of the instant Application, but as outlined below, when these are each discussed in turn, they are either not benefits at all because they do not differ materially from the service that Brentwood is or could provide, and thus do not meet the requirements of applicable law, or they fall into the category of gross mischaracterizations of the facts and likely outcomes for both PAWC and Brentwood customers. Moreover, the only potentially tangible benefit from this transaction – access by a small set of Brentwood customers to its wastewater low-income program – pales in comparison to the significant harm that would occur, and it would be unreasonable to conclude that this benefit standing alone would be sufficient to outweigh the substantial harm of the transaction. The OCA addresses each of these issues below and submits that the instant Application must be denied.

i. The Borough and PAWC Failed to Provide Substantial Evidence that Brentwood Customers Would Receive Benefits from PAWC’s Fitness.

In their Main Briefs, PAWC and the Borough presented evidence regarding the Company’s fitness as a large, certificated public utility; however, the Company and the Borough did not present substantial evidence that the approval of the instant Application would provide significant benefits to Brentwood customers over and above what is being provided already.

During the Evidentiary Hearings, Counsel for the Borough continually alluded to the fact that the Borough was not competent to be in the wastewater business. *See* Tr. at 345 (by ALJ Dunderdale, “Counselor, are you asking a witness for BIE to critique Brentwood, your client’s performance levels?”). In the direct and rebuttal testimony of Brentwood, Mr. Zboyovsky, the Borough Manager, did the same. Brentwood St. 1-R at 2 (“Any suggestion that the Borough and Pennsylvania-American administer the same quality of wastewater service and operational efficiency is not only preposterous, but ignores Pennsylvania-American’s size, wastewater expertise, and financial acumen.”). Throughout the Borough’s Main Brief, hyperbole was the tool of choice to compare the fitness of PAWC and the Borough itself. Brentwood M.B. at 23 (“the record simply does not support the preposterous notion that Brentwood could *ever*, through any amount of cash infusion, obtain the same level of expertise and provide the same level of service as Pennsylvania-American.”).

The facts belie the parties’ hyperbole as the record reflects that the Borough has had no difficulty funding infrastructure upgrades and replacements for the System in recent years. OCA St. 1 at 12, 13; OCA M.B. at 16. While the Borough has not contributed towards long-term, large-scale capital improvements in the past five years, its decision not to do so stems from its desire to sell, not because it cannot do so. OCA St. 1 at 13; OCA M.B. at 16. Moreover, the Borough has been in compliance with all of its regulatory Consent Orders and Agreements with ALCOSAN, the U.S. Environmental Protection Agency (USEPA), the Pennsylvania Department of Environmental Protection (PaDEP), or the Allegheny County Health Department (ACHD), within the past five years. Exhs. ND-3 and ND-6; OCA M.B. at 17. No customer complaints have been filed with the PaDEP or the ACHD regarding the Borough’s emergency response capabilities. Tr. at 347. In other words, there is no evidence to suggest the fact that the Borough is not providing

its customers with adequate service, as required by environmental regulations, or that the Borough would be forced into selling its system if it were not municipally-owned. While the Borough could be offering *better* service – as no wastewater service provider, including PAWC, is perfect – there is no indication in the record that any proposed improvement in service would manifest as a substantial benefit to Brentwood customers.

Importantly, the Public Utility Code focuses on the benefits which are provided to the customers of an acquired system as well as the *capacity or ability* of the selling system to provide such benefits. *Cicero*, 300 A.3d at 1119. In other words, the Borough’s failure to consider any measures – other than selling its system – to maintain and upgrade the Brentwood system after 2019 cannot be used as an indication that the Borough is incapable of providing for any needed capital improvements to the system. OCA St. 1 at 13; Tr. at 180, 181. Specifically, the Borough did not calculate the cost of necessary capital improvements or how that cost would impact Brentwood customers and did not consider the option of hiring a contract operator to run the system on the Borough’s behalf. OCA St. 1 at 13; Tr. at 180, 181.

Thus, notwithstanding decades of successful operation, the Borough and PAWC now allege that the Borough lacks the technical capabilities to handle the System’s maintenance and improvements over time because it employs no “in-house” engineers. Brentwood M.B. at 22, 23; PAWC M.B. at 18. The Borough has not considered the cost of retaining an engineer, by employment or by contract, to fill any gaps in its technical fitness, because it was relying on the approval of the instant Application. Tr. at 180, 181. The Borough’s failure to assess all options does not create a net public benefit. Neither the Borough nor the Company presented any evidence on how much it would cost to retain a contract engineer, any potential savings or benefits which would result from employing an in-house engineer as opposed to a contract engineer, or that the

Company only utilizes the services of in-house engineers and does not ever use contract engineers to perform work.

Absent the presentation of any evidence to support the allegation that Brentwood is not *capable* of providing a level of service to its customers that substantially differs from that which would be provided by PAWC, the Borough and PAWC's exaggeration on this issue should be given no weight. To the extent that Brentwood providing an increased level of service would increase the cost paid by the system's consumers, an issue raised by both the Company and the Borough, there is no evidence to support how much that increase would have to be, as the Borough never estimated an amount. OCA St. 1 at 13; Tr. at 180, 181. Thus, the Commission has no way of knowing if it would be more or less than the immediate rate impact which would result from approval of the instant Application. The decision by PAWC and the Borough to not provide this evidence cannot then become pretext for approval of the application because it might cost some unknown amount for the Borough to make capital improvements and hire personnel.

Put simply, the arguments presented by PAWC and the Borough regarding the comparative fitness of the two servicers are significantly colored by the lack of evidence presented on the capacity of the Borough to provide comparable service to its customers. As no evidence has been presented that the Borough is not providing adequate service or lacks the capacity to provide adequate service, any difference in fitness between PAWC and the Borough provides no substantial benefit to Brentwood customers. Where purported benefits flow from fitness, and not the specific transaction, the extent of the acquiring utility's fitness subsumes the affirmative public benefits test. *Cicero*, 300 A.3d at 1119. The Commission's net benefits assessment should not be subsumed by the Borough and PAWC's statements disparaging current sewer service in Brentwood and

regarding PAWC's fitness; arguments regarding the servicers' comparative fitness are not based on a complete record and should be given no weight.

ii. The Instant Application Would Provide No Benefit to the ALCOSAN Region and Would Provide No Regionalization or Consolidation Benefit.

The Borough claims that, if the instant Application is approved, that the entire ALCOSAN region would benefit as a result of PAWC's ability to address I/I in Brentwood. Brentwood M.B. at 12. However, this statement is a mere assertion that has no evidentiary basis. In addition, not all collection systems which are part of the ALCOSAN treatment network are inter-connected with Brentwood; only those systems which flow towards the same treatment facility are inter-connected and participate in cost-sharing or other mechanisms which provide mutual benefits to consumers. Collection systems on the opposite side of Allegheny County would receive no benefit from approval of this Application because they will not receive less I/I flow from Brentwood, cost-sharing from PAWC, or any distributions of the purchase price the Borough will receive at Closing. The Borough's claim is unsupported.

In fact, the ALCOSAN regionalization initiatives will likely be more negatively impacted by approval of the Application than positively. Specifically, the Borough and PAWC have refused to participate in ALCOSAN's Regionalization Plan, which is part of its efforts to comply with a Clean Water Plan developed pursuant to a Modified Consent Decree with the USEPA, PaDEP, and the ACHD. OCA St. 1SR at 9; OCA M.B. at 34. The regulatory and accounting complexities involved in PAWC's collection of ALCOSAN treatment costs and any potential cost-sharing agreements with neighboring municipalities pose another challenge. App'x A-25.3; OCA M.B. at 50. Further, the determination of the Borough's rate base under Section 1329 is also extremely complex, due to the Borough's current provision of service to upstream municipalities. I&E St. 1-SR at 20; OCA M.B. at 46. On the other hand, the current system of municipally-owned collection

systems has created predictability while minimizing regulatory complexities which result from actions before the Commission.

It is also irrelevant that the Borough, if the Application is denied, is less likely than PAWC to purchase neighboring municipal systems. *See* PAWC M.B. at 16. The Commission’s policy supporting regionalization and consolidation is specifically targeted at providing economic and environmental benefits to consumers, where the economic benefits result from greater economies of scale. 52 Pa. Code § 69.721(a) (“The Commission believes that further consolidation of water and wastewater systems within this Commonwealth may, with appropriate management, result in greater environmental and economic benefits to customers.”). The Commission’s policy statement does not provide that the aim of regionalization and consolidation is satisfied because the overall number of wastewater providers decreased as a result of a transaction. *Id.* PAWC and the Borough have alleged no facts to indicate that greater environmental or economic benefits would result from approval of this Application; instead, Brentwood and current PAWC customers will face higher rates in the short- and long-term in exchange for maintaining Brentwood’s compliance with environmental regulations.

For PAWC to assert that the Commission’s policy of regionalization and consolidation support its application in some abstract way – when the facts scream that the approval of the application would subvert already existing regionalization – is akin to policy-level gaslighting and should not be allowed. A policy statement is not a license or permission to acquire systems at any cost, with no affirmative public benefit, and then claim that one is fulfilling Commission policy. Therefore, the Company’s use of the Commission’s policy favoring regionalization and consolidation is erroneous and should be given no weight. Similarly, the arguments presented by

the Borough and PAWC which allege – without adequate factual basis – that the ALCOSAN region would benefit from PAWC’s ownership of the Brentwood system should be given no weight.

iii. PAWC’s Attempt to Minimize Immediate Rate Impact Should Be Given No Weight.

PAWC provided notice to current Brentwood customers that their rates would have to increase by an estimated 11% to cover their cost of service, if the instant Application is approved. App’x 18-d (revised).<sup>1</sup> The Company has proposed a rate freeze which would maintain Brentwood’s current rates until the second anniversary of the Closing of the transaction, which extends beyond the effective period of the Company’s next Base Rate Case. OCA M.B. at 25; OCA St. 2 at 8. Despite this estimate, in its 2023 Base Rate filing, PAWC proposes increasing Brentwood rates by 20.3% following the termination of the rate freeze. *Pennsylvania-American Water Company v. Pa. P.U.C.*, Docket Nos. R-2023-3043189 (water) and R-2023-3043190 (wastewater) at Exh. 3-A (filed Nov. 8, 2023) (PAWC 2023 Base Rate Case)<sup>2</sup>.

While PAWC acknowledges the fact that it filed a base rate case on the third page of its Main Brief, the Company fails to articulate that it has proposed to increase Brentwood’s rates by 20.3% following the termination of the rate freeze; instead, throughout the Brief, the Company maintains that the estimated rate impact is 11%. PAWC M.B. at 3, 24. The 11% estimate does not include any planned capital improvements. AEE-1REV. However, in its base rate filing, the

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<sup>1</sup> During the course of reviewing the PAWC 2023 Base Rate Case, it became apparent that the Company’s calculation of 11% is an incorrect representation of the required increase to Brentwood rates to cover the system’s cost of service. PAWC 2023 Base Rate Case at Exh. 3-A. In the 2023 Base Rate Case, PAWC identified the current Brentwood revenues to be \$1,815,000, while in the instant Application, PAWC identified the current revenues to be \$4,031,000, which includes the \$1,815,000 as well as the \$2,216,000 in revenues collected on behalf of ALCOSAN for treatment. Compare PAWC 2023 Base Rate Case at Exh. 3-A with AEE-1REV. When determining the projected rate increase to cover the Brentwood system’s revenue deficiency, the Company should not have included the \$2,216,000 in revenues collected on behalf of ALCOSAN for treatment, as the Company has adamantly maintained that ALCOSAN charges are not revenues, which means they should not contribute to a revenue deficiency. Instead, the estimated revenue increase should have been 24.5%, when dividing the estimated revenue deficiency by the actual system revenues. Similarly, the estimated revenue requirement increase, including one-fifth of estimated capital expenditures, should have been 30%.

<sup>2</sup> Available at: <https://www.puc.pa.gov/pcdocs/1804574.pdf>, p. 404 of 1699.

Company is proposing to increase Brentwood's revenue requirement by \$1,934,637, or 106%; approximately 42% of the proposed revenue requirement will be shifted to PAWC water customers, as opposed to the 33% proposed in the instant Application. *Compare* PAWC 2023 Base Rate Case, Exh. 3-A *with* AEE-1REV. While the Company might argue that it does not always receive the increases in revenue requirement it requests, it remains highly likely given the requests made by PAWC in its rate case that, if this application is approved, when Brentwood customers resume receiving rate increases to cover the increased cost of service on the second anniversary of closing, the rate increases will be much higher than 11%. Tr. 406-407.

Importantly, the proposed rate freeze simply delays the harm of the acquisition to Brentwood customers for a short period. Following the termination of the rate freeze, Brentwood customers' rates will increase. Further, when Brentwood customers are not paying rates, the costs incurred by the system are shifted to other PAWC customers, including PAWC water customers under an Act 11 shift. *See* PAWC St. 3-R at 4; OCA M.B. at n. 11. While PAWC has provided that it will impute the revenue increase the Brentwood customers would have paid had there been no rate freeze<sup>3</sup>, the Company provides no such protections for its current customers, some of whom are also Brentwood sewer customers. *See* PAWC St. 3-R at 4; OCA M.B. at n. 11. It is telling that, of PAWC's requested \$1,934,637 increase in revenue requirement from the Brentwood rate division in the 2023 Base Rate Case, PAWC has proposed that 81% be paid by current water customers, while the remaining 19% will be accounted-for in Brentwood's proof of revenues until the end of the system's rate freeze. PAWC 2023 Base Rate Case, Exh. 3-A.

Thus, in determining whether there is evidence of harm that outweighs any purported benefits, the Commission must consider the known and probable rate increases that would result

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<sup>3</sup> PAWC will impute only the Brentwood revenue increase that is not shifted to its water customers. PAWC St. 3-R at 4; OCA M.B. at n. 11.

from the approval of this acquisition as they are anything but minimal. In exchange for their rate increases, current PAWC customers will see no real benefits, as the Company did not provide any evidentiary support to show that benefits would result if the instant Application is approved, aside from highly speculative economies of scale at some unknown time in some unknown amount. *See* PAWC M.B. at 30, 31. Therefore, the Company’s attempt to waive away potentially significant rate increases in the short-term as “minimal” is misleading – especially when considering the proposals contained in PAWC’s 2023 Base Rate Case – and should be given little weight when performing the net benefits assessment.

iv. PAWC’s Attempt to Minimize Rate Impact Is Misleading.

While the Commission has ultimate authority to determine whether rates set in a base rate proceeding are just and reasonable, it is during an Application under Section 1329 that the Commission establishes the ratemaking rate base which is incorporated into that of the acquiring utility. 66 Pa. C.S. § 1329(c). During base rate proceedings following the approval of an Application under Section 1329 which includes acquired rate base, the Commission is required to give the acquiring utility the opportunity to earn a fair rate of return on that rate base under generally accepted ratemaking principles. As a result, the revenue requirement is known in the application case and a reasonable estimate of the rate impact is known, too, during the Section 1329 proceeding. *McCloskey v. Pa. P.U.C.*, 195 A.3d 1055, 1067 (Pa. Cmwlth. Ct. 2018) (*McCloskey*); *Cicero*, 300 A.3d at 1119.

While PAWC asserts that the correct time to determine future rate impact on its existing customers is during future rate cases, and not in the instant proceeding, the Company’s approach ignores *McCloskey* and *Cicero*. PAWC’s position also ignores the pancaking effect which multiple, simultaneous, pending acquisitions have on rates. PAWC M.B. at 30, 31. Including Brentwood, PAWC has five pending acquisitions before the Commission. *See* Docket Nos. A-2023-3039900

(Towamencin); A-2023-3042058 (Sadsbury Township Municipal Authority); A-2023-3042567 (Township of Farmington); A-2023-3043194 (Audubon Water Company). Following the approval of any of these acquisitions, PAWC would have a different size customer base and would own additional plant which it could request be included in ratemaking rate base in subsequent base rate proceedings; as a result, the outcome of those applications affects the rate impact that Brentwood and PAWC customers will face should the instant Application be approved.

Further, the Company's planned capital expenditures will also have a long-term impact on ratemaking rate base which is not accounted-for in PAWC's estimated immediate rate impact. AEE-1REV. Specifically, all capital additions are proposed additions to rate base, which increase the Company's revenue requirement if they are approved. In the Brentwood system, PAWC is proposing to add \$8 million in capital expenditures to rate base over the next five years. PAWC Exh. DJH-2. If all capital expenditures in each service territory PAWC has applied to acquire were considered, the long-term rate impact would be substantial.

As a result, it is necessary to consider rate impact beyond the strictly immediate impact indicated by PAWC in their notice. The Commission is required to weigh all "acknowledged or known harms" when performing the net benefits assessment, which includes rate harms which are reasonably foreseeable because of other, pending applications as well as increases to rates because of planned capital improvements. *Cicero*, 300 A.3d at 1119. In other words, the Commission knows or can acknowledge that *other* acquisitions, which are filed for approval and pending during its consideration of a proposed acquisition, create a cumulative upward pressure on rates which must be considered when determining whether an individual transaction provides substantial affirmative public benefit. OCA M.B. at 25. The cumulative effect of such acquisitions on the rates of current PAWC water and wastewater customers weighs as a heavy harm which would result from the

instant Application, despite the Company's failure to acknowledge it. *See* PAWC M.B. 30-32 (providing that the only effects on PAWC customers from this transaction are benefits to the public-at-large and which might result from economies of scale).

v. PAWC's Comparison of the Proposed Acquisition of Brentwood to Other Acquisitions Under Section 1329 Is Flawed.

The instant Application is factually distinct from all of PAWC's previous acquisitions under Section 1329. Any attempt by the Company to draw comparisons between them is misleading, as the decisions of the Commission in previous proceedings are based solely on the fact-based inquiry of that Application and that transaction.

For example, PAWC begins its Main Brief by attempting to distinguish the instant Application from the Commission's approval of the transaction between Aqua Pennsylvania, Inc. (Aqua) and East Whiteland Township which was reversed by the Commonwealth Court. PAWC M.B. at 10; *see Cicero*, 300 A.3d 1106. Instead, PAWC tries to draw a stronger comparison between its recently-approved acquisition of the Butler Area Sewer Authority (BASA). PAWC M.B. at 10; *Application of Pennsylvania-American Water Co. under Section 1329 for Acquisition of the Butler Area Sewer Authority*, Docket No. A-2022-3037047 (Order Nov. 9, 2023) (BASA Order)<sup>4</sup>. Later, the Company compares the rate increase proposed in the instant Application with the rate increases which resulted from four previous, approved Section 1329 applications. PAWC M.B. at 24.

However, the issues presented by the instant Application are unique and cannot be properly compared to the East Whiteland Township, BASA, City of York Sewer Authority, Upper Pottsgrove Township, or Valley Township cases. PAWC M.B. at 10, 24. For example, none of the five mentioned Section 1329 proceedings involved the Commission considering how a wastewater

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<sup>4</sup> Available at: <https://www.puc.pa.gov/pdocs/1805882.pdf>.

servicer should charge for treatment services provide by ALCOSAN. Further, all other applications under Section 1329 by PAWC which have been approved were the result of settlements, not contested litigation. *See Application of Pennsylvania-American Water Co. under Section 1329 for Acquisition of the Butler Area Sewer Authority*, Docket No. A-2022-3037047 (Statement of Chairman DeFrank Nov. 9, 2023) (the fact of a settlement supports granting an Application under Section 1329)<sup>5</sup>.

Due to the factual uniqueness of the instant Application, the OCA submits that the Commission should not afford the Company’s comparison to other applications under Section 1329 much weight, especially as an attempt to minimize the proposed rate impact to Brentwood customers. PAWC M.B. at 24. The law requires that the Commission’s decision as to whether net benefits would result from a proposed transaction be rooted in the facts specific to the transaction, after performing a fact-based evaluation and fact-based balancing. BASA Order at 14 (citing *Cicero*, 300 A.3d at 1117). It would be a disservice to Brentwood customers to liken the instant Application to one of the five mentioned by the Company; as such, the OCA respectfully requests that PAWC’s comparisons to other acquisitions under Section 1329 be given no weight.

vi. PAWC’s Estimated Costs to Brentwood Customers if the Application Is Denied Are Speculative and Without Merit.

In their Main Brief, PAWC provides an estimate that the Borough of Brentwood would need to raise rates by 20% immediately and an additional 9% by 2026, should the Application be denied. PAWC M.B. at 12, 27. To find the immediate rate increase of 20%, PAWC looked at the increase in the Consumer Price Index (CPI) since October 2019, when the Borough last raised its

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<sup>5</sup> Available at: <https://www.puc.pa.gov/pcdocs/1804764.pdf>. Additionally, each Settlement Agreement contained a provision that “[t]he Settlement may not be cited as precedent in any future proceeding, except to the extent required to implement this Settlement.” *See, e.g., Application of Pennsylvania-American Water Co. under Section 1329 for Acquisition of the Butler Area Sewer Authority*, Docket No. A-2022-3037047 at ¶ 43 (Joint Petition for Settlement Aug. 14, 2023), available at: <https://www.puc.pa.gov/pcdocs/1795956.pdf>. As such, the Company’s reliance on the Settlement Agreements is in contravention to the Settlement Agreements themselves.

wastewater collection rate, or shortly thereafter. PAWC M.B. at 26. To find that the Borough would need to increase rates an additional 9% by 2026 to keep pace with the increasing cost of inflation, PAWC took the CPI increase for the twelve-month period ending September 2023 of 3.7% and multiplied it 2.5 to estimate the CPI's increase between September 2023 and March 2026. PAWC M.B. at 25. There are several issues with the Company's extra-record methodology to estimate a rate increase should the Application be dismissed, considering that the Borough did not make any projections for how much rates would have to increase. Tr. at 177.

Initially, PAWC assumes facts outside of the record and, thus, its calculation should be afforded no weight. The evidentiary record closed on November 14, 2023, at the conclusion of the Evidentiary Hearings. At no point during the course of PAWC's direct, rebuttal, or rejoinder testimony – as well as the ability to introduce cross-exhibits – did the Company move for the introduction of any evidence regarding the CPI, including testimony containing any calculations that it or its lawyers made using the CPI. The Company provided no foundation for why the CPI was relevant to the instant Application or who made the calculations or why the Commission should give any weight to rate increase estimates, which are contained only in PAWC's brief and determined using the CPI. The OCA and other parties were not given the opportunity to present evidence to contest the use of CPI data or for expert witnesses to consider whether CPI data can accurately estimate rate increases over time and, if they can, if the Company's calculation was accurate. As such, any reliance PAWC places on the data should not be considered.

However, even if the Commission considers this extra-record evidence, there are fundamental flaws in PAWC's arguments. PAWC's arrival upon the 20% and 29% increase figures demonstrates, at best, a lack of fundamental understanding of the CPI. Specifically, the CPI “measures the average price change over time for a market basket of goods and services” for urban

consumers to estimate any increases in the cost of living. *Consumer Price Index: Design*, Bureau of Labor Statistics (last accessed Dec. 4, 2023)<sup>6</sup>. Notably, the “basket of goods” contains the items and services which an average person spends money on, including filling their car with gas, paying rent, buying eggs, and utility bills. *Id.* The “basket of goods” does not contain items such as concrete used in construction, steel for manhole covers, the price of contract engineers, pipe, or light duty vehicles. *Id.* As a result, the CPI is a good proxy for the inflation experienced by consumers living in urban areas. The CPI is a bad proxy for estimating the increasing cost of utility service over time – which should form the basis for the Borough’s collection service charge – as the consumer basket of goods is not meant to estimate the increasing costs faced by utility service providers due to inflation.

Further, an increase in the CPI does not mean that the cost of goods and services in all areas increases proportionately. For example, in the twelve-month period ending October 2023, the CPI increased by 3.2% for all items within the basket of goods, while the cost of “energy” decreased by 4.5%. *Consumer Price Index Summary*, Bureau of Labor Statistics (last accessed Dec. 4, 2023)<sup>7</sup>. There is no evidence provided by PAWC that the 3.7% increase in the CPI for the twelve-month period ending September 2023 is representative of a 3.7% increase in the cost of providing wastewater service during that time, or any evidence to support that the two years and three months following the twelve-month period ending September 2023 will maintain the same level of inflation. PAWC M.B. at 26. As the Borough did not provide an estimate of how much rates would have to increase should this Application be denied, PAWC cannot simply make up a proxy after the close of the record and then ask the Commission to render a decision based on its make-pretend numbers. Were the Commission to rely on the poor proxy of the CPI to produce a wildly

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<sup>6</sup> <https://www.bls.gov/opub/hom/cpi/design.htm>

<sup>7</sup> <https://www.bls.gov/news.release/cpi.nr0.htm>

speculative projected rate increase of 29% by 2026, it would be basing its decision on argument dressed as fact. Any assertion supporting such reliance is misplaced or misleading. Tr. at 177.

PAWC also reiterated the testimony of Borough Manager Zboyovsky, who stated that, in 2012, the Borough received a cost estimate for improvements to its system that would have required the Borough to increase rates by 50% by 2027. Tr. at 178. Including the rate increases by ALCOSAN, between 2012 and 2027, Brentwood customers' rates were projected to increase by 160%. Tr. at 179. PAWC submitted that, because the Borough has not increased its rates since 2019, a large portion of the 50% increase in rates had not yet taken place. PAWC M.B. at 26. However, the Borough's rates have increased 64% since 2012.<sup>8</sup> As such, PAWC cannot rely on Mr. Zboyovsky's projections from 2012, as they are too old to provide a credible basis for the extent to which rates would have to increase under Borough ownership to maintain the *status quo*, including the estimated increases to ALCOSAN rates over time. PAWC has no factual or evidentiary basis upon which it can make any claims regarding how much Brentwood rates would have to increase if the Application is denied, and the claims made in its Main Brief are wildly speculative, at best.

PAWC's speculation regarding rate impact also extends to the cost of proposed capital improvements to the Brentwood system. In its Main Brief, PAWC alleges that, if the Application is denied, Brentwood customers would need to each pay at least \$2,000 for the System to receive the capital investment contemplated by PAWC, which total approximately \$8 million over five years. PAWC M.B. at 18, 27. This argument is overly simplistic and significantly flawed for three reasons.

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<sup>8</sup> The Borough increased its rates by 7% in 2012, 10% in 2013, 17% in 2014, 11% in 2015, and 7.5% in 2018. Tr. 180.  $1.07 * 1.10 * 1.17 * 1.11 * 1.075 = 1.64$ , or a 64% increase in rates since 2012.

First, PAWC's statement is premised on the idea that every dollar that PAWC plans to spend is necessary. However, beyond estimating that \$3,105,000 of the \$8 million in total expenditures will be contributed towards Brentwood's Ten Percent Plan, there is no real estimate as to how much of the planned capital expenditures will result in known or measurable benefit to Brentwood customers. PAWC Exh. DJH-2. As there is no evidence in the record to support that the planned capital expenditures are necessary, the OCA submits that any argument premised on the idea that such expenditures are necessary should not be given much weight.

Second, according to PAWC's estimates, paying for capital expenditures to the Brentwood system would cost Brentwood customers an approximately 3.7% increase in their monthly wastewater bills. OCA Exh. ND-13. Specifically, PAWC estimated that the inclusion of one-fifth of the planned capital expenditures in the projected rate increase under PAWC ownership would add \$150,000 to the revenue deficiency, or 3.7% of the revenues currently collected by the Borough. *Id.* PAWC's statement provides that all \$8 million in planned improvements be collected at once and proportionately by customer; however, the Company spread the cost over five years in its Application, and the current rate design in Brentwood does not have all 3,980 customers pay a flat rate without regard for customer class. PAWC M.B. at 18. Therefore, over five years' time, the Borough would collect sufficient revenues to complete PAWC's projected capital improvements while paying at least 7.3% less per month than under PAWC's estimated rate increase of 11%, before factoring in the Borough's lower cost of capital. OCA St. 1SR at 7 ("Brentwood Borough's cost of capital is 4.37%" while "PAWC's cost of capital is 7.10%.")<sup>9</sup>

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<sup>9</sup> While PAWC might argue that, due to "economies of scale," the Company might be able to obtain materials at a lower cost than the Borough, no evidence was presented which would support such an argument, and it should be given little weight. PAWC provided an example of such economies by referencing the Company's ability to procure pipe and light vehicles for lesser costs than market index or dealer invoices, respectively. PAWC St. 1-R at 13; OCA St. 1SR at 5. Notably, the Company's comparison was to market indices, and not to the cost at which the Borough would procure similar materials and equipment. OCA M.B. at 40. Regardless, any economies of scale which would result are not so great as to eliminate Brentwood's projected revenue deficiency. OCA St. 1SR at 5; OCA M.B. at 40.

Third, PAWC’s “\$2,000 a head” methodology fails to consider the Borough’s ability to draw on low- or no-interest grants and loans to reduce the cost of needed capital investment to consumers. For example, the Borough is able to receive ALCOSAN Grow grants to assist with remediating inflow and infiltration (I/I) into its collection system, one of the primary concerns within the ALCOSAN regional interceptor systems. OCA M.B. at 27-28; OCA Exh. ND-5. Further, the Borough could pursue loans or grants through the Pennsylvania Infrastructure Investment Authority (PENNVEST), to address issues including and beyond I/I. *About Us*, PENNVEST (last accessed Dec. 5, 2023)<sup>10</sup>. By utilizing programs such as ALCOSAN Grow or PENNVEST, the Borough would be able to significantly reduce any burden which would be placed on its ratepayers to fund capital improvements.

Therefore, the arguments presented by PAWC that the Borough would need to increase rates by at least 20% if the Application is not approved, and that Brentwood customers would need to each pay \$2,000 to receive PAWC’s planned capital improvements if the Application is not approved, are purely speculative and not tied to any evidence. Further, both arguments can be *generously* characterized as misleading. The 20% rate increase is based on the CPI, a tool which measures the increased cost of consumer goods and services over time, not the cost it takes a utility to provide service over time. PAWC M.B. at 26. PAWC’s “\$2,000 a head” argument is based not only on the unsupported premise that PAWC’s planned capital improvements are all necessary, but also that customers would have to pay for planned capital improvements all at once and would contribute identically across customer classes. PAWC M.B. at 18. As a result, the OCA submits that PAWC’s estimates should be given no weight when performing the net benefits assessment.

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<sup>10</sup> <https://www.pennvest.pa.gov/Pages/default.aspx>.

b. There Is No Net Benefit to the Proposed Transaction.

When considering the long-term rate impact of the proposed transaction on both PAWC and Brentwood customers, the Company has not provided evidentiary support to establish that net benefits will result. To the extent that PAWC has alleged any benefits exist – with the exception of PAWC’s ability to provide a low-income discount program – those benefits result entirely from PAWC’s fitness, are not specific to this transaction, and do not differ substantially from the service currently provided by the Borough. *See* OCA M.B. at 18, 19 (providing that the availability of a low-income program to a small number of Brentwood customers does little to alleviate the rate pressure which will be placed on all Brentwood customers over time). As a result, PAWC has failed to meet its burden of proof under Section 1103 of the Public Utility Code, as interpreted by the Commonwealth and Supreme Courts, to establish that net benefits would result from the proposed transaction. Where a utility is unable to establish a net benefit would result from an Application under Section 1102, the Commission should reject that Application. *City of York*, 295 A.2d at 141. Therefore, the OCA respectfully requests that PAWC’s Application be rejected.

3. PAWC Cannot Treat ALCOSAN Charges as Pass-Through Charges Under the Public Utility Code, if the Application Is Approved.

PAWC cannot be allowed to treat ALCOSAN charges as pass-through charges, as the Company has cited no provision of statutory or regulatory authority to support its proposal and has not provided sufficient evidence to warrant the treatment of ALCOSAN charges as adjustable rates. OCA M.B. at 29-32. It is necessary for the public interest that, should the Commission approve the Application, the Company’s proposal to include ALCOSAN treatment rates as pass-through charges must be denied. Under Section 1103(a) of the Public Utility Code, the Commission is permitted to impose conditions on the approval of an Application, if the conditions are just and reasonable. 66 Pa. C.S. § 1103(a). Therefore, the OCA respectfully requests that if the application

is approved, the Commission should require PAWC to include ALCOSAN rates as PAWC's operating expenses, as in the Company's other collection-only systems. OCA M.B. at 29-32; OCA St. 1 at 18; OCA St. 1SR at 11.

Under PAWC's current proposal, Brentwood customers would be charged wastewater treatment as a pass-through for ALCOSAN rates, while PAWC's other collection-only systems have the treatment cost included in operations expenses. *See* 66 Pa. C.S. § 1304 ("No public utility shall, as to rates, make or grant any *unreasonable* preference" to a particular class of consumers.) (emphasis added); OCA M.B. at 30-32; Tr. at 407-10. While PAWC has argued that the Brentwood system is factually different from the other collection-only systems, the semantic distinction that PAWC tries to make fails, and, within the Public Utility Code and the Commission's Regulations, there is no legal basis upon which PAWC can provide ALCOSAN charges as pass-through rates. Notably, while the Public Utility Code allows for public utilities to seek adjustable rates, PAWC has not met its evidentiary burden under the Code to establish that adjustable rates are required in this instance. 66 Pa. C.S. § 1307. PAWC does not currently have an adjustable rate mechanism for treatment costs for its other collection-only system. Tr. at 407-10. As a result, the current proposal would result in harm to Brentwood customers and current and future PAWC customers in collection-only systems.

To support its theory, PAWC compared ALCOSAN charges to the pass-through charges used by electric distribution companies (EDCs) to recover costs associated with power delivery from electric generation suppliers (EGSs). PAWC M.B. at 53. This comparison misses the mark. First, unlike in the electric choice context, there is no statutory basis for Brentwood customers to choose who provides their wastewater treatment. A household does not get to decide whether it wants PAWC to treat its wastewater or ALCOSAN, or another provider. Only customers who

affirmatively enter into a contract with an EGS pay for electricity through consolidated billing. *See* Electricity Generation Customer Choice and Competition Act, 66 Pa. C.S. §§ 2801 *et seq.* (creating competitive markets for the purchase of electricity by retail customers, commonly referred to as the “Choice Act”). Brentwood customers have no “choice” who provides their wastewater treatment service: it is provided by ALCOSAN.

To the extent an analogy can be made, ALCOSAN charges are more akin to the provision of default service by an EDC than to a customer shopping on the competitive electric market for an EGS. Default service providers pass-through to retail customers “all reasonable costs incurred” to provide default electric service, especially generation costs, through a Section 1307 adjustable-rate mechanism. 66 Pa. C.S. § 2807(e)(3.9). Costs which are passed-through are subject to Commission review of the reasonableness of the contract for generation, but the Commission may not deny the pass-through charges if the generation contract is, itself, reasonable and consistent with a Commission-approved default service plan. *Id.* ALCOSAN rates are not subject to Commission review, the Commission has no review over the Z Agreement, and there is no statutory authorization to pass-through such charges; therefore, any comparison between the retail electric market and ALCOSAN service is without merit.

The Public Utility Code and Commission regulations contain no parallel regulation or rule which allows for the implementation of pass-through charges for water and wastewater service, with the exception of 71 P.S. Section 720.212. *See* OCA M.B. at 32; 71 P.S. § 720.212 (statutorily codifying the Cooperation Agreement between the Pittsburgh Water and Sewer Authority (PWSA) and the City of Pittsburgh, requiring PWSA to continue the ALCOSAN billing arrangement which existed before it came under Commission regulation). As such, PAWC cannot compare its proposal to pass-through charges for EDCs or for PWSA. *Compare* PAWC M.B. at 54 (alleging there is no

reason that PAWC cannot treat ALCOSAN charges the same as PWSA) *with Cooperation Agreement Between the City of Pittsburgh and the Pittsburgh Water and Sewer Authority*, Docket No. U-2020-3015258 (Initial Decision Aug. 31, 2020) (providing that the enactment of 71 P.S. § 720.212 removes consideration of PWSA’s treatment of ALCOSAN charges – due to its inclusion in the Cooperation Agreement – from Commission authority)<sup>11</sup>.

Absent a specific statutory or regulatory authorization, the Commission may only create pass-through charges under Section 1307; however, PAWC did not present evidence sufficient to demonstrate that ALCOSAN charges should be treated as an adjustable rate under Section 1307. OCA M.B. at 51; *Aqua Pennsylvania, Inc. v. Pa. P.U.C.*, Docket No. R-2021-3027385, 2022 PA. PUC LEXIS 161, \*155 (Order May 12, 2022) (Aqua 2021 Base Rate Case)<sup>12</sup>. The Commission has previously required that the utility requesting a pass-through under Section 1307 demonstrate that there is a need for the pass-through, and the costs to which it applies are unique, unexpected, or non-recurring, such that they are not normal, ongoing costs of providing water service. *Id.* Further, the charges the utility requests to pass-through must be readily identifiable and beyond the control of the requesting public utility, such as the cost-incurred to provide purchased water. *See Popowsky v. Pa. P.U.C.*, 13 A.3d 583, 591 (Pa. Cmwlth. Ct. 2011). PAWC has not attempted to provide evidence to satisfy any of these requirements.

Because PAWC has no statutory or regulatory authorization to treat ALCOSAN charges as a pass-through and has not provided sufficient evidence to support the treatment of ALCOSAN charges as an adjustable rate under Section 1307, PAWC’s proposal that ALCOSAN charges be included in Brentwood rates as a pass-through charge should be rejected. Instead, PAWC should be required to treat Brentwood’s treatment costs as if it were one of the other collection-only

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<sup>11</sup> Available at: <https://www.puc.pa.gov/pcdocs/1675681.pdf>.

<sup>12</sup> Available on the Commission’s website at: <https://www.puc.pa.gov/pcdocs/1744354.pdf>.

systems serviced by PAWC, if the Application is approved. OCA M.B. at 30-32; Tr. at 407-10. However, PAWC has failed to demonstrate through credible evidence that the proposed Transaction will result in affirmative public benefits under Section 1103 of the Public Utility Code as interpreted by *City of York* and its progeny. Therefore, the OCA respectfully requests that the instant Application be denied.

B. Section 1329

As discussed in the OCA's Main Brief, the process for determining the fair market value is based on two separate appraisals that reflect the judgments and choices made by each utility valuation expert. OCA M.B. at 41. PAWC's proposed rate base is overstated due to the inclusion of a portion of plant which provides free service to upstream municipalities within the ALCOSAN treatment network. If the Commission approves the proposed acquisition, the Commission cannot include the rate base proposed by PAWC until accurate UVE appraisals are submitted by the Company and the Borough which does not include the portion of plant which provides free service. OCA M.B. at 44-47; I&E St. 1-SR at 20.

1. Fair Market Value for Ratemaking Purposes

While PAWC argues that the portion of plant which provides free service to upstream municipalities is used and useful, the Company does not articulate a position on what the actual fair market value of the system for ratemaking purposes should be if that portion of plant is not included. *See* PAWC M.B. at 33. Therefore, the Company's baseless argument should be rejected for the reasons set forth *infra*, in Section IV.B.6.a, as well as in the OCA's Main Brief and the testimony presented by Mr. Kubas on behalf of I&E. OCA M.B. at 44-47; I&E St. 1-SR at 20.

2. Tariff and Rates

Similarly, PAWC provided no support for how its proposed tariff is reasonable and in accordance with the law, when the proposed tariff includes ALCOSAN rates as a pass-through

charge and does not provide notice to customers of ALCOSAN's schedule of rates. PAWC M.B. at 34. The OCA opposes PAWC's proposed tariff supplement attached to its application, effective upon Closing of the instant transaction. OCA M.B. at 42. PAWC has provided no support for its argument that ALCOSAN charges should not be included in its tariff, as the Company has cited to no statutory or regulatory provision which would permit such a charge, and provided no evidence to distinguish its proposed treatment of ALCOSAN charges from how treatment costs are addressed in the Company's other collection-only systems. *See* 66 Pa. C.S. § 1304; *supra* at Section IV.A.3; OCA M.B. at 30-32; Tr. at 409, 410.

### 3. DSIC

PAWC has accepted the OCA's recommendation that Brentwood assets be excluded from the Distribution Service Improvement Charge (DSIC) until Brentwood customers begin paying the DSIC. *See* PAWC M.B. at 34; OCA M.B. at 42, 43; PAWC St. 3-R at 5. However, PAWC's argument that it should not be required to file an amended Long-term Infrastructure Improvement Plan (LTIIP) within 90 days of closing should be rejected. The Company's disagreement with the OCA's recommendation stems from the vague statement that there are many factors the Company considers when filing its amended LTIIP, including the impact the addition to rate base authorized for its acquisitions has on its overall rate base. PAWC M.B. at 35. The OCA submits that, due to the Company's *many* pending acquisitions which may close within 90 days of closing of the proposed transaction, PAWC's argument fails to consider how much its existing rate base may change in the coming months. OCA M.B. at 43; OCA St. 1 at 21. Filing an amended LTIIP would allow for Commission review of the proposed capital expenditures in the myriad systems which will have been recently acquired by the Company and allow for the DSIC to be applied to spread the cost of anticipated capital expenditures associated with the Company's proposed acquisitions across the PAWC customer base.

4. Claims for AFUDC and Deferred Depreciation

PAWC does not object to the OCA's recommendation that the Allowance for Funds Used During Construction (AFUDC) for post-acquisition improvements not recovered through the DSIC for book and ratemaking purposes, as well as deferred depreciation on those improvements, be litigated in the first Base Rate Case which includes the Brentwood system. PAWC M.B. at 35. As such, the parties agree that the Commission should address the Company's AFUDC and deferred depreciation in its 2023 Base Rate Case, which it has filed and includes the Brentwood system assets, if the instant Application is approved. *See* PAWC 2023 Base Rate Case.

5. Transaction and Closing Costs

The OCA has provided no evidence on, or adjustments to, the transaction and closing costs claimed by PAWC in this Application. However, the OCA submits that it retains the ability to contest the reasonableness of any legal or engineering fees incurred by PAWC as a result of the instant Application, including those legal and engineering fees PAWC is obligated to pay to the Borough under the terms of the Asset Purchase Agreement. Any transaction and closing costs which the Company seeks to recover will be addressed in the Company's 2023 Base Rate Case. I&E St. No. 1-R at 31; PAWC M.B. at 36.

6. Additional Issues

a. Plant in Service Used to Serve "Non-Customers"

The UVE appraisals submitted by PAWC and Brentwood include plant which is not used and useful because it provides free service to non-customers. Under the Public Utility Code, no regulated public utility can provide free service through any mechanism, direct or indirect, even if offered as consideration for the purchase of an asset. *Phila. Suburban Water Co. v. Pa. P.U.C.*, 808 A.2d 1044, 1050 (Pa. Cmwlth. Ct. 2002) ("Free public utility service has been examined by our appellate courts and found to be anathema to a system of regulation and publication of a utility's

tariffs.”); OCA M.B. at 45. Where a utility does offer free service, the portion of plant which provides free service is not used and useful, and, therefore, cannot be added to rate base when acquired under Section 1329. 66 Pa. C.S. § 102 (“‘Rate base.’ The value of the whole or any part of the property of a public utility which is used and useful in the public service.”); 66 Pa. C.S. § 1329(c); OCA M.B. at 46.

While PAWC alleges that the entirety of the Brentwood system is used and useful, the Company fails to consider the portion of plant which contributes to providing free service to its upstream municipalities, the Whitehall Borough and City of Pittsburgh. PAWC M.B. at 38. No witness has stated that the trunklines which accommodate intermunicipal flows provide service *only* to Whitehall Borough and the City of Pittsburgh; however, the Commission would be remiss to fail to consider the portion of flow which the intermunicipal trunklines do bear from upstream municipalities. There is no data to show how much flow the trunklines accept from upstream municipalities; for all PAWC or the Borough know, Whitehall Borough and the City of Pittsburgh could be responsible for 99% of the trunklines’ usage. I&E St. 1-SR at 20; OCA M.B. at 46. According to the Company, the Commission should ensure “that the cost causers pay the appropriate costs.” PAWC M.B. at 53.

In spite of the Company’s mixed messaging, it is still attempting to include the intermunicipal assets in its rate base. While the process to distinguish what portion of the plant that provides free service to upstream might be difficult, PAWC does not know how difficult it would be, as no attempt was made to parse out any plant which is not used and useful in the public service. I&E St. 1-SR at 20. If the Company seeks to have the instant Application approved, it need not include those assets in rate base; it does not need to violate the Z Agreement and Cooperation Agreement by charging upstream municipalities for their usage of the intermunicipal trunklines.

See App'x A-25.3; OCA M.B. at 46. If the Application is approved, Brentwood's ratemaking rate base can be incorporated into that of PAWC without removing the system from the ALCOSAN treatment network or requiring that Brentwood build its own wastewater treatment plant, so long as only that rate base which does not provide free service is included under Section 1329. Compare PAWC M.B. at 39 with OCA M.B. at 46.

PAWC's assertions that requiring a more complex UVE appraisal would be a disincentive to other municipalities within the ALCOSAN treatment network from selling their collection systems, and that doing so would constitute bad public policy, are irrelevant. PAWC M.B. at 40. Policy considerations are always made subsequent to the enforcement of the Commission's statutory and regulatory mandate, and, even then, are not binding on the Commission. See 66 Pa. C.S. § 1329(c) (only "ratemaking rate base of the selling utility shall be incorporated"); see also *Pa. P.U.C. v. Philadelphia Gas Works*, Docket No. R-2023-3037933, at 35, 36 (Order Nov. 9, 2023) (Policy Statements do not have the force of law; rather, they serve "as a guide for the Commission to consider.")<sup>13</sup>. The Commission has a statutory mandate – which has been reiterated many times by the Commonwealth and Supreme Courts and has been upheld by the Supreme Court of the United States – to *only* include plant which is used and useful to the public service in ratemaking rate base. See OCA M.B. at 44; see also, e.g., *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 308 (1989). Therefore, any argument which relies on a policy of not disincentivizing the sale by municipally-owned collection systems in the ALCOSAN region patently ignores the Commission's statutory mandate.

PAWC's argument that the burden of performing complex UVE appraisals to exclude the portion of plant which provides free service to upstream municipalities should, as a result, be given

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<sup>13</sup> Available at: <https://www.puc.pa.gov/pdocs/1804829.pdf>.

no weight. The cost of performing an accurate study is not material: when the Company requests that the Commission authorize the addition of plant to rate base, the Company bears the burden of providing accurate appraisals that contain only plant that is used and useful in the provision of public utility service. In order to ensure that only used and useful plant is added to PAWC's rate base should this Application be approved, the Commission should require the Company and the Borough to submit accurate UVE appraisals, which exclude the portion of plant that would provide free service to upstream municipalities, to determine the correct fair market value of Brentwood's rate base under Section 1329.

b. The Rate Freeze Is a Rate Stabilization Plan

The rate freeze agreed to by the Company and the Borough in the Asset Purchase Agreement is a rate stabilization plan. OCA St. 1 at 16. Under Section 1329, a rate stabilization plan is defined as “[a] plan that will hold rates constant or phase rates in over a period of time after the next base rate case.” 66 Pa. C.S. § 1329(g). In the Company's 2023 Base Rate Case, the proposed tariff phases in the Brentwood customers' rate increase on the second anniversary of the transaction's closing, increasing from 11% to 20.3%. PAWC 2023 Base Rate Case at Exh. 3-A. As this proposal seeks to hold rates constant after the Company's base rate case and later phase in new rates, the proposal is a rate stabilization plan. OCA M.B. at 47. Arguments raised by the Company that the proposed rate freeze is not a rate stabilization plan are not supported by any evidence other than the Company's blanket denial. PAWC's reliance on the Commission's decision in *New Garden* is misplaced, as the determination that *one* proposed rate freeze is not a rate stabilization plan does not mean that *all* rate freezes are not rate stabilization plans. PAWC M.B. at 41 (citing *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 (Order June 29, 2017) *rev'd on other grounds, McCloskey*).

The current proposal has the effect of depriving the Commission and the parties of the ability to fully evaluate the benefits and harms of the proposed transaction. OCA St. 1 at 16; OCA M.B. at 48. Therefore, the OCA respectfully requests that the Commission deny the proposed rate freeze and, if it is approved, require the Company to submit the evidence required under Section 1329(g).

c. Future Customer Notices Should Show a Range of Impacts

The OCA's witness Mr. DeMarco recommended in his direct testimony that PAWC should add a range of bill impacts in Section 1329 proceedings for a customer using 150% and 200% of PAWC's estimated average household water usage of 3,212 gallons per month. OCA St. 1 at 25. PAWC has provided no legal basis upon which Mr. DeMarco's recommendation should be rejected. Tr. at 383-84. The Company does claim that an improved notice might cause customer confusion; however, the notice suggested by Mr. DeMarco will assist more customers in determining the actual rate impact a proposed transaction might have on their monthly bills than it would potentially confuse. *See* OCA St. 1 at 25. Therefore, the Commission should require the Company to issue more accurate notices in future acquisitions under Section 1329.

C. Section 507

In its Main Brief, ALCOSAN requested that the Commission approve the Cooperation Agreement without amendment. ALCOSAN M.B. at 13. The OCA understands the importance to ALCOSAN of the enforceability of the Cooperation Agreement against the Borough following Closing to ensure the uniformity of Z Agreements within its treatment network and does not attempt to interfere with ALCOSAN's aims. *See* OCA M.B. at 53 (supporting the preservation of the uniformity of Z Agreements).

However, in its Main Brief, the OCA did propose amending the Cooperation Agreement. Specifically, the OCA requested that the Commission exercise its authority under Section 508 to

amend the Cooperation Agreement, requiring that PAWC include ALCOSAN treatment costs in its operations expenses and not as a pass-through charge or, in the alternative, that PAWC should be required to treat the ALCOSAN pass-through as an automatically adjustable rate under Section 1307(a), provide notice to its customers of ALCOSAN rates in its tariff and any rate increases, and that PAWC annually true-up the ALCOSAN rates collected against the amount paid to ALCOSAN. OCA M.B. at 49-53. The OCA submits that none of these proposed changes to the Cooperation Agreement would affect ALCOSAN's ability to uniformly enforce the Z Agreements or collect quarterly customer charges from PAWC. Therefore, the OCA argues that ALCOSAN's concerns are not affected by the proposed amendments to the Cooperation Agreement, and that the Commission should amend the Cooperation Agreement so that it is reasonable, legal, and otherwise valid, as it is currently inequitable as-written.

D. Preservation of the Z Agreement and other Z Agreements

The OCA does not contest ALCOSAN's aims of maintaining the uniformity among the Z Agreements. OCA M.B. at 53. However, the OCA does have concerns regarding the impact an acquisition by PAWC may have on the ALCOSAN region, as set forth more fully *supra* and in the Main Brief.

E. Recommended Conditions for Approval.

As set forth above and in the OCA's Main Brief, the OCA recommends that the Commission deny the relief requested in the Application. OCA M.B. at 53-58. If, however, the Commission approves the proposed acquisition, the OCA recommends that the following conditions be applied:

1. Missing Easements and Other Property Rights

The OCA presented no evidence on the issue of missing easements and other property rights.

2. Cost of Service Studies:

- *PAWC should be required to provide a separate Cost of Service Study for the Brentwood system, in the first base rate case which includes the system's assets, as well as all subsequent rate cases.*

3. Rate Freeze

- *The rate freeze provision should be rejected. OCA St. 2 at 11. If the Commission does not reject the rate freeze provision, the Commission should condition its approval on the recognition that the Commission retains the ultimate authority to set rates, including but not limited to, the authority to allocate revenues, if appropriate, to the Brentwood customers that are different from the restrictions contained in Section 7.03 of the Asset Purchase Agreement.*

4. Customer Notices

- *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.*

5. ALCOSAN Charges and Discounts (as discussed more fully in Section IV.A.3.)

- *PAWC should be required to include ALCOSAN treatment costs as an operations expense, recovered in base rate, and not as a pass-through, line item charge on bills.*

6. Specific Notice for Brentwood Customers Prior to Closing

- *PAWC should be required to provide an additional notice to current Brentwood customers because PAWC understated the potential rate impact of the proposed transaction.*

7. Payment Agent in Brentwood

- *PAWC should maintain a payment agent within the Borough of Brentwood.*

8. Additional Conditions

- *PAWC and Brentwood should be required to provide Utility Valuation Expert appraisals which do not include the portion of Brentwood's plant which provides free service before any portion of Brentwood's plant is included in rate base.*
- *The proposed projects reflected in the revised LTIIP should be in addition to, and not reprioritize, any capital improvements that PAWC was already committed to undertake for existing customers.*
- *Rate claims related to the accrual of AFUDC for non-DSIC eligible, post-acquisition improvements should be made in the next PAWC base rate case following the plant additions.*

**V. CONCLUSION WITH REQUESTED RELIEF**

For the reasons stated above, the Application should be denied. PAWC has failed to meet its burden of proof under Section 1102 and 1103.

Respectfully Submitted,

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