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December 14, 2023

VIA ELECTRONIC FILING

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17120

**RE: Docket No. A-2021-3024058– Application of Pennsylvania-American
Water Company to Acquire the Wastewater System Assets of the
Borough of Brentwood**

Dear Secretary Chiavetta:

We are counsel to the Borough of Brentwood (the “Borough”) in the above-referenced matter, and are submitting, with this letter, the Borough’s Reply Brief.

This document is being served via electronic mail on all parties of record. This document was also filed electronically with the Public Utility Commission on this date.

Thank you.

Very truly yours,

Sydney N. Melillo

CC: All parties of record
Thomas Wyatt, Esq.
Matthew S. Olesh, Esq.

CERTIFICATE OF SERVICE

I, Sydney N. Melillo, Esq., hereby certify that I have served a true and correct copy of the foregoing document upon the following parties via electronic mail:

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/s/ Sydney N. Melillo

Dated: December 14, 2023

BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

The Honorable Katrina Dunderdale, Presiding

In re: Application of Pennsylvania-American Water : Docket No. A-2021-3024058
Company under Section 1102(a) of the Pennsylvania :
Public Utility Code, 66 Pa C.S. § 1102(a), for approval :
of (1) the transfer, by sale, of substantially all of the :
Borough of Brentwood's assets, properties and rights :
related to its wastewater collection and conveyance :
system to Pennsylvania-American Water Company, :
and (2) the rights of Pennsylvania-American Water :
Company to begin to offer or furnish wastewater :
service to the public in the Borough of Brentwood, :
Allegheny County, Pennsylvania :

**REPLY BRIEF OF
THE BOROUGH OF BRENTWOOD**

/s/ Matthew S. Olesh

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Dated: December 14, 2023

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Pursuant to the procedural schedule established by the Honorable Katrina Dunderdale and in accordance with Commission Regulations at 52 Pa. Code § 5.501, the Borough of Brentwood (hereinafter “Brentwood” or the “Borough”) hereby submits this Reply Brief in support of the Application of Pennsylvania-American Water Company (hereinafter “Pennsylvania-American” or the “Company”), filed with the Public Utility Commission (the “Commission”) pursuant to sections 507, 1102, and 1329 of the Public Utility Code for approval to acquire the Borough’s wastewater collection and conveyance system (the “Proposed Transaction” or the “Application”). More specifically, the Borough submits this Reply Brief primarily in response to the Main Briefs submitted by the Office of Consumer Advocate (“OCA”) and the Bureau of Investigation and Enforcement (“I&E”) (collectively referred to herein as the “Advocates,” unless individually identified).

I. STATEMENT OF THE CASE

Please see Brentwood’s Main Brief.

II. BURDEN OF PROOF

Please see Brentwood’s Main Brief. Brentwood respectfully submits that as the applicant, Pennsylvania-American has satisfied its burden of proof, and the Advocates have not sufficiently rebutted Pennsylvania-American’s record evidence.

III. SUMMARY OF ARGUMENT

Despite the Borough and Pennsylvania-American offering testimony and other record evidence of the numerous benefits of the Proposed Transaction, the Advocates summarily dismiss the existence of any benefits from the Proposed Transaction. The briefs submitted by the Advocates make clear that they are more interested in setting policy than applying the law to the facts of this case. The Advocates’ stubborn refusal to recognize any benefit whatsoever in the Proposed Transaction – where even their own witnesses do so – calls the credibility of their

arguments into question and lays bare their goal of blocking any transaction that comes before the Commission involving a municipality selling its assets to a private actor that might result in a rate increase no matter how modest – *i.e.*, any transaction that comes before the Commission involving a municipality selling its assets to a private actor.

Pennsylvania-American has established a *prima facie* case that the Proposed Transaction satisfies the substantial affirmative public benefits test established by the Public Utility Code. The Advocates not only fail to present any credible evidence to rebut this presumption but ignore the undisputed record evidence Pennsylvania-American and Brentwood have adduced throughout this proceeding. Thus, for the reasons set forth herein, the Borough respectfully requests that the Commission reject the arguments afforded by the Advocates (which are wholly unsupported by the record evidence and, in fact, directly contradicted by the record) and approve the Proposed Transaction.

IV. ARGUMENT

A. Section 1102 and 1103 Issues

1. Fitness

Please see Brentwood’s Main Brief.

2. Substantial Public Benefit Test

a. **The Record is Replete with Affirmative Public Benefits Contrary to the Advocates’ Erroneous Proposition that the Record is “Devoid” of Benefit.**

In its Main Brief, the OCA states that “[s]imply put, the record is replete with harm and devoid of benefit.” *See* OCA Main Brief, p. 25. Similarly, I&E states that “[t]he Applicant in this proceeding has made unquantified generalized assertions that current customers will benefit from the economies of scale, but I&E submits that this is simply insufficient to show any affirmative public benefits.” *See* I&E Main Brief, p. 7. While the Borough believes these statements are so

far from the truth that they must be hyperbole, the Borough is compelled to summarize (once again) the numerous benefits of the Proposed Transaction set forth in the evidentiary record in an abundance of caution.

Of significant importance considering the right to a clean environment in the Pennsylvania Constitution, the Proposed Transaction adds a proven partner in Pennsylvania-American to help remediate the environmental challenges specific to Brentwood and the ALCOSAN region at large. Despite the Advocates' efforts to outright deny the existence of this benefit or dismiss it as merely "aspirational," Pennsylvania-American provides numerous examples of its concrete record of success of improving and correcting systems with similar compliance issues as Brentwood and the ALCOSAN region faces (*i.e.*, sanitary sewer overflows and high inflow and infiltration as a result of major storm events). *See* PAWC Statement No. 2, pp. 20–26 (summarizing Pennsylvania-American's environmental compliance experience in the Commonwealth and providing illustrative examples of Pennsylvania-American's success in improving environmental issues in both Clarion and Scranton).

As has been discussed at length by the Borough and Pennsylvania-American witnesses, the Borough is currently subject to, and has been subject to, a regulatory order with the ACHD for 16 of the last 19 years. *See* PAWC Statement No. 2-R, p. 5. Similarly, ALCOSAN has been subject to a consent decree with EPA, PaDEP, and the ACHD since 2008, modified as recently as May 2020 – referred to herein as the Modified Consent Decree. *See* PAWC Statement No. 2, pp. 11–12. Pennsylvania-American employs a Manager of Wastewater Compliance—an employee whose sole responsibility is to address environmental compliance for all Pennsylvania-American's wastewater treatment systems in conjunction with its compliance team. *See id.* at p. 17. The Borough not only has no such employee who is solely dedicated to compliance, but the Borough

does not currently employ an in-house engineer at all. *See* Brentwood Statement No. 1-R, p 3. Likewise, the Borough does not have access to the same resources and tools to monitor, address, and remedy environment compliance issues. *See id.* Instead, the Borough only has eight Public Works employees assigned to sanitary sewer service (including the slew of other responsibilities for the Public Works Department). *See* Brentwood Statement No. 1, pp. 14–15; Brentwood Statement No. 1-R, pp. 2–4 (comparing Brentwood’s Public Works Department to Pennsylvania-American’s team).

Since the OCA cannot actually refute that Pennsylvania-American has the experience and capital to implement the necessary improvements to Brentwood’s nearly century-old System, it argues that Pennsylvania-American’s access to capital and record of environmental stewardship “are not specific to this transaction.” *See* OCA Main Brief, pp. 14, 17. For reasons unbeknownst to the Borough, the OCA seemingly (and incorrectly) argues that Pennsylvania-American and Brentwood only identified benefits that stem from Pennsylvania-American’s technical, managerial, and financial fitness. *See id.* This is inaccurate and a misstatement of the record developed in this proceeding. As Brentwood’s witness, Mr. Zboyovsky, explained, the Borough gave great weight to Pennsylvania-American’s record for successfully addressing PaDEP and EPA compliance orders that require operational and capital improvements throughout the bidding process. *See* Brentwood Statement No. 1-R, p. 7. With environmental challenges being a prominent motivation behind Brentwood’s decision to sell its System, the Borough Council selected Pennsylvania-American as the winning bidder due to this unique reputation and experience improving water and wastewater systems with on-going environmental issues in the Commonwealth so that it could address the issues faced by Brentwood. *Id.*; *see also* PAWC Statement No. 2, pp. 20–26 (summarizing Pennsylvania-American’s environmental compliance

experience in the Commonwealth and providing illustrative examples of Pennsylvania-American's success in improving environmental issues in both Clarion and Scranton).

Pennsylvania-American's capability to address the environmental concerns that are specific to Brentwood and the ALCOSAN region is evidenced by the five-year capital plan, appended as PAWC Exhibit DJH-2 to PAWC Statement No. 2, the Direct Testimony of Daniel Hufton, P.E., that sets forth Pennsylvania-American's commitment to address and invest millions of dollars into specific projects necessary to bring the System into compliance under its ACHD regulatory order and current O&M Program Plan. *See* PAWC Statement No. 2, pp. 17–18 (describing Pennsylvania-American's plan to address the environmental challenges in Brentwood). These benefits are derived not from Pennsylvania-American's "fitness," but from its commitment to address the environmental compliance challenges to wastewater operations in Brentwood specifically and ability to follow through on those commitments. The Borough selected Pennsylvania-American because the Proposed Transaction provides for tangible benefits beyond the Company's undeniable, undisputed, and unmatched technical, managerial, and financial fitness.

Moreover, the sale to the Pennsylvania-American does not only provide benefits in the form of environmental compliance. Brentwood customers will experience numerous customer service benefits that have been detailed at great length in this proceeding, but the Advocates simply ignore. These benefits include, but are not limited to, the following:

- Expanded customer service hours – including the ability to speak with a live representative 24/7/365, and access to Pennsylvania-American's field service crews for emergency field work (main breaks, sewer backups, overflows) 24/7/365. *See* PAWC Statement No. 2, pp. 28, 33. Brentwood's current process requires the customer to either (1) leave a voice message with the Public Works Department that will be addressed the following day, or (2) call 911 to report the emergency, which will only be addressed the same evening if there is a public safety concern. *See* Brentwood Statement No. 1, p. 16.

- Access to Pennsylvania-American’s three tiers of low-income discounts to fixed and volumetric wastewater charges. *See* PAWC Statement No. 3, p. 16–18 (describing and summarizing the available Pennsylvania-American’s low-income programs);
- An improved, consolidated billing process for Brentwood customers. *See* Brentwood Statement No. 1, p. 15–16.

Thus, the Advocates’ hyperbolic conclusion that the Proposed Transaction is “devoid” of any benefits is not only unsubstantiated but is directly contradicted by the record evidence. There is simply no record evidence to rebut the *prima facie* case that the Proposed Transaction satisfies the substantial affirmative public benefits test.

b. The Advocates’ Position that the Substantial Public Benefits of the Proposed Transaction Do Not Outweigh the “Harm” of the Modest Potential Rate Impacts to Customers is Unsupported by the Record Evidence and, in fact, is Directly Contradicted by the Record Evidence.

Despite the Advocates’ best efforts to ignore the record evidence, the Proposed Transaction provides numerous public benefits that will not only be experienced by Brentwood customers, but also the entire ALCOSAN region. The only conceivable harm these numerous benefits are to be weighed against is a projected modest rate increase of 11% for Brentwood customers and a *de minimis* rate increase for Pennsylvania-American’s existing wastewater customers. The Advocates identified no other credible detriments.¹

¹ In its Main Brief, the OCA seeks to manufacture an additional “harm” into the Proposed Transaction by erroneously stating that the Borough has “refused” to cooperate with ALCOSAN since entering the Proposed Transaction and, therefore, Brentwood customers and the neighboring municipalities will be deprived the regionalization benefits from “the ALCOSAN treatment regional cooperative.” *See* OCA Main Brief, pp. 33-36. This contention is wholly unsupported by the record evidence, and – as the OCA is aware – entirely devoid of truth. Brentwood, ALCOSAN, and Pennsylvania-American engaged in active discussions to preserve the integrity of the Z Agreement and ensure continued compliance with the Modified Consent Decree for the ALCOSAN region if the Proposed Transaction is approved. The result was not only the execution of the Cooperation Agreement (that sets forth and allocates certain rights and obligations from Brentwood to Pennsylvania-American under the Z Agreement) but also a stipulation among Brentwood, ALCOSAN, and Pennsylvania-American to ensure that each party understood and agreed to honor all respective duties and obligations under the Cooperation Agreement and Z Agreement if the Proposed Transaction is approved. *See* Transcript of Evidentiary Hearing, November 8, 2023, pp. 159 (describing the contents of Brentwood, ALCOSAN, and Pennsylvania-American stipulation); *see also* Transcript of Evidentiary Hearing, November 14, 2023, pp. 321:3–324:12 (same). This stipulation was not

As Mr. Zboyovsky testified, however, a rate increase to Brentwood customers is inevitable regardless of whether the Proposed Transaction is approved given the System's age and the ongoing environmental challenges in the ALCOSAN region regardless of whether the Proposed Transaction is approved. *See* Brentwood Statement No. 1, p. 10; Brentwood Statement No. 1-R, pp. 7–8. Thus, when conducting the substantial public affirmative benefits test, it is clear that the weight of benefits to be realized under this Proposed Transaction far outweigh the sole potential harm relied upon by the Advocates, which will be realized even if the Proposed Transaction is denied. As Brentwood made clear in its Main Brief, any argument that Brentwood would somehow possibly be able to obtain similar benefits in the absence of the Proposed Transaction (a) has no evidentiary support in the record beyond sheer speculation and (b) would only theoretically be possible (implausible as that scenario is) if the exact same asserted harm – rate increases – was even further imposed. *See* Brentwood Main Brief, pp. 20-24.

Thus, as a threshold matter, it is questionable whether the potential rate impact of the Proposed Transaction can even be considered a true harm in the first place. If the Proposed Transaction is denied, Brentwood will need revenue through either its own rate increases, the imposition of increased taxes, or both. If approved, the Proposed Transaction will not only mitigate against such measures but will provide concrete benefits in numerous ways that are specific to Brentwood, including improvement of public services and the ability to better address environmental issues. The political judgment of Brentwood's elected officials as to the best way to attain these benefits should not be supplanted. Moreover, in the absence of the Proposed Transaction, Brentwood's ability to raise any necessary revenue (including through rate increases)

admitted into the evidentiary record due to the Advocates' objections, including the OCA. The OCA cannot seek to preclude evidence on the matter and then claim that the lack of such evidence is a harm when it knows full well that no such harm will result.

will be unchecked, whereas if the Proposed Transaction is approved, the Commission can and will control any potential rate impact prospectively through the ratemaking process. The Borough has no doubt that the Commission would do so consistent with its statutory obligations to set “just and reasonable” rates. Thus, it can hardly be said that a harm will result where Brentwood’s residents will be in nearly identical positions with respect to paying increased amounts except with the Proposed Transaction providing additional protection that will not exist if it is denied.

Nonetheless, the Advocates’ position appears to be that any rate increase constitutes harm that cannot be counterbalanced by any amount of benefit, no matter how apparent. In taking this position, the Advocates seek to minimize or, more often, flat-out ignore the panoply of benefits that exists in the evidentiary record in the furtherance of their own policy goals. In doing so, the Advocates ignore the legal mandate to consider all benefits, no matter how inconsequential or “aspirational” the Advocates may believe them to be, in undertaking the requisite balancing of benefits against harm set forth by sections 1102 and 1103 of the Public Utility Code as interpreted by the Pennsylvania Courts. *See Popowsky v. Pennsylvania Pub. Util. Comm’n*, 937 A.2d 1040, 1057 (Pa. 2007) (“[t]he Commission is not required to secure legally binding commitments or to quantify benefits where this may be impractical, burdensome, or impossible; rather, the [Commission] properly applies a preponderance of the evidence standard to make factually-based determinations (including predictive ones informed by expert judgment concerning certification matters.”).

Moreover, in coming to their respective conclusions, the Advocates hang their hats on the recent decision of the Commonwealth Court in the *Cicero* case. *See Cicero v. Pennsylvania Pub. Util. Comm’n*, 300 A.3d 1106 (Pa. Cmwlth. 2023), *petitions for allocatur pending*. However, the Advocates both (a) fail to acknowledge that the Court’s holding in that case is not final, as it

remains subject to the potential for further review by the Pennsylvania Supreme Court, and (b) misapply even the legal standards that were erroneously created in *Cicero*. For example, *Cicero* did not stand for the notion that a system must be “distressed” for a sale to realize substantial public benefit, yet the Advocates go to considerable lengths to make that very point, arguing that the service provided by Brentwood to date has been “adequate.” There are multiple issues with this approach.

First, the evidentiary record does not support the premise that wastewater service in Brentwood has actually been adequate. An illustrative example of Brentwood’s inadequacy in its ownership of the System is evidenced by its inability to get out from under regulatory oversight for 16 of the last 19 years. *See* Transcript of Evidentiary Hearing, November 8, 2023, pp. 149:22–150:7 (explaining that Brentwood being under a regulatory order for the vast majority of the last two decades is inconsistent with adequate operation of a wastewater system). Additionally, the Borough provided a concrete, illustrative example of how the Borough was unable to promptly address sewer back-ups in several residential Brentwood customers’ homes in November 2022 due to its lack of resources. *See* Brentwood Statement No. 1, p. 16; Brentwood Statement No. 1-R, p. 4.

Conversely, if the Proposed Transaction is approved, Pennsylvania-American’s field service crews are available for emergency field work (main breaks, sewer backups, overflows) 24/7/365 – a marked improvement from the customer service experience had by the Brentwood customers affected by the November 2022 back-ups under Brentwood ownership. Finally, Mr. Zboyovsky admits that the Borough and its small Public Works Department is in over its head in its operation of sanitary sewer service and has not proactively addressed the System’s environmental issues either. *See* Brentwood Statement No. 1-R, p. 4 (“It feels as if the Borough is

often scrambling through its day-to-day administration of sanitary sewer service and management of the System.”); *see* Brentwood Statement No. 1-R, p. 5 (“I cannot recall an instance where the Borough proactively funded, designed, and implemented an improvement in its System (aside from routine required maintenance and repairs) as is evident from the fact that the majority of the System is nearly a century old.”). While the Advocates may not like these facts because they do not fit neatly within the alternative narrative they seek to create, they cannot point to any actual record evidence contradicting the fact that the services being provided by Brentwood are heading in the wrong direction and could benefit substantially from the course correction that the Proposed Transaction offers.

Second, even assuming for the sake of argument that Brentwood provides services that constituted some degree of “adequacy,” that does not preclude a finding of substantial public benefits that outweigh the harms posited by the advocates. Just because service may be adequate does not mean that it cannot be better, and just because service can be better does not mean that Brentwood itself is equally capable of providing it.

Here, Brentwood has submitted un rebutted record evidence that it will not be able to provide the same or substantially similar service to that which will be provided by Pennsylvania-American if the Proposed Transaction is approved. For example, the Borough’s eight-person Public Works Department pales in comparison to Pennsylvania-American’s approximate 1,200 professionals whose sole focus and priority day-to-day is the provision of safe, reliable, and cost-efficient water and wastewater service. *See* Brentwood Statement No. 1, pp. 14–15; Brentwood Statement No. 1-R, pp. 2–4 (comparing Brentwood’s Public Works Department to Pennsylvania-American’s team). The Borough also does not currently employ an in-house engineer at all. *See* Brentwood Statement No. 1-R, p. 3. Likewise, the Borough does not have access to the same

resources and tools to monitor, address, and remedy environment compliance issues as Pennsylvania-American. *See id.* Pennsylvania-American not only has a dedicated compliance team with access to its statewide resources and advanced management tools, and the resources of its parent company to address environmental issues – but Pennsylvania-American also employs a Manager of Wastewater Compliance whose sole responsibility is to ensure environmental compliance across all Pennsylvania-American’s wastewater treatment systems in the Commonwealth. *See PAWC Statement No. 2, p. 17.* It is hard to imagine how anyone can characterize the continued provision of services by Brentwood as “adequate” in light of this evidence.

Moreover, the position espoused by the Advocates – that any municipality is capable of providing the same benefits as a private actor if it has access to enough resources to do so – is grounded in a fallacy that exists outside of any semblance of practical reality. It is easy to say, as I&E’s witness tries to do, that a municipality is “equally capable of providing” any benefits or upgrades that are contemplated by Pennsylvania-American by throwing enough money at the situation. Left unsaid, however, are the harms that would almost certainly come to pass if a municipality sought to increase its available capital, either through taxes, loans, or some other method of borrowing, the burden for which is ultimately shouldered by its residents.

Thus, the Advocates seek to take *Cicero* to an illogical, unsustainable place. It is not enough for the Advocates to claim that the services being proposed by Pennsylvania-American are the same as those already being provided by Brentwood, as such a conclusion is patently unsupported by the record evidence. Instead, the Advocates essentially seek to extrapolate *Cicero* to claim that all benefits of a proposed transaction must be discounted because, in theory, a municipality might be equally capable of providing any of them with enough resources. Such an

absurd conclusion is not what was intended by the Commonwealth Court in *Cicero* as it essentially reads the “substantial public benefit” test out of existence.

B. Section 1329 Issues

1. Fair Market Value for Ratemaking Purposes

Please see Brentwood’s Main Brief.

2. Tariff and Rates

Please see Brentwood’s Main Brief.

3. DSIC

Please see Brentwood’s Main Brief.

4. Claims for AFUDC and Deferred Depreciation

Please see Brentwood’s Main Brief.

5. Transaction and Closing Costs

Please see Brentwood’s Main Brief.

6. Additional Issues

a. All of Brentwood’s Assets Are Used and Useful in Providing Public Utility Service to Brentwood’s Customers

Brentwood notes that it is simply incorrect for the Advocates to claim that the System assets are not fully “used and useful.” Although raised in the context of the determination of rate base, this issue has important implications for the Proposed Transaction as a whole, particularly as it relates to the use of intermunicipal trunk lines. These trunk lines are critical to connecting Brentwood’s System to ALCOSAN for treatment, the exclusive wastewater treatment provider in the greater Pittsburgh area pursuant to the Z Agreement. Without the trunk lines, Brentwood customers would be left without any sort of viable treatment option. It thus defies logic that any of the Advocates could put forth the notion that these lines are not “used and useful” under the

applicable legal standards, and (as with other issues) they have not offered any evidence to this effect.

b. Brentwood’s Role as a Billing Agent for ALCOSAN and All Obligations Part and Parcel to that Role Will Be Taken On By Pennsylvania-American.

Brentwood further notes that it is not correct for the Advocates to argue that Pennsylvania-American’s proposal to act as ALCOSAN’s billing agent is “akin to a pass-through under section 1307(a) of the Public Utility Code.” *See* OCA Main Brief p. 51. All Pennsylvania-American seeks to do here is to shift the obligations under Brentwood’s current role as ALCOSAN’s billing agent to Pennsylvania-American. ALCOSAN charges are separate from Brentwood’s charges, and it is incorrect as a matter of law to conclude otherwise simply because they are proposed to be on the same consolidated bill. It is not accurate (and unsupported by any record evidence) to claim that Brentwood purchases bulk treatment services from ALCOSAN. Rather, and simply put, customers of Brentwood are also customers of ALCOSAN.

C. Section 507 Issues

Please see Brentwood’s Main Brief.

D. Preservation of the Z Agreement and Other Z Agreements

Please see Brentwood’s Main Brief.

E. Recommended Conditions for Approval

Please see Brentwood’s Main Brief.

F. Incorporation of Pennsylvania-American’s Arguments

Brentwood endorses, adopts and incorporates by reference all arguments made in Pennsylvania-American’s Reply Brief.

V. CONCLUSION WITH REQUEST FOR RELIEF

For all the reasons set forth herein, as well as the reasons set forth in Pennsylvania-American's Reply Brief, the Borough respectfully requests that the Commission approve of the Application and grant Pennsylvania-American's requested relief.

Respectfully submitted,

/s/ Matthew S. Olesh

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