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January 24, 2024

**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 Exceptions to the Recommended Decision of Administrative Law Judge Katrina Dunderdale.

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,

A handwritten signature in blue ink that reads "S. Melillo".

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: Lcpwct{ 44, 2026

**BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

**EXCEPTIONS OF THE BOROUGH OF BRENTWOOD TO  
THE RECOMMENDED DECISION OF ADMINISTRATIVE  
LAW JUDGE KATRINA DUNDERDALE**

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*Attorneys for the Borough of Brentwood*

Dated: January 24, 2024

## I. INTRODUCTION

Pursuant to the procedural schedule established and in accordance with the regulations of the Pennsylvania Public Utility Commission (the “Commission”) at 52 Pa. Code Section 5.533, the Borough of Brentwood (hereinafter “Brentwood” or the “Borough”) hereby submits these Exceptions to the Recommended Decision of Administrative Law Judge Katrine Dunderdale (“Judge Dunderdale”), dated January 17, 2024 (the “Recommended Decision”) in connection with the Application of Pennsylvania-American Water Company (“Pennsylvania-American” or “PAWC”) filed with the Commission pursuant to sections 507, 1102, and 1329 of the Public Utility Code (the “Application”) that is the subject of this proceeding.

Brentwood excepts to the Recommended Decision because it ignores the clear record evidence that supports approval of the Application. The Recommended Decision fails to properly account for the clear benefits that the transaction presents to the Borough and its residents in wrongfully holding that they do not outweigh a modest potential rate increase. The Recommended Decision turns a blind eye to the evidence presented by Brentwood that it has struggled to be responsive to emergencies and distorts the environmental compliance challenges that Brentwood has faced and continues to face. The Recommended Decision does not merely give Brentwood’s record evidence inadequate weight – it ignores the evidence entirely, seemingly in an effort to shoehorn the record into its predetermined (and incorrect) conclusion.

In addition to ignoring Brentwood’s evidence, the Recommended Decision gives undue weight to the “evidence” that it considers helpful to its cause of denying the Application. Most notably, the Recommended Decision seems to entirely rely on the testimony of one witness – who has no affiliation with or firsthand knowledge of the Borough – that Brentwood seemingly has endless resources at its disposal to provide service at a level comparable to PAWC. This testimony

both ignores the practical realities of municipal governance in favor of conclusory statements that have no actual evidentiary support and ignores the obvious: that even if such financial resources were accessible to Brentwood (and there is a dearth of evidence suggesting this is actually the case), doing so would result in the exact same harm – rate increases – that seems to concern Judge Dunderdale and the statutory advocates. Indeed, the Recommended Decision ignores the fact that the only harm it considers in connection with the Application – increased rates – is the same harm Brentwood residents will face if the Application is denied.

The practical impact of the Recommended Decision is that it takes important decision-making authority out of the hands of local government officials who conclude that it is in their municipality's best interest to exit the wastewater business in a manner that will provide a net benefit to their constituents. This was unquestionably the case here, where Brentwood recognized that not only would a sale of its wastewater system free up critically needed resources, but that doing so would result in an overall improvement in the quality of services that would be received by its customers, including responsiveness to emergencies and the ability to not just address ongoing environmental issues, but ensure that they do not reoccur. If the Recommended Decision is upheld, municipalities such as Brentwood will simply not be able to exit the wastewater business absent catastrophic circumstances.

Brentwood respectfully requests that the PUC look at the entirety of the record, properly balance all of the undisputed transaction benefits against the relatively minor potential rate impact, and approve the Application.

#### **A. Procedural History**

This proceeding concerns Pennsylvania-American's application for approval to acquire Brentwood's wastewater collection and conveyance system pursuant to sections 507, 1102, and

1329 of the Pennsylvania Public Utility Code, filed with the Commission in March 2023 (the “Proposed Transaction”). The Application was assigned Docket No. A-2021-3024058 by the Commission with Judge Dunderdale presiding.

The Office of Small Business Advocate (“OSBA”) filed a Notice of Appearance and Notice of Intervention on April 7, 2023. Similarly, the Office of Consumer Advocate (“OCA”) filed a Protest in this proceeding on May 4, 2023 and the Bureau of Investigation and Enforcement (“I&E”) filed a Notice of Appearance on May 12, 2023.<sup>1</sup> On October 2, 2023, the Borough filed its Petition to Intervene to adequately address the interests of Brentwood in this proceeding as the owner and operator of the System.

On October 11, 2023, the Allegheny County Sanitary Authority (“ALCOSAN”) filed a Petition to Intervene to protect its interests as the exclusive wastewater treatment provider in the region pursuant to the Pittsburgh Zone Project Agreement of December 1, 1949, among ALCOSAN, the City of Pittsburgh, and the Borough (the “Z Agreement”). *See generally* ALCOSAN Statement No. 1, Direct Testimony of Douglas Jackson, P.E; *see also* Z Agreement, attached to Pennsylvania-American’s Application as Appendix A-25.3. As a result of significant environmental challenges in its service area, ALCOSAN has been subject to a consent decree with the United States Environmental Protection Agency (“EPA”), the Pennsylvania Department of Environmental Protection (“PaDEP”), and the Allegheny County Health Department (“ACHD”) since 2008, modified as recently as May 2020 (hereinafter the “Modified Consent Decree”). *See* PAWC Statement No. 2, Direct Testimony of Daniel Hufton, P.E., pp. 11–12. Brentwood, as party to the Z Agreement, is also bound by the terms of the Modified Consent Decree. *See* Brentwood Statement No. 1, Direct Testimony of George Zboyovsky, pp. 6, 7.

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<sup>1</sup> OCA, OSBA, and I&E will be referred to collectively as the “Statutory Advocates,” unless individually identified.

Before the Application was filed, Brentwood, ALCOSAN, and Pennsylvania-American engaged in numerous discussions to preserve the integrity of the Z Agreement and ensure continued compliance with the Modified Consent Decree if the Proposed Transaction is approved. As a result of this collaboration, Brentwood and Pennsylvania-American entered into a Cooperation and Allocation of Responsibilities Agreement (the “Cooperation Agreement”), which sets forth and allocates certain rights and obligations from Brentwood to Pennsylvania-American under the Z Agreement. *See* the Cooperation Agreement, attached to Pennsylvania-American’s Application as Appendix A-25.3.

An initial telephonic prehearing conference for the Application was held on Tuesday, October 17, 2023. Pursuant to the Prehearing Conference Order issued by Judge Dunderdale, a litigation schedule was set providing, *inter alia*, for evidentiary hearings on November 8, 2023 and November 14, 2023.

The following parties prepared and pre-served written testimony on behalf of Brentwood in this proceeding: (1) Brentwood Statements Nos. 1 and 1-R, Direct and Rebuttal testimony of George Zboyovsky, the Borough Manager; and (2) Brentwood Statement No. 2, Direct testimony of Harold Walker III from Gannett Fleming Valuation and Rate Consultants, LLC, the UVE engaged by the Borough. At the November evidentiary hearings, all pre-served written testimony and exhibits exchanged by the parties were entered into the record. Additionally, the following witnesses provided oral rejoinder testimony and/or underwent cross-examination at the evidentiary hearings: Michael Salvo, Daniel Hufton, P.E., and Ashley E. Everette on behalf of Pennsylvania-American; George Zboyovsky on behalf of the Borough; Nicholas A. DeMarco and Barbara R. Alexander on behalf of the OCA; and Joseph Kubas on behalf of I&E. All other witnesses were

excused from attending the evidentiary hearings. On November 14, 2023, the evidentiary hearing was adjourned.

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

Brentwood owns and operates the Borough's wastewater collection and conveyance system (the "System"), which consists of approximately 200,000 linear feet of gravity collection mains and approximately 1,050 manholes, associated infrastructure and appurtenances, and numerous related land rights. *See* Brentwood Statement No. 1, p. 5. As of the date of filing the instant Application, the Brentwood System serves approximately 3,890 active commercial and residential customers. *See id.* The Brentwood System's pipe network is split into two watersheds located at Point of Connection MH-89 (Saw Mill Run) and Point of Connection MH-42 (Streets Run), which are both part of the ALCOSAN service area. *See id.* at p. 6. The Borough's sewage flows through a series of intermunicipal trunk lines that flow through downgradient communities for treatment by ALCOSAN, the exclusive wastewater treatment provider in the greater Pittsburgh area pursuant to the Z Agreement. *See id.*; *see also* ALCOSAN Statement No. 1, p. 2.

Due to the significant environmental compliance issues that plague its region, ALCOSAN has been subject to a consent decree with the United States Environmental Protection Agency, the Pennsylvania Department of Environmental Protection, and the Allegheny County Health Department ("ACHD") since 2008, modified as recently as May 2020 (hereinafter the "Modified Consent Decree"). *See* PAWC Statement No. 2, pp. 11–12. As a result, the Borough and its System are also bound by the terms of the Modified Consent Decree. *See* Brentwood Statement No. 1, pp. 6, 7. Similarly, through 16 of the last 19 years, the Borough itself has also been under regulatory order with the ACHD to remediate several environmental compliance concerns in its operation of the System. *See* PAWC Statement No. 2-R, Rebuttal Testimony of Daniel Hufton, P.E., pp. 5.

Accordingly, with the aforementioned environment challenges and costly upgrades necessary to bring the System into compliance looming, the Borough Council was faced with the reality that significant investment into the System was necessary – leading the Borough’s duly-elected officials to determine that a sale of the System to a third-party Commission-regulated utility like Pennsylvania-American, was in the best interests of its residents. *See generally id.* at pp. 9–11 (discussing the Borough’s deliberative process in exploring a sale). Moreover, Pennsylvania-American’s enhanced access to capital and its particular expertise bringing out-of-compliance systems like Brentwood into compliance, *inter alia*, were critical to the Borough Council’s ultimate determination that this Proposed Transaction was in the best interest of the Borough. *See* Brentwood Statement No. 1-R, Rebuttal Testimony of George Zboyovsky, pp. 6, 7. As such, after a lengthy deliberative process with multiple opportunities for public participation and input, the Borough Council voted unanimously to approve the sale to Pennsylvania-American.

With the sale of its System, the Borough also must ensure the preservation and enforcement of its rights and obligations under the Z Agreement. Thus, Pennsylvania-American and Brentwood entered into the Cooperation and Allocation of Responsibilities Agreement setting forth duties and obligations of the Borough and Pennsylvania-American under the Z Agreement and, more specifically, to ensure continued compliance with the Modified Consent Decree. *See* PAWC No. 1, Direct Testimony of Michael Salvo, pp. 9–10; *see also* ALCOSAN Statement No. 1, pp. 9–10.

Ultimately, the Borough Council’s decision to sell the System strikes a balance between the need for capital improvement to remedy environmental challenges posed by the aging System to ensure public safety and welfare without placing Brentwood customers at risk for significant, unreasonable rate increases.

### **C. Recommended Decision**

In her Recommended Decision, Judge Dunderdale recommended the denial of the Application based on an erroneous conclusion that Pennsylvania-American failed to meet its burden to illustrate that its ownership will affirmative promote the service, accommodation, convenience, or safety of the public under section 1103 of the Public Utility Code (the “Code”). For reasons set forth in more detail below, Brentwood excepts to the Judge Dunderdale’s Recommended Decision in its entirety and, therefore, respectfully request that the Commission approve the Proposed Transaction.

## **II. SUMMARY OF ARGUMENT**

Brentwood respectfully submits the following exceptions to the Recommended Decision for the numerous reasons set forth in more detail below. Judge Dunderdale erred in her finding that Pennsylvania-American failed to provide sufficient proof that an affirmative benefit will accrue to existing or future customers of Pennsylvania-American, to Brentwood customers, or the public at-large.

First, Judge Dunderdale misinterpreted and misapplied the legal standard set forth by sections 1102 and 1103 of the Code, as interpreted by the Pennsylvania Supreme Court in *Popowsky* and *City of York*, and further expounded upon by the Commonwealth Court in *McCloskey*. The law is clear: Pennsylvania-American must demonstrate that its acquisition of the System will affirmatively promote the service, accommodation, convenience, or safety of the public in a substantial way. More importantly, it is well-settled that the Commission need not secure legally binding commitments or quantify benefits where this may be impractical, burdensome or impossible; instead, the Commission properly applies a preponderance of the

evidence standard to make fact-based determinations (including predictive ones informed by expert judgment) concerning certification matters.

Setting aside the mischaracterization and/or willful ignorance of the record evidence in this proceeding detailed below, Judge Dunderdale ultimately concluded that Pennsylvania-American's failure to proffer specific and quantifiable evidence that Brentwood's service is inadequate and that the Borough is unable to obtain capital necessary to improve its 100-year-old wastewater system renders this transaction detrimental to the public due to the modest estimated rate increases to Pennsylvania-American's existing customers in the short term. However, there is no requirement under Pennsylvania law that a system must be troubled, or a municipality must be in distress, for the Commission to approve a transaction. Thus, even accepting Judge Dunderdale's misstatements of the record as fact (*e.g.*, refusing to accept that Brentwood is struggling with its day-to-day operation of the System and the various environmental compliance challenges in the ALCOSAN region), Judge Dunderdale misapplied the legal standards set forth by section 1102 and 1103 of the Code as interpreted by the Pennsylvania Supreme Court.

Moreover, Judge Dunderdale's conclusion that the Proposed Transaction does not provide any public benefit that outweighs potential and prospective rate increases to existing Pennsylvania-American customers is erroneous, regardless of the standard applied. In fact, from a review of the Recommended Decision, it is apparent that much of the evidence proffered by Brentwood and Pennsylvania-American was simply ignored. For example, Judge Dunderdale states that the benefits of the Proposed Transaction are merely "general" benefits anticipated by any acquisition and not supported by any specific evidence. *See* Recommended Decision, p. 128. This is a gross mischaracterization of the record evidence proffered by Pennsylvania-American and Brentwood in the instant proceeding and is merely an illustrative example of the numerous inaccuracies

contained in the Recommended Decision. As set forth in more detail below, there are numerous facts from the record that were either overlooked, mischaracterized, or outright disregarded by Judge Dunderdale in reaching her conclusion that the Proposed Transaction is not in the public interest.

Finally, the Recommended Decision, if adopted, would set public policy in a manner that is antithetical to how municipal government actually functions in the Commonwealth. To reach its desired conclusion, the Recommended Decision presumes a seemingly endless supply of resources available to municipalities with zero consequences for accessing them. This is simply not grounded in reality. Municipalities such as Brentwood who seek to exit the wastewater business and who undertake due diligence in properly considering and balancing the net benefits of a sale against any harm (as Brentwood did here) should be permitted to do so.

Accordingly, for the reasons set forth herein, Brentwood respectfully submits the following Exceptions to the Recommended Decision and urges the Commission to approve the Application and Proposed Transaction.

### **III. EXCEPTIONS**

#### **A. Exception No. 1 – The Recommended Decision Misinterpreted and Misapplied the Legal Standards Set Forth by Sections 1102 and 1103 of the Public Utility Code as Interpreted by Pennsylvania Courts**

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The Borough respectfully excepts to the Recommended Decision as Judge Dunderdale clearly misinterpreted and, thus, misapplied the legal standards set forth by section 1102 and 1103 of the Code as interpreted by the Pennsylvania Supreme Court that is applied to review of section 1329 applications such as the instant Application.

## 1. The Applicable Standard

Section 1102 of the Code requires Commission approval, by issuance of a *Certificate of Public Convenience*, for a public utility like Pennsylvania-American to expand its service territory and offer, render, furnish, or supply wastewater service to the public. *See* 66 Pa.C.S. § 1102(a)(1). Pursuant to the Code, the Commission will issue a Certificate of Public Convenience to a public utility, like Pennsylvania-American, when granting such a certificate “is necessary *or proper*, for the service, accommodation, convenience, or safety of the public.” *See id.* § 1103(a) (emphasis added). Importantly, the Pennsylvania Courts have determined that a Certificate of Public Convenience need not be “absolutely necessary” to be granted as “not only would this approach be impractical and unrealistic, *but it would also actually pose a danger to the health, safety, and welfare of the public.*” *See Hess v. Pa. Pub. Util. Comm’n*, 107 A.3d 246, 262 (Pa. Cmwlth. 2014) (emphasis added).

Instead, the Pennsylvania Supreme Court has interpreted section 1103(a) to require a showing that a proposed transaction will “affirmatively promote the ‘service, accommodation, convenience, or safety of the public’ in some substantial way.” *See, e.g., Popowsky v. Pa. Pub. Util. Comm’n*, 937 A.2d 1041, 1052 (Pa. 2007); *City of York v. Pa. Pub. Util. Comm’n*, 295 A.2d 825, 828 (Pa. 1972). More specifically, the Pennsylvania Supreme Court explained that the 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 fact-based determinations (including predicted ones informed by expert judgment) concerning certification matters. *Popowsky v. Pa. Pub. Util. Comm’n*, 937 A.2d 1040, 1055–1056 (Pa. 2007).

Further, the Commonwealth Court has held that a potential impact on rates does not render a proposed transaction detrimental to the public; instead, the Commission must assess whether the impact of rates is outweighed by other positive factors that the acquisition – on the whole – will confer substantial public benefits. *See McCloskey v. Pa. Pub. Util. Comm’n*, 195 A.3d 1055, 1066-67 (Pa. Cmwlth. 2018).<sup>2</sup> Significantly, in *McCloskey v. Pa. Pub. Util. Comm’n*, the Commonwealth Court specifically re-affirmed that the Commission must only address the potential rate impact of a proposed acquisition “in a general fashion” in the balancing test required by section 1102 of the Code. *See* 195 A.3d 1055, 1066–67 (Pa. Cmwlth. 2018). Thus, a potential impact on rates does not automatically render a transaction detrimental to the public; instead, the Commission must assess whether the impact of rates is outweighed by other positive factors that the acquisition – on the whole – will confer substantial public benefits.<sup>3</sup> In other words, the Commission has recognized that rate impact, alone, is not dispositive of affirmative public benefits as the Commission recognizes that customers’ rate increases may occur in exchange for safe, efficient, and environmentally sound wastewater service.

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<sup>2</sup> The Commission must also consider whether the party receiving the assets and service obligations is technically, legally, and financially fit. *See Joint Application of Peoples Natural Gas Co. LLC, Peoples TWP LLC, and Equitable Gas Co., LLC*, Docket No. A-2013-2353647, 309 P.U.R.4th 213 (2013). Among other benefits provided by the Proposed Transaction, there is no dispute that Pennsylvania-American is technically, legally, and financially fit to provide wastewater service in the Commonwealth; nonetheless, the Application makes it clear that Pennsylvania-American has the requisite technical, legal, and financial fitness to own and operate Brentwood’s System and as a partner to ALCOSAN to address the environmental challenges in the region. Moreover, while a public utility’s fitness to provide wastewater service does not alone satisfy the burden to prove substantial affirmative public benefits under section 1102, Pennsylvania-American’s fitness – as the largest investor-owned water and wastewater provider in the Commonwealth with nearly 1,200 professionals whose sole focus is the provision of safe, reliable, and cost-efficient water and wastewater service – cannot be overlooked as an overwhelming benefit of this Proposed Transaction. Pennsylvania-American’s size, wastewater expertise, and financial acumen is a significant improvement from the status quo for wastewater service in Brentwood and provides the ALCOSAN region with a proven industry expert to finance and implement the necessary infrastructure improvements for the aging System.

<sup>3</sup> In a more recent case, *Cicero v. Pa. Pub. Util. Comm’n*, 300 A.3d 1106 (Pa. Cmwlth. 2023), *petitions for allocatur pending*, the Commonwealth Court reversed the Commission’s approval of a public utility’s acquisition of a local, municipally-owned wastewater system after finding that the transaction did not meet the substantial affirmative public benefit test under section 1102 because the benefits set forth in the application did not outweigh the prospective harms.

More importantly, the law states that “an acquiring utility is not required to offer specific evidence on how the transaction would offer substantial public benefit over the incumbent utility;” instead, “as long as the reasons the applicant advances are a public benefit, *even if the reasons as well as the means by which they are to be achieved are general in nature*, these reasons, if accepted by the Commission, constitute substantial evidence to find that there is a public benefit sufficient to justify finding that the merger is in the public interest under Section 1103 of the Code.” See *McCloskey*, 195 A.3d at 1065 (emphasis added).

## **2. Standard Applied in the Recommended Decision**

Judge Dunderdale’s recommendation to deny the Application is unsupported by the record evidence and, in fact, directly contradicted by the record evidence (as described in more detail below in the Brentwood’s Exception No. 2). Even leaving that aside (for the moment), Judge Dunderdale misinterpreted and, therefore, misapplied the legal standard set forth by sections 1102 and 1103 of the Code as it has been interpreted and applied by the Pennsylvania courts.

The Recommended Decision erroneously reads a newly imagined burden of proof for applications brought pursuant to section 1329 of the Code. Judge Dunderdale describes the sections 1102 and 1103 standard applicable to section 1329 proceedings as follows:

Determining the presence of an affirmative public benefit does not require the Commission to find every customer receives a benefit from the proposed transaction. The primary objective is to service the interests of the public. An acquisition provides an affirmative benefit if the benefits outweigh the adverse impacts for that transaction, considering the technical and legal fitness of the purchasing entity, to provide service, the public need for service, the inadequacy of existing service and other relevant evidence. **For [Pennsylvania-American] to meet its burden herein, it must show that the proposed transaction will benefit both existing [Pennsylvania-American] customers and the acquired Brentwood customers, as well as the public-at-large. That determination is especially necessary when, as here, the acquiring utility ([Pennsylvania-American]) avails itself of the provisions of 66 Pa.C.S. § 1329, saying that the current service provider is struggling or at least providing lower quality service than [Pennsylvania-American] could provide.**

*See Recommended Decision*, p. 123 (emphasis added). This summary of the standard applied to 1329 proceedings is simply inaccurate. There is no “especially necessary” standard that must be applied to the instant application. Instead, as set forth in great detail above, the Commission must determine whether the purported harm to the Proposed Transaction is outweighed by other positive factors that the acquisition – on the whole – will confer substantial public benefits. *See McCloskey v. Pa. Pub. Util. Comm’n*, 195 A.3d 1055, 1066-67 (Pa. Cmwlth. 2018).

Furthermore, instead of reviewing the evidence that was actually proffered in this proceeding, Judge Dunderdale afforded undue evidentiary weight to information that she inaccurately claims is *not* in the record – namely, evidence that Brentwood’s service is inadequate or Brentwood does not have the resources to fund capital improvements necessary . For example, Judge Dunderdale stated the following:

- “The only improvements [Pennsylvania-American] can make to the Brentwood system would be a replacement of the pipes. While that action might benefit Brentwood customers specifically, and upstream municipalities generally, by reducing leaks or overflows, the evidence presented overwhelmingly proved Brentwood currently provides safe, adequate, and reliable collection and conveyance service. No evidence was presented to show that Brentwood has failed to address the issues in the older conveyance system.” *See Recommended Decision*, p. 123.
- “No evidence was presented about a single instance when an emergency occurred, or a [sic] that a complaint was filed by a Brentwood customer about a failure to respond timely to any complaint or problem.” *See Recommended Decision*, p. 127.
- “[N]o evidence was presented that Brentwood has been unable or would be unable to secure funding or discounts. Further, there is no indication that Brentwood would be unable to raise the capital necessary to ensure continued compliance, to the extent that additional capital is needed.” *See Recommended Decision*, p. 127–28.

Not only are these conclusions from the Recommended Decision contradicted by the record evidence in this proceeding, they illustrate that Judge Dunderdale misapplied the law.

Under the standard used by Judge Dunderdale, any transaction proposed under section 1329 of the Code would not be in the public interest because she views the statutorily-permitted

spreading of rates to the acquiring utility's existing customers as an insurmountable harm. *See* Recommended Decision, p. 124 (“While Brentwood customers will not see an increase in the rates, [Pennsylvania-American]’s existing water and wastewater customers clearly will be impacted.”). Similarly, Brentwood’s (supposed) ability to raise capital to invest in and improve the System and its “adequate” provision of wastewater service to date is not dispositive in the substantial affirmative benefit analysis set forth by sections 1102 and 1003 and Pennsylvania case law (especially where, as addressed below, the record evidence does not support these factual conclusions).

Judge Dunderdale repeatedly states that Pennsylvania-American failed to meet its burden to prove that the harms of the Proposed Transaction are outweighed by the benefits. However, aside from the purported harm of some future issue potentially developing between Pennsylvania-American and ALCOSAN (concocted entirely by Judge Dunderdale in her Recommended Decision), the only harm identified in connection with the Application is a projected modest rate increase of 11% to Brentwood customers. *See* Recommended Decision, p. 123-124 (describing a fictional future disagreement between ALCOSAN and Pennsylvania-American regarding the Cooperation Agreement). The weight of the evidence of record (largely ignored by Judge Dunderdale) balances in favor of the benefits to be realized, which far outweigh the sole harm of a potential 11% rate increase. Nonetheless, Judge Dunderdale ignored the Proposed Transaction’s benefits and concluded that Brentwood’s history of adequate service (which is contradicted by the record evidence) renders this transaction detrimental to the public due to the potential and prospective rate increases to Pennsylvania-American’s existing customers in the short term (which are expressly permitted by the Code) and a potential future rate increase to Brentwood customers

(even though the Recommended Decision does not consider the rate increases Brentwood will face if the Application is denied). This is not the standard set forth by the law.

The question for the Commission is whether Pennsylvania-American's acquisition of the System under the terms of the Proposed Transaction will affirmatively promote the service, accommodation, convenience, or safety of the public in some substantial way. Pennsylvania-American need not prove that Brentwood is incapable of providing adequate wastewater service or that Brentwood is somehow deficient in its operation of the System.

Accordingly, the Borough excepts to the Recommended Decision as it misinterpreted and, thus, misapplied the correct legal standard in recommending denial of the Application.

**B. Exception No. 2. – The Recommended Decision's Conclusion that the Substantial Public Benefits of the Proposed Transaction Do Not Outweigh the "Harm" of the Proposed Transaction is Unsupported by the Record Evidence, and in fact, is Directly Contradicted by the Record Evidence**

The Borough excepts to the Recommended Decision and Judge Dunderdale's conclusion that Pennsylvania-American "failed to establish that the sewer system under [Pennsylvania-American's] ownership will affirmatively promote the service, accommodation, convenience, or safety of the public [and] the evidence did not establish that any benefit to be realized from the proposed transaction would outweigh the harms to current Pennsylvania-American's water and wastewater customers or existing Brentwood wastewater customers." *See* Recommended Decision, p. 129. This conclusion is not only unsupported by the record but directly contradicted by the evidence submitted by Brentwood and Pennsylvania-American.

While Judge Dunderdale did not apply the correct legal standard in recommending the denial of the Application, the factual findings in the Recommended Decision are erroneous regardless of the standard applied because they ignore the clear, and numerous, public benefits that exist.

## **1. Failure to Consider All Testimony Given at Public Input Hearings**

In her Recommended Decision, Judge Dunderdale gives undue weight to the sparse testimony presented at the public input hearings by current Pennsylvania-American customers who saw a rise in their wastewater bills after Pennsylvania-American acquired other wastewater systems in the Commonwealth. *See* Recommended Decision, pp. 124, 125. Judge Dunderdale states that “[t]he rise in rates has been so drastic that the public input witnesses credibly testified about extreme efforts that have been had to be taken to render the bill totals affordable.” *Id.* at 125. Judge Dunderdale refers to the anecdotal testimony of rate impact in other transactions as “disturbing.” However, an examination of the full spectrum of testimony offered at the public input hearings illustrates that it does not justify the erroneous conclusion that the sale is not in the public interest.

A total of two of the five total individuals testifying at the public input hearing opposed the sale, and their opposition was based entirely on testimony dealing with rate impact of other transactions. As Judge Dunderdale correctly notes, these two existing Pennsylvania-American customers testified about their concern regarding increases to their utility bills if the Proposed Transaction is approved and provided anecdotes regarding their recent efforts to pay their utility bills. However, the Recommended Decision seems to “cherry pick” this testimony – even though it is of questionable relevance to the transaction at hand – while ignoring the testimony of two Brentwood business owners who testified that the Borough is ill-equipped to provide wastewater services. Indeed, one of these witnesses explicitly testified as to his belief that Pennsylvania-American is a stronger, better equipped utility with more available resources to maintain and manage the wastewater infrastructure in Brentwood. Moreover, one witness appeared on behalf of the Dollar Energy Fund to describe the low-income assistance options available to Pennsylvania-

American customers and specifically acknowledged that Brentwood does not have any such assistance program.

The Recommended Decision gives disproportionate weight to testimony favorable to its position, even when not relevant to this proceeding, while failing to properly acknowledge and give weight to the testimony that provides support for the Application's approval. It is clear that Judge Dunderdale only selectively considered testimony that was critical of the Proposed Transaction and disregarded any and all other testimony. The PUC should reject the erroneous conclusions in the Recommend Decision made in reliance on this flawed analysis.

## **2. Mischaracterization of Brentwood's Current Service and Capabilities**

Judge Dunderdale also grossly misstates the record evidence regarding the adequacy of Brentwood's provision of wastewater service.<sup>4</sup> Specifically, Judge Dunderdale states that "the evidence presented overwhelmingly proved Brentwood currently provides safe, adequate, and reliable collection and conveyance service," *see* Recommended Decision, p. 123, and "[t]here is no indication that Brentwood would be unable to raise the capital necessary to ensure continued compliance, to the extent that additional capital is needed." *See id.* at 128. These statements are either flatly contradicted by the record evidence, speculative, or both.

The testimony submitted by George Zboyovsky, the Borough's Manager, directly contradict Judge Dunderdale's conclusions regarding the Borough's current ability to provide adequate and fund the improvements necessary to bring the 100-year-old System into compliance:

- "[W]ith the significant capital investment and time required to bring the Borough's nearly century old System into compliance, the Borough leadership ultimately

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<sup>4</sup> It is worth noting Judge Dunderdale also concludes that the approval of the Proposed Transaction will result in "free service" provided to the upstream municipalities. However, that simply is not the case here. With the execution of the Cooperation Agreement, Pennsylvania-American (as Brentwood has for more than 70 years pursuant to the Z Agreement) will receive compensation including, the right to convey its wastewater through the trunklines of downstream municipalities without charge. As such, Brentwood respectfully submits that Judge Dunderdale erred in her conclusion that this Proposed Transaction will result in Pennsylvania-America providing "free service" to these upstream municipalities.

determined that a sale to a third party was in the best interest of the Borough and its customers. ***In short, the Borough Council does not believe it can operate and maintain the System as well as Pennsylvania-American will.*** See Brentwood Statement No. 1, p. 8 (emphasis added).

- These [environmental] compliance issues were, among others, a substantial motivating factor the Borough’s decision to sell its System to a large third-party public utility like in Pennsylvania-American, which is better equipped to address the environmental compliance issues posed by the Borough’s nearly century old System.” See Brentwood Statement No. 1, pp. 8-9.
- “As Manager of the Borough for the last fifteen years, ***I can confidently say that if the Borough believed it could raise the same capital to address the environmental compliance issues in the region and provide the same quality of service/customer service to its residents as Pennsylvania-American, then the Borough Council would not have explored a sale of its System.*** 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.” See Brentwood Statement No. 1-R, p. 2 (emphasis added).
- “While the Statutory Advocates baselessly assert that the Proposed Transaction maintains the status quo, this is objectively untrue. As a concrete example of this and as I stated in my direct testimony, several Brentwood residential customers experienced sewage back-ups in their homes that the Borough was unable to properly address for a few weeks in November 2022. However, under Pennsylvania-American ownership and its Emergency Response Plans, the Company’s on-call field service crew available 24/7/365 outside of normal work hours would have responded to this emergency and provided a same-day resolution to the sewage back-up.” See Brentwood Statement No. 1-R, p. 4.
- “Frankly, 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. 4.
- “While the Borough has worked hard to meet its obligations under ALCOSAN’s COA since its inception, ***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.*** If the Proposed Transaction is approved, the entire region and ALCOSAN will benefit from a partnership with an industry expert with significantly more time, resources, skill, and staff to achieve the goals established in the COA as well as additional necessary investment” See Brentwood Statement No. 1-R, p. 5 (emphasis added).

- “Just as access to money is only one factor of financial fitness, financial fitness is only one factor to efficiently own and operate a wastewater system. There is no question that Pennsylvania-American has more experience in evaluating and improving water and wastewater systems to remedy on-going environmental challenges. ***No amount of money available to the Borough can outweigh the invaluable expertise Pennsylvania-American brings to improving Brentwood’s aging wastewater system facing the environmental challenges in this region.***” See Brentwood Statement No. 1-R, p. 7 (emphasis added).
- “The unpredictability of possible issues going forward is an important point and one that, as considered by Brentwood, was significant in analyzing and weighing the transaction’s benefit. Currently, Brentwood is entirely reactive to problems as they arise. This leads to uncertainty and is far from optimal. We understand that Pennsylvania-American, in contrast, would be much more proactive in addressing matters before they became problems, such as providing critical infrastructure upgrades.” See Brentwood Statement No. 1-R, p. 8.

Mr. Zboyovsky – the individual trusted with managing the day-to-day operations in the Borough at the direction of the duly-elected Borough council since 2008 – provided unambiguous testimony that the Borough does not have the requisite experience and skillset to implement the necessary overhaul of its System and would benefit from the expertise of a larger utility like Pennsylvania-American, as Brentwood has been unable to proactively upgrade and/or improve its aged 100-year-old System on its own.

Despite Judge Dunderdale’s assertion to the contrary, there was no meaningful rebuttal to Mr. Zboyovsky’s testimony. In fact, Joseph Kubas – I&E’s witness – conceded that Pennsylvania-American is much more capable and equipped to address any System replacements, upgrades, and other improvements/maintenance, recognizing that (a) the Proposed Transaction did indeed present benefits, particularly to Brentwood, directly resulting from Pennsylvania-American’s ownership, and (b) the Borough would not be able to provide anywhere near the same level of service as Pennsylvania-American without significant expenditures and raising of rates. *See, e.g.*, Transcript of Evidentiary Hearing, November 14, 2023, pp. 334:8–335:24, 336:25–337:10. While Mr. Kubas attempted to create the illusion that the Borough could easily access the significant

financial resources that would be needed for it to properly continue to operate the System, this testimony was entirely speculative and lacked any concrete evidentiary support in the record beyond Mr. Kubas's sheer conjecture.

To the contrary, the record directly supported Mr. Zboyovky's testimony. For example, for 16 of the last 19 years, the Borough has been subject to a regulatory order with the ACHD to remediate several environmental compliance concerns in its operation of the System. *See* PAWC Statement No. 2-R, Rebuttal Testimony of Daniel Hufton, P.E., p. 5; *see also* Transcript of Evidentiary Hearing, November 8, 2023, pp. 149:22–150:7. This does not mean that the System is in compliance with environmental regulations. It means that the System had so many violations that a regulatory order was needed. This does not demonstrate “adequate” service – it demonstrates challenges that Brentwood has faced and with which it continues to struggle.

Moreover, Pennsylvania-American witness Daniel Hufton, a professionally-trained engineer, specifically (and correctly) noted the following about Brentwood's wastewater operations:

Based on past history, Brentwood has not proactively addressed environmental compliance issues before they rose to the level of compliance orders from the Regulatory Agencies. This is a reactive approach to environmental compliance and does not proactively address the underlying problem of lack of regular infrastructure renewal and replacement. Without a well-funded program to upgrade aging collection system assets, I believe that Brentwood will continue to experience hydraulic overloading and SSOs in portions of its System.

*See* PAWC Statement No. 2, Direct Testimony of Daniel Hufton, P.E., p. 20. Nonetheless, Judge Dunderdale either overlooked, mischaracterized, or disregarded this ample record evidence in reaching her unsubstantiated conclusion that Brentwood provides adequate and safe wastewater service.

Perhaps the most illustrative instance of the Recommended Decision ignoring record evidence of the service provided by Brentwood is the contention that “[n]o evidence was presented

about a single instance when an emergency occurred, or a [sic] that a complaint was filed by a Brentwood customer about a failure to respond timely to any complaint or problem.” *See* Recommended Decision, p. 127. This conclusion is not merely erroneous, but it flies directly in the face of the clear, undisputed testimony provided by Brentwood of a November 2022 instance where Brentwood was unable to properly deal with a customer’s wastewater emergency. *See* Brentwood Statement No. 1-R, p. 4. Brentwood offered this testimony as a representative example of the issues it has faced in addressing emergency situations. However, the Recommended Decision not only failed to even acknowledge the existence of this testimony, but incorrectly reached the conclusion that its subject matter was never even addressed in the record.

### **3. Failure to Consider All Evidence of Public Benefits**

Finally, while the Recommended Decision correctly determined that the Proposed Transaction would have a net positive impact on the Borough itself, Judge Dunderdale erroneously concluded that “the evidence did not establish that any benefit to be realized from the proposed transaction would outweigh the harms to current [Pennsylvania-American] water and wastewater customers or existing Brentwood wastewater customers.” *See* Recommended Decision, p. 129. To arrive at this conclusion requires an unwarranted wholesale dismissal of the actual benefits set forth in the record.

The benefits of the Proposed Transaction are concrete, well-established by the record, and outweigh the projected modest 11% rate increase. These benefits include, but are not limited to, the following:

- Pennsylvania-American employs approximately 1,200 professionals whose sole focus and expertise are in water and wastewater utility operations in the Commonwealth including engineering, regulatory compliance, distribution and collection system operation and maintenance, accounting, and customer service. *See* PAWC Statement No. 1, p. 14–15.

- Pennsylvania-American’s call center is available from 7:00 a.m. to 7:00 p.m. for routine customer questions/concerns, and Pennsylvania-American customers can also reach a representative via electronic mail at any time at [infopa@amwater.com](mailto:infopa@amwater.com). *See* PAWC Statement No. 2, p. 33. More importantly, Pennsylvania-American’s customer service call center is available 24/7/365 to address customer emergencies. *Id.* at 28. Further, not only can customers in an emergency situation speak with a live representative 24/7/365, Pennsylvania-American’s field service crews are also on-call and available for emergency field work (main breaks, sewer backups, overflows) 24/7/365. *Id.*
- Customers will have 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). Brentwood does not provide any such customer assistance program;
- Pennsylvania-American has a dedicated compliance team with access to its statewide resources and advanced management tools, as well as the resources of its parent company to address. *See* PAWC Statement No. 2, p. 17. This fact is especially important considering the environmental challenges that plague Brentwood and the ALCOSAN region at large. Pennsylvania-American also 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.* The Borough has no such employee who is solely dedicated to compliance; in fact, 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).
- Through the negotiations of the Proposed Transaction, Pennsylvania-American and Brentwood understood that a collaborative working relationship with ALCOSAN – the exclusive wastewater provider in the greater Pittsburgh area pursuant to the Z Agreement – is not only ideal to remedy the environmental challenges in Brentwood and the ALCOSAN region, but necessary. Thus, Pennsylvania-American has made efforts to build a relationship with ALCOSAN and commit to proactively address the environmental challenges in the ALCOSAN region if the Proposed Transaction is approved. The culmination of these efforts is Brentwood and Pennsylvania-American executing the Cooperation Agreement, which sets forth and allocates certain rights and obligations from Brentwood to Pennsylvania-American under the Z Agreement, to ensure that each party understands and agrees to honor all respective duties and obligations if the Proposed Transaction is approved.

There is simply no basis in fact for the conclusion that the “the evidence did not establish that any benefit to be realized from the proposed transaction would outweigh the harms to current [Pennsylvania-American] water and wastewater customers or existing Brentwood wastewater customers” upon examination of the record evidence. *See* Recommended Decision, p. 129. In fact, this statement illustrates the flawed standards employed by the Recommended Decision in the first instance. The question for the Commission is not whether any benefit standing alone outweighs the potential rate impact, but whether *all* benefits, taken together, do so, as they do here. These benefits are clear and ample, and must be afforded proper weight by law.

Brentwood respectfully submits that the conclusion reached in the Recommended Decision is not only wholly unsupported by the record but is, in fact, directly contradicted by the record evidence presented in this proceeding. Accordingly, the Borough excepts to the Recommended Decision.

**C. Exception No. 3 – The Recommended Decision Attempts to Set Public Policy In Requiring That a Municipality Cannot Sell its Wastewater Assets Unless or Until Dire Circumstances Warrant the Sale**

Ignoring the record evidence regarding Brentwood’s motivations for selling its System, Judge Dunderdale states that “[t]he evidence clearly showed that the Borough of Brentwood would prefer to receive the purchase price and no longer be responsible for the day-to-day operations of the wastewater conveyance system.” *See* Recommended Decision p. 127. As discussed above, this is a gross mischaracterization of the Borough’s intentions and the evidentiary record.

Brentwood was proactive in acknowledging the significant expertise needed to bring the System into compliance, recognizing that it did not have that expertise and, after careful consideration, determining that Pennsylvania-American was better suited to deal with the necessary overhaul of the System, especially with the environmental challenges posed to the

Borough and the ALCOSAN region at large that were only exacerbated by the Borough's 100-year-old System. The record evidence makes clear that the ALCOSAN region as a whole is plagued by environmental challenges such that the Borough has remained under regulatory order with ACHD for 16 of the last 19 years, and ALCOSAN has been subject to consent decrees with the EPA, PaDEP, and ACHD since 2006. While Brentwood has made diligent efforts to comply with the regulatory orders with ACHD and the Modified Consent Decree, the Borough has been unable to operate its System in a manner that does not require regulatory oversight. *See* PAWC Statement No. 2-R, Rebuttal Testimony of Daniel Hufton, P.E., p. 5; *see also* Transcript of Evidentiary Hearing, November 8, 2023, pp. 149:22–150:7. Thus, beginning in September 2019, the Borough Council explored a sale of its System to a third-party public utility.

These efforts in foresight and proactivity only serve to promote public safety and should be commended. Instead, the Recommended Decision seeks to supplant this well-reasoned judgment by local elected officials by both creating a new legal standard and implementing public policy that requires a municipality to be providing worse service than the potential acquiring utility and/or to be in some form of financial distress for a transaction to be approved. Not only does this disincentivize municipalities with respect to the operation of similar systems, but it also creates a standard that rewards poor performance and penalizes the provision of competent service.

The Borough – and specifically, the local Borough Council elected to make decisions that it determines to be in their constituents' best interest – is best situated to know the ins and outs of the day-to-day operation of the System and the pitfalls that are both present now and linger on the horizon. They are best positioned to determine the impact of continued System operations on their community. Here, Brentwood has set forth the clear reason why it believes that the benefits of the

Proposed Transaction far outweigh any rate impact, a conclusion that was reached after an exhaustive, deliberative, transparent and lengthy process.

If the Application is denied, it will disincentivize municipalities, and particularly those in the ALCOSAN region, from even conducting this analysis, let alone reaching the difficult decision to sell. They will be forced to tread water and make complete guesses as to when they are close enough to drowning as to seek intervention by way of privatization. Local municipal officials should not be forced to wait until the service being provided is at such a point of being unsafe, unreliable, and/or inadequate that they are left with literally no other option. Municipalities must be afforded the opportunity to avoid even approaching that point.

Similarly, it would be a slap in the face to municipalities across this Commonwealth to dictate to them that they can easily go and obtain funding that is (according to the statutory advocates) supposedly readily available to solve all of their problems. Part of the calculus undertaken by Brentwood here was analysis of the financial impact of borrowing money, issuing a bond, or otherwise obtaining the funding needed to continue to operate the System (even in the suboptimal reactive state in which Brentwood currently does so). Any decision to incur more financial obligation is a decision to undertake ways to pay it back, either through tax increases or other means. In that sense, it is a clear additional benefit of the Proposed Transaction that Brentwood will not need to resort to these measures to obtain funds that *might* be available and that *might* permit it to meet the needs of the System going forward.

Those charged with municipal governance should not be placed in such positions. They must be empowered by this Commission to make the difficult decisions for which they were elected, taking all factors into consideration, and to be proactive rather than reactive.

Accordingly, the Borough respectfully excepts to the Recommended Decision because it purportedly establishes a new legal standard and policy by which applications to acquire a municipal authority and/or municipality's wastewater assets whose operators are in a stable financial position and have reputation for safe, reliable service to their customers will be subject to a higher scrutiny.

#### **IV. INCORPORATION OF PENNSYLVANIA-AMERICAN'S EXCEPTIONS**

In addition to the above Exceptions, the Borough adopts and incorporates by reference the Exceptions filed by Pennsylvania-American to the Recommended Decision.

#### **V. CONCLUSION**

For all of the reasons set forth herein, the Borough respectfully submits that Judge Dunderdale erred in concluding that the Application should be denied. The Commission is presented with a record that fully demonstrates the Proposed Transaction's numerous substantial affirmative public benefits. Accordingly, the Borough respectfully request that the Commission grant the Exceptions submitted by the Borough and Pennsylvania-American regarding the Recommended Decision and approve the Proposed Transaction.

Respectfully submitted,

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Dated: January 24, 2024