



January 24, 2024

VIA E-FILING

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

Exceptions of Pennsylvania-American Water Company

Dear Secretary Chiavetta:

Enclosed for filing with the Pennsylvania Public Utility Commission are the Exceptions of Pennsylvania-American Water Company in the above-referenced matter.

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

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

Sincerely,

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

DPZ/kmg
Enclosure

cc: Administrative Law Judge Katrina L. Dunderdale
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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 Transfer, by Sale, of :
Substantially All of the Assets, Properties and Rights :
Related to the Wastewater Collection and Conveyance : Docket No. A-2021-3024058 *et al.*
System Owned by Borough of Brentwood; and the :
Rights to Begin to Offer or Furnish Wastewater Service :
to the Public in the Borough of Brentwood, Allegheny :
County, Pennsylvania :

CERTIFICATE OF SERVICE

I hereby certify that I have this 24th day of January, 2024 served a true copy of the foregoing **Exceptions of Pennsylvania-American Water Company** upon the parties, listed below and in the manner described below in accordance with the requirements of 52 Pa. Code §1.54 (relating to service by a party).

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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

**EXCEPTIONS OF PENNSYLVANIA-AMERICAN
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AND NOW COMES Pennsylvania-American Water Company (“PAWC” or the “Company”) pursuant to 52 Pa. Code § 5.533, to file these Exceptions to the Recommended Decision (“Recommended Decision” or “R.D.”) issued by Administrative Law Judge Katrina L. Dunderdale (the “ALJ”) on January 17, 2024. PAWC respectfully requests that the Pennsylvania Public Utility Commission (the “Commission”) reverse the Recommended Decision and approve PAWC’s application (the “Application”) to acquire the wastewater collection and conveyance system (the “System”) owned by the Borough of Brentwood (“Brentwood”). The evidentiary record developed in this proceeding clearly demonstrates that the acquisition would produce an affirmative public benefit of a substantial nature. In addition, the evidentiary record demonstrates that all of the assets of the Brentwood System are used and useful in the public service and that approval of the Application would not result in PAWC providing free service to upstream municipalities.

I. PROCEDURAL HISTORY

To avoid unnecessary repetition, PAWC incorporates by reference its Main Brief and Reply Brief. The Procedural History of this case is summarized at pages 1-3 of PAWC’s Main Brief and page 1 of PAWC’s Reply Brief.

To update that Procedural History: On December 14, 2023, PAWC, Brentwood, the Office of Consumer Advocate (“OCA”) and the Commission’s Bureau of Investigation and Enforcement (“I&E”) filed Reply Briefs. On that same date, the Office of Small Business Advocate (“OSBA”) and the Allegheny County Sanitary Authority (“ALCOSAN”) filed letters indicating that they would not file Reply Briefs. On January 17, 2024, the ALJ issued her Recommended Decision recommending that the Commission deny the Application.

II. SUMMARY OF ARGUMENT

The crux of this case is whether to approve PAWC's acquisition of the System (the "Transaction"). The applicable legal standard is the affirmative public benefit test; PAWC must show that the Transaction will "affirmatively promote the service, accommodation, convenience or safety of the public in some substantial way." *City of York v. Pa. Pub. Util. Comm'n*, 295 A.2d 825, 828 (Pa. 1972). When the benefits of the Transaction are weighed against the detriments, the preponderance of the evidence shows that the specific benefits that will flow from this particular Transaction outweigh the detriments. This is particularly clear when one compares what would happen (a) if the Commission approves the Transaction (thereby allowing PAWC to acquire the System) to (b) what would happen if the Commission disapproves the Transaction (thereby maintaining the *status quo*).

This is also clear when one compares the instant Transaction to other recent transactions. In the most recent Section 1329 case to come before the Commission, the Commission approved PAWC's acquisition of the Butler Area Sewer Authority ("BASA"). *Application of PAWC to Acquire the Wastewater Collection and Treatment System Owned by the Butler Area Sewer Authority*, Docket No. A-2022-3037047 (Opinion and Order entered Nov. 16, 2023) ("BASA Order"). Although that case involved a settlement, that fact alone should not distinguish the two cases, producing a different result.

In the BASA case, as in this case, the proposed acquisition had significant environmental benefits. Both cases involved systems that had a history of environmental issues. In this case, Brentwood has been under regulatory orders to come into compliance with applicable environmental laws and regulations for 16 of the last 19 years, but has proven unable to address the problems. The Recommended Decision overlooked this record of failure, instead relying on the testimony of two witnesses who have never even been to Brentwood. These witnesses

incorrectly alleged that the System is providing “adequate” service just because it is meeting the milestones in the regulatory orders. If the Transaction is approved, PAWC will not just meet the milestones in the existing regulatory orders; PAWC bring the System into and keep it in compliance with applicable environmental laws and regulations – as it has done for other recent acquisitions.

In the BASA case, as in this case, the Recommended Decision recommended disapproving the Transaction, primarily because of the alleged rate impacts to customers of the buyer and seller. In both cases, the Recommended Decision overlooked the evidence that rates will increase for the acquired system’s customers regardless of whether the Transaction is approved or disapproved. In this case, the estimated impact of the Transaction on the rates of Brentwood’s customers – calculated as required by *Application of Pennsylvania-American Water Company Pursuant to Sections 1102 and 1329 of the Public Utility Code for Approval of its Acquisition of the Water System Assets of the Steelton Borough Authority*, Docket No. A-2019-3006880 (Opinion and Order entered Oct. 3, 2019) (the “*Steelton Order*”) – is a possible 11% rate increase after the expiration of a two-year rate freeze.¹ In contrast, if the Transaction is disapproved, in two years, Brentwood would need to increase rates by about 29% just to keep pace with inflation since its last rate increase (in 2019). In other words, it is unclear whether the rate impact of the Transaction would be detrimental or beneficial for the System’s present customers. The possible rate impact of the Transaction on Brentwood’s customers’ rates therefore should be given little weight, and should not outweigh all of the benefits that Brentwood’s customers will receive from the Transaction.

¹ In the *BASA* proceeding, using this same methodology, the Company notified customers that BASA’s customers could experience a 94.4% rate increase as a result of the acquisition, but the Commission approved a settlement in which PAWC agreed to propose to move the BASA system to 1.4 times the current BASA rate or PAWC’s proposed Rate Zone 1 system-average wastewater rates, whichever is lower.

The Transaction's impact on the rates of PAWC's existing customers would be quite modest. Using the methodology required by the *Steelton Order*, PAWC estimated the impact on PAWC's wastewater customers as 0.3% and the impact on PAWC's water customers as 0.0%. The Recommended Decision suggests that the rate impact will be higher, relying in part on PAWC's proposed rate increase in PAWC's Pending Rate Case.² PAWC's estimate was included in its customer notice – the purpose of which is to notify customers of the possible rate impact of the Commission's decision in this particular application proceeding. PAWC Main Brief at 48-49, PAWC Reply Brief at 42-43. Many additional factors are considered when a utility proposes a rate increase and when a rate increase is ultimately approved by the Commission.

Contrary to the Recommended Decision, PAWC does not rely on its legal, technical and financial fitness to establish that the Transaction is in the public interest. Instead, PAWC and Brentwood together have established an extensive record showing specific benefits from the Transaction that outweigh the detriments of this Transaction for each relevant stakeholder group. Comparing what would happen if the Transaction is approved to what would happen if the *status quo* is maintained demonstrates that PAWC would do more than just provide the same level of services as are already being provided by Brentwood.

The Recommended Decision also recommended that the Acquisition should be disapproved because it would purportedly result in PAWC providing free service to upstream municipalities. These municipalities will convey wastewater through trunklines in Brentwood for ultimate treatment in the ALCOSAN wastewater treatment plant. This recommendation was error.

PAWC proposed a tariff that does not include a tariffed rate for service to upstream municipalities, but PAWC would receive compensation for this service. If the Transaction is

² *Pennsylvania-American Water Company v. Pa. Pub. Util. Comm'n*, Docket Nos. R-2013-3043189 and R-2023-3043190 (pending) ("PAWC's Pending Rate Case").

approved, PAWC will provide service to the upstream municipalities as a member of the ALCOSAN regional interceptor system. All municipalities in the ALCOSAN regional interceptor system are subject to uniform Other Z Agreements. These agreements do not contemplate a charge akin to a tariffed rate, but they do contain a complex series of bargained-for exchanges of consideration between the parties. Pursuant to these agreements, PAWC will receive valuable consideration in return for conveying the upstream municipalities' wastewater through its trunklines. This consideration includes, but is not limited to, the right to convey PAWC's wastewater through the trunklines of downstream municipalities without charge. The mutual consideration contained in these agreements rebuts any argument that PAWC will not receive consideration for the service provided to the upstream municipalities. There is no "free service" that would be provided.

As part of the Application, PAWC submitted several contracts to the Commission for approval pursuant to Section 507 of the Code, including the Cooperation Agreement, by which PAWC will assume certain rights and obligations of Brentwood pursuant to the Z Agreement. The consideration exchanged between the parties to the Cooperation Agreement and the Other Z Agreements is reasonable and should be approved by the Commission pursuant to Section 507. The Commission should approve the bargained-for exchange of consideration in the Cooperation Agreement, rather than disapproving the entire Transaction simply because PAWC will not charge the upstream municipalities a tariffed rate.

The Commission should not issue a decision that would effectively prevent any municipality in the ALCOSAN system from selling its wastewater system to a public utility. Many of the other collection systems in the ALCOSAN regional interceptor system are also older systems experiencing many of the same challenges as Brentwood's System. Other communities

in the ALCOSAN system may wish to sell their systems as a way of addressing these issues (and for other reasons). A Commission decision adopting the Recommended Decision would effectively prevent any municipality in the ALCOSAN system from selling its system. This result would not just be contrary to the facts and the law, it would be contrary to the public interest.

Finally, the Recommended Decision erred by not considering the myriad of other issues presented by the parties in this case. As a result, the Commission does not have the benefit of the ALJ's reasoning on these issues. For the convenience of the Commission, PAWC summarizes the arguments in its Main and Reply Briefs on these additional issues.

III. EXCEPTIONS

The Recommended Decision found that PAWC is legally, financially and technically fit to own and operate the Systems, as required by Sections 1102 and 1103 of the Pennsylvania Public Utility Code ("Code"), 66 Pa. C.S. §§ 1102 and 1103. However, the ALJ concluded:

Ultimately, PAWC's Application must be denied because PAWC failed to meet its burden of proof that the public interest will benefit from the acquisition of the Brentwood system, that the change in ownership will create an affirmative benefit to all affected entities, or that the inclusion of non-jurisdictional service without payment are consistent with the Public Utility Code or the Commission's Orders and regulations.

R.D. at 129.

PAWC respectfully submits that the first two findings concern the same issue: Did PAWC carry its burden of proving that the "Transaction will "affirmatively promote the service, accommodation, convenience or safety of the public in some substantial way," as required by *City of York*? Therefore, these two findings will be discussed together. Second, PAWC will address the ALJ's finding concerning "non-jurisdictional service without payment." Finally, PAWC will address all of the other issues in this proceeding, which the ALJ failed to address.

A. EXCEPTION 1: PAWC PROVED, BY A PREPONDERANCE OF THE EVIDENCE, THAT THE ACQUISITION WILL AFFIRMATIVELY

PROMOTE THE SERVICE, ACCOMMODATION, CONVENIENCE OR SAFETY OF THE PUBLIC IN SOME SUBSTANTIAL WAY.

1. Legal Standards

As the party seeking an order from the Commission, PAWC bears the burden of proof. 66 Pa. C.S. § 332(a). With regard to the *City of York* standard (commonly known as the affirmative public benefits test), PAWC must prove that the net benefits of the Transaction outweigh the net detriments. *Popowsky v. Pa. Pub. Util. Comm'n*, 937 A.2d 1040, 1056 (Pa. 2007). An acquisition provides an affirmative benefit if the net benefits of the transaction outweigh the net adverse impacts of the transaction. *Application of CMV Sewage Co., Inc.*, 2008 Pa. PUC LEXIS 950. When looking at the benefits and detriments of a transaction, the focus of the analysis must be on all affected parties, not merely a particular group or a particular geographic area. *Middletown Township v. Pa. Pub. Util. Comm'n*, 482 A.2d 674 (Pa. Cmwlth. 1984).

PAWC argued that the Transaction passes the affirmative public benefit test because the benefits of the Transaction outweigh the detriments for all of the stakeholder groups impacted by the Transaction: the public-at large; Brentwood (as the seller); the existing customers of Brentwood's System; PAWC (as the buyer); and the existing water and wastewater customers of PAWC. Consequently, the net benefits outweigh the net detriments of the Transaction, considered as a whole. PAWC Main Brief at 14-32; PAWC Reply Brief 6-26.

The Recommended Decision agreed with PAWC that the Transaction benefits Brentwood and PAWC. However, the Recommended Decision found that the net benefits of the Transaction are outweighed by the net detriments for the public-at-large, the existing customers of Brentwood and the existing water and wastewater customers of PAWC. The Recommended Decision erred in finding that the detriments of the Transaction outweigh the benefits for these four stakeholder

groups. In addition, the Recommended Decision erred by failing to weigh the benefits against the detriments of the Transaction as a whole.³

2. The Transaction Benefits the Public-at-Large

The Transaction benefits members of the public-at-large (all residents of the Commonwealth, whether or not they are customers of Brentwood or PAWC) in that the Transaction promotes the Legislature’s policy goals when it enacted Section 1329. PAWC St. No. 1 at 21. The Commission has recognized that Section 1329 reflects a legislative determination that fair market value acquisitions of municipal water and wastewater systems further the public interest. *See, BASA Order* at 59 (citing *Implementation of Section 1329 of the Public Utility Code – Tentative Implementation Order*, Docket No. M-2016-2543193 (Order entered Jul. 21, 2016) and *Implementation of Section 1329 of the Public Utility Code – Tentative Supplemental Implementation Order*, Docket No. M-2016-2543193 (Order entered Sept. 20, 2018)). The Recommended Decision failed to consider this benefit. It should be given some weight.

PAWC also argued that the Transaction benefits the public-at-large because it promotes the Commission’s policy favoring regionalization and consolidation of water and wastewater systems. 52 Pa. Code § 69.721(a). The Recommended Decision, at 123, disagreed that the Transaction promotes regionalization, but failed to consider whether the Transaction promotes consolidation of the industry. The Transaction clearly promotes consolidation⁴ because the Transaction will result in Brentwood’s System being combined with PAWC’s wastewater system.

³ It is the weight of the benefits and detriments, not the number of benefits and detriments, that controls. Vice Chairman Barrow, oral statement in the BASA case. PAWC offers the following analysis for the affirmative public benefits test: (a) for each stakeholder group, identify each benefit and each detriment, assign a weight to each, and determine whether the net benefits outweigh the net detriments; then (b) add/subtract the net benefits/detriments for the several stakeholder groups to determine whether the net benefits outweigh the net detriments for the Transaction as a whole.

⁴ In business and finance, “To consolidate (consolidation) is to combine assets, liabilities, and other financial items of two or more entities into one.” <https://www.investopedia.com/terms/c/consolidate.asp>

In addition, the Transaction promotes consolidation because a single entity will now provide both water and wastewater services to Brentwood's customers, promoting the coordination of projects and the sharing of equipment among the providers. PAWC Amended St. No. 1 at 17; Tr. 156.

The Recommended Decision primarily found that the Transaction would not benefit the public-at-large because "Brentwood currently provides safe, adequate and reliable collection and conveyance service." R.D. at 123. Even if the Commission would agree with this conclusion – which it should not – this conclusion does not mean the Transaction is a net detriment to the public-at-large; it just means that, from an environmental perspective, the Transaction would maintain the *status quo* rather than benefitting the public-at-large. Even if the Transaction would only maintain the environmental *status quo*, the Transaction would still be a net benefit for the public-at-large because the benefits discussed above outweigh the adverse impacts of the Transaction for the public-at-large (no such adverse impacts have been alleged).

Nevertheless, the Commission should not find that the Transaction would only maintain the environmental *status quo*. The Commission should find that the Transaction will affirmatively benefit the public-at-large from an environmental perspective.

The Recommended Decision, at 123, concluded "the evidence presented shows Brentwood is complying with the various agreements and cooperating with state and local authorities in addressing the [environmental] issues in a timely manner." *See also*, R.D. at 127 (Brentwood "is taking the corrective action required by environmental regulators and ALCOSAN"). This case is similar to PAWC's acquisition of the BASA system, which involved a wastewater system that was under a Corrective Action Plan. The BASA system had a long history of environmental challenges. Although BASA was complying with the Corrective Action Plan, PAWC argued that the acquisition would benefit the public-at-large because PAWC would ultimately bring the system

into compliance with applicable environmental laws and regulations. Additionally, PAWC made a commitment to invest a significant amount of money in capital improvements to address the system's environmental issues. *Application of Pennsylvania-American Water Company to Acquire the Wastewater System of the Butler Area Sewer Authority*, Docket No. A-2022-3037047 (Recommended Decision issued Sept. 14, 2023) at 34-35. The Commission ultimately agreed with PAWC that the acquisition benefitted the public-at-large from an environmental perspective. *BASA Order* at 61.

Similarly here, the evidence shows that “Brentwood has been, and continues to be, in violation of state and federal environmental regulations.” PAWC St. No. 2-R at 2. *See also* PAWC St. No. 2-R at 3-4 (“By failing to control excessive [inflow and infiltration] and contributing to illegal [sanitary sewage overflows], Brentwood has failed to provide adequate service to its customers for many years, and today continues to fail to provide adequate service to its customers.”). Being under a regulatory order such as a Consent Order means that a system has persistently violated environmental regulations to the point that the regulator had to step in and enforce a regulatory order. In this case, Brentwood has been under a regulatory order for 16 of the past 19 years. Being compliant with the terms of a Consent Order does not mean that the System is in compliance with environmental regulations. In fact, Brentwood remains out of compliance with environmental regulations. Tr. 150. If the system was compliant with applicable statutes and regulations, it would not be under a Consent Order in the first place. PAWC St. No. 2-R at 2-4; Tr. 146.

Just as in the BASA proceeding, PAWC has committed to investing a significant amount of money in capital improvements to the System to improve environmental compliance (and for other purposes). PAWC St. No. 2 at 18, PAWC Exhibit DJH-2. If the Transaction is approved,

PAWC has committed to bringing the System into compliance with applicable environmental laws and regulations – as it has done with other systems it has acquired. PAWC St. No. 2-R at 4. In contrast, if the Transaction is disapproved, there would be no change in the *status quo*; Brentwood would remain in violation of applicable environmental laws and regulations for the foreseeable future.

The Recommended Decision downplays the extent to which PAWC can remediate the System. R.D. at 127. It claims that upstream municipalities can continue to pollute Brentwood, regardless of the level of capital investment that PAWC commits to reducing inflow and infiltration. The Recommended Decision further claims that the only improvement PAWC can make to the Brentwood system is to replace the pipes. R.D. at 123.

The record shows that the environment is being polluted in contravention of the Environmental Rights Amendment, PA. CONST. art. I, § 27: “The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment.” The record also shows that environmental regulatory agencies with jurisdiction – the Pennsylvania Department of Environmental Protection and the Allegheny County Health Department – have found that the System is not in compliance with applicable laws and regulations and have ordered Brentwood to take remedial action. The Commission should not find that the owner of the System (whether it is Brentwood or PAWC) is powerless to improve the situation.

The System needs to come into compliance with applicable environmental laws and regulations. For twenty years, Brentwood has demonstrated that it cannot get the job done. This proven track record of failure should be more persuasive than the testimony of two witnesses who have never even been to Brentwood – yet assert that the System is providing “adequate” service.

PAWC, on the other hand, has a proven track record of addressing environmental issues at the systems it acquires. It has committed to bringing the System into compliance as well. The resulting improvements in the environment will benefit the public-at-large.

Consequently, the Commission should find that the Transaction would benefit the public-at-large from an environmental perspective. Considering the importance of these environmental benefits under the Commonwealth's Constitution, the Commission should give this benefit considerable weight.

Significantly, no party has alleged that the Transaction would have any detrimental impacts on the public-at-large. The record certainly does not support a finding of any detrimental impacts on the public-at-large.

Therefore, the Commission should find that, on net, the benefits of the Transaction for the public-at-large substantially outweigh the detriments of the Transaction for the public-at-large.

3. The Transaction Benefits the Borough of Brentwood

The Recommended Decision found that the Transaction would have a net positive impact on the Borough of Brentwood as the seller of the System. R.D. at 122. PAWC does not except to this finding.

It is significant to note, however, that the citizens of Brentwood (many of whom are customers of the Brentwood system) are the ultimate beneficiary of many of these benefits. For example, they will benefit when the Borough uses the proceeds of the sale for public purposes.

No party has even alleged any detriment to Brentwood from selling the System. The Commission should find that the Transaction will have a substantial net benefit for Brentwood.

4. The Transaction Benefits Brentwood's Existing Customers

The Recommended Decision found that the detrimental rate impacts of the Transaction outweigh all the benefits of the Transaction for Brentwood's existing customers. The Recommended Decision's analysis should not be adopted by the Commission. As discussed below, it is not clear whether approving the Transaction will have a beneficial or a detrimental rate impact on Brentwood's customers, compared to disapproving the Transaction. Considering this uncertainty, the rate impact of the Transaction should not be given much weight – especially when weighed against the certain benefits that will flow from the Transaction.

If the Transaction is approved, the APA provides that rates for Brentwood customers will not increase until two years after closing on the Transaction. All future rate impacts will be determined by the Commission, based on the requirement that rates be just and reasonable. 66 Pa. C.S. § 1301. In PAWC's Pending Rate Case, the Company has proposed an 11% increase to the total bill for Brentwood customers to become effective at the end of the rate freeze period, consistent with PAWC's notice to Brentwood customers of the rate impact of the Transaction. PAWC developed this estimate using the methodology approved by the Commission in the *Steelton Order*.

The Recommended Decision improperly inflated the impact of the Transaction on rates. The Recommended Decision considered the testimony of two witnesses at the public input hearing, who are customers in a recently-acquired PAWC system. They testified that their rates increased significantly after closing on that acquisition due to PAWC's subsequent rate increases (which included other acquisitions). R.D. 125. This testimony should not have been considered because it is irrelevant; the scope of this proceeding is limited to the impact of *this Transaction alone*. *BASA Order* at 62 (“the Commission agrees with PAWC that the Recommended Decision

incorrectly considered the rate impact of the acquisition together with the rate impacts of *other* PAWC acquisitions and not this acquisition alone” (emphasis in original)).

The Recommended Decision was also influenced by I&E’s assertion that PAWC’s estimates have not proven to be an accurate prediction of future events. R.D. 129. PAWC’s estimate, however, is not intended to be a “crystal ball” predicting the future. PAWC’s estimate was included in its customer notice – the purpose of which is to notify customers of the possible rate impact of the Commission’s decision in this particular application proceeding. PAWC Main Brief at 48-49, PAWC Reply Brief at 42-43. Many additional factors are considered when a utility proposes a rate increase and when a rate increase is ultimately approved by the Commission. Consequently, the Commission should reject the Recommended Decision’s over-inflated and unsupported estimate of the rate impact of the Transaction on Brentwood’s existing customers.

Additionally, in determining the impact of the Transaction on the rates of Brentwood’s customers, the Recommended Decision improperly failed to consider what would happen to those rates if the Transaction is disapproved. The evidence clearly demonstrates that rates will increase *even if* the Transaction is disapproved. Brentwood St. No. 1-R at 7, Tr. 136. During his testimony, Borough Manager Zboyovsky stated that, in 2012, the Borough estimated that it would need to increase its collection rates by 50% by 2027. Tr. 178. This estimate was only for increases in the Borough’s rate for collection and conveyance service. If increases in ALCOSAN’s treatment charges are included, Brentwood customers could experience a 160% increase in rates by 2027. Tr. 179.

In its Main Brief, at 26, PAWC properly relied on U.S. Government publications⁵ to show that, if the Transaction is disapproved, Brentwood would need to increase rates immediately by

⁵ In its Reply Brief, at 16, the OCA complained that these publications were not placed into the record. Published materials, such as law review articles, court decisions, and U.S. Government publications, are commonly cited in

19.55% just to cover the cost of inflation from the date of its last rate increase (in 2019) to October 2023. In his rebuttal testimony, PAWC witness Salvo noted that closing on the acquisition would not occur until at least April 2024 and the APA provides for a two year rate freeze after closing. “Based on the consumer price index, the inflation rate for the 12-month period ending September 2023 was 3.7%. At that pace prices will rise by about 9.2% by the time the rate freeze is over.” PAWC St. No. 1-R at 12. In summary, if the Commission disapproves the Transaction, Brentwood customers could see a rate increase of nearly 29% (19.55% + 9.2%, without compounding) by 2026 just to cover the cost of inflation since Brentwood’s last rate increase. This rate increase does not include any amount for capital improvements to the System.

In its Reply Brief, at 15-18, the OCA challenges the use of the consumer price index to measure the impact of inflation, but does not suggest an alternative measure of inflation. The Commission should not simply ignore the impacts of inflation.

It is likely that the consumer price index understates the amount of the increase that Brentwood’s customers will face if the Transaction is disapproved. The 2019 survey by the American Water Works Association revealed that “Between 1996 and 2018, charges increased 5.09 percent annually for water and 5.64 percent annually for wastewater. This compares to an annual 2.1 percent increase in the CPI over the same period.”⁶ According to a July 2023 article in the New York Times, average water and sewer bills have increased by about 50 percent over the last decade.⁷ The Borough increased its rates by 7% in 2012, 10% in 2013, 17% in 2014, 11% in

briefs without being introduced into the record. In addition, Mr. Salvo’s rebuttal testimony included testimony concerning Brentwood’s rate increases, if the Transaction would be disapproved, based on the consumer price index. PAWC St. No. 1-R at 12. This testimony was neither challenged nor rebutted.

⁶ <https://www.awwa.org/AWWA-Articles/awwas-2019-water-and-wastewater-rate-survey-reveals-increasing-utility-costs-boosting-rates#:~:text=The%20rates%20survey%20revealed%20that,the%20highest%20in%20the%20Northeast>

⁷ <https://www.nytimes.com/2023/07/14/your-money/water-bills-tips.html>

2015 and 7.5% in 2018. Tr. 180. In 2021, ALCOSAN announced that it was increasing its rates for treatment service by 7% each year from 2022-2026. OCA St. 2 at 8.

In determining the rate impact of the Transaction on Brentwood's customers, the amount of the rate increase that would occur if the Transaction is disapproved should be considered. *BASA Order*, at 61-62. It should also be noted that, in raising rates for its existing customers, Brentwood would not be subject to Commission oversight. *Id.*

In Brentwood's case, it is not clear whether Brentwood's existing customers would experience a greater rate increase if PAWC would acquire the System or if Brentwood would retain control of the System. Therefore, it is not clear whether the Transaction would have a positive or negative effect on rates for Brentwood's customers. Considering this uncertainty, the Commission should not give this factor much weight. *Id.* at 62. *See generally Cicero v. Pa. Pub. Util. Comm'n*, 300 A.3d 1106 (Pa. Cmwlth. 2023), *pet. for alloc. pending* (the Court agreed with the OCA that the known harms in that case outweighed the speculative benefits). The Recommended Decision gave this factor considerable weight. This was error.

The Recommended Decision notes that, if the Transaction is approved, Brentwood would lose access to grants through ALCOSAN's Grow program. R.D. at 128. Considering the small amounts involved (to date, Brentwood has received \$232,000 through this program, PAWC Reply Brief at 13), this detriment should not be given much weight.

The Recommended Decision also erred in its consideration of the benefits of the Transaction for Brentwood customers. According to the Recommended Decision, "The crux of PAWC's argument sits squarely on the assumption that since PAWC is fit to provide the service, its fitness is proof enough that there is a public benefit that outweighs the harm for the public as well as the customers." R.D. at 128. This statement is contradicted by substantial evidence. The

record demonstrates that PAWC introduced a considerable amount of evidence showing the specific benefits that will flow from this particular Transaction. In fact, in its Reply Brief, PAWC addressed this very point:

PAWC has introduced extensive evidence of the specific benefits that will result from this particular Transaction. Many other fit public utilities could acquire the System without the benefits that PAWC has established for this Transaction. Not every fit public utility already provides drinking water to Brentwood's customers, nor does every fit public utility have a large wastewater operations center nearby to leverage existing personnel and equipment resources. Not every fit public utility responds to customer requests more quickly than does Brentwood, especially after hours and during emergencies. Not every fit public utility has a record of resolving environmental issues at utilities it has acquired. Not every fit public utility would be willing to commit millions of dollars for post-acquisition improvements to address the System's environmental issues. Not every fit public utility would be willing to spend almost two years negotiating the Cooperation Agreement to preserve and maintain the ALCOSAN regional interceptor system. PAWC St. No. 1 pp. 8-9. PAWC is legally, technically and financially fit to own and operate the System, but there is no basis for the Commission to conclude that all of the benefits of the Transaction are merely a result of PAWC's fitness.

PAWC Reply Brief at 10-11.

The Recommended Decision acknowledges that the Transaction will have benefits for Brentwood's existing customers. These benefits include: customer service availability 24/7; customers' ability pay bills on-line; and customer assistance programs.⁸ The Recommended Decision concluded that each of these benefits is "nominal" (*i.e.*, the Recommended Decision gave each benefit little weight). R.D. 126. PAWC disagrees that these benefits (particularly assistance in paying one's wastewater bill) are "nominal" benefits, and submits that each should be given a modest weight – especially considering that these benefits (unlike the Transactions rate impacts) are certain to occur.

As discussed further below, PAWC submits that every benefit and every detriment should be considered and given an appropriate weight. Together, the numerous benefits

⁸ Additional benefits are discussed in PAWC's Main Brief at 14-33 and Reply Brief at 6-26.

that Brentwood's customers will certainly receive as a result of the Transaction outweigh the nominal impact of the System losing access to Grow grants and the uncertain (possibly positive) rate impacts of the Transaction. Consequently, the Commission should find that PAWC introduced sufficient evidence to establish a *prima facie* case that the Transaction will benefit Brentwood's existing customers, and that no party rebutted that *prima facie* case. *See, e.g.*, PAWC Reply Brief at 12-20.

5. The Transaction Benefits PAWC as the Buyer

The Recommended Decision found that the Transaction would have a net positive impact on PAWC as the buyer of the System. R.D. at 122. PAWC does not except to this finding. It should be noted, however, that when an acquisition has net benefits for the buyer, the ratepayers are the ultimate beneficiaries of these benefits. *See, e.g., City of York*, 295 A.2d at 829.

No party has even alleged any detriment to PAWC as a result of its acquisition of the System. The Commission should find that the Transaction will have a substantial net benefit for PAWC.

6. The Transaction Benefits PAWC's Existing Wastewater Customers

The Recommended Decision acknowledges that the Transaction will have benefits for PAWC's existing wastewater customers. Those benefits include that the wastewater system will grow by approximately 4,000 customers, R.D. at 122, or by about 4%, PAWC Reply Brief at 20. PAWC's existing wastewater customers will benefit from this growth because, by adding connections to the PAWC system, there will be more customers to share future infrastructure investment costs. This promotes stable rates across the entire PAWC system. Customers who benefit from near-term improvements will one day help pay for improvements on behalf of other customers on other parts of the PAWC system. PAWC St. No. 1 at 19.

The Recommended Decision finds that the Transaction will have detrimental impacts on PAWC's existing wastewater customers, primarily because of the Transaction's potential impact on the rates of PAWC's existing wastewater customers. The Commission will set just and reasonable rates in for PAWC's existing wastewater customers. PAWC estimated the impact of the Transaction on PAWC wastewater customers' rates using the methodology approved by the Commission in the *Steelton Order*. PAWC estimated the rate impact of the Transaction on existing PAWC wastewater customers as a possible 0.3% rate increase.

The Recommended Decision, however, suggests that the rate impact of the Transaction will be significantly greater than 0.3%. As discussed above, the Recommended Decision improperly considered irrelevant testimony of two witnesses at the public input hearing, and was influenced by I&E's assertion that PAWC's estimates have not proven to be accurate predictors of future events. R.D. 129. For the reasons discussed above, the Commission should reject the Recommended Decision's suggestion that the rate impact of the Transaction on PAWC's existing wastewater customers will be more than 0.3%. Notably, in PAWC's Pending Rate Case, Exhibit No. 3-A, Combined Water and Wastewater Revenue Requirement – Summary, the Company has proposed that none of the increase associated with Brentwood be allocated to PAWC's other wastewater customers.

The Recommended Decision also suggests that the Transaction will have a detrimental impact on existing PAWC wastewater customers because PAWC will become part of the ALCOSAN system, which does not operate pursuant to Commission regulations or Commission oversight. R.D. at 122. The Recommended Decision does not explain how PAWC's participation in the ALCOSAN system will adversely impact existing PAWC customers, nor does it cite any record evidence to support this finding. In providing service to these customers, PAWC will

remain subject to Commission regulations and Commission oversight. As a result, this suggestion should be rejected as unduly speculative and unsupported by the evidence.⁹

In short, the benefit of this Transaction to PAWC's existing wastewater customers is the addition of almost 4,000 additional customers, whereas the detriment is an estimated 0.3% rate increase. PAWC respectfully submits that the benefits outweigh the detriments. The benefits are certain; there is no question that the Transaction will expand the Company's wastewater customer base, allowing it to spread costs over a greater number of customers in every future rate case. In contrast, the rate impact from this Transaction is uncertain.

For all of the above reasons, PAWC respectfully submits that the Commission should find that the Transaction benefits PAWC's existing wastewater customers.

7. The Transaction Benefits PAWC's Existing Water Customers

The Transaction will have no immediate impact on the rates of PAWC's existing water customers. However, it could impact the rates of these customers in the future because Section 1311(c) of the Code, 66 Pa. C.S. § 1311(c), allows a utility that provides both water and wastewater service to allocate a portion of its wastewater revenue requirement to its water customers "if in the public interest."

PAWC estimated the impact of the Transaction on existing PAWC water customers' rates using the methodology approved by the Commission in the *Steelton Order*. PAWC estimated the rate impact of the Transaction on existing PAWC wastewater customers as a possible 0.0% rate increase.

The Recommended Decision, however, suggests that the rate impact of the Transaction will be greater than 0.0%. For example, the Recommended Decision cites PAWC's Pending Rate

⁹ The Recommended Decision, at 121-122, finds that PAWC's existing customers will not benefit from "providing utility service without charge to non-jurisdictional entities." PAWC will respond to this finding in Exception 2 below.

Cases a authority for the proposition that “PAWC plans to allocate approximately 42% of Brentwood’s wastewater revenue requirement to PAWC’s water customers system-wide.” Finding of Fact 83. PAWC’s estimate was included in its customer notice – the purpose of which is to notify customers of the possible rate impact of the Commission’s decision in this particular application proceeding. PAWC Main Brief at 48-49, PAWC Reply Brief at 42-43. Many additional factors are considered when a utility proposes a rate increase and when a rate increase is ultimately approved by the Commission.

In weighing the benefits and the detriments of the Transaction on PAWC’s existing water customers, PAWC respectfully submits that the language of Section 1311(c) is decisive. The Transaction will have no impact whatsoever on the rates of PAWC’s existing water customers unless the Commission finds that such a result is in the public interest. If an event occurs only if the Commission finds it is “in the public interest” for that event to occur, it is hard to consider that event detrimental. PAWC respectfully submits that the Transaction benefits PAWC’s existing water customers because of the overall growth of PAWC’s combined water and wastewater operations.

8. Conclusion: The Aggregate Benefits of the Transaction Outweigh its Aggregate Detriments

In weighing the benefits and detriments of a transaction, the Commission should consider *all* benefits and detriments. *McCloskey v. Pa. Pub. Util. Comm’n*, 195 A.3d 1055, 1067 (Pa. Cmwlth. 2018), *alloc. denied*, 207 A.3d 290 (Pa. 2019). The Recommended Decision concluded that the Transaction benefits the buyer and the seller, but then eliminated those benefits from the analysis, concluding that the Transaction need only benefit the public-at-large, Brentwood’s customers, and PAWC’s existing water and wastewater customers. R.D. 122. In determining

whether the Transaction, as a whole, passes the affirmative public benefits test, the Recommended Decision erred in not considering the impact of the Transaction on Brentwood and PAWC.

In balancing the benefits and detriments of the Transaction, the Recommended Decision frequently discounts the benefits of the Transaction, finding that, if the Transaction is disapproved, the Borough could spend ratepayer dollars (and possibly tax dollars) to obtain the same benefits that it would have received if the Transaction had been approved. *See, e.g.*, R.D. at 127-128 (suggesting that there is no evidence that the Borough could not borrow money to improve the System). The Recommended Decision, however, fails to explain why it is in the public interest for the Borough to spend untold amounts of money to obtain the same benefits that it could receive by selling the system – in addition to receiving \$19 million to use for public purposes. From a macroeconomic perspective, it is inefficient for every municipality to duplicate the staff, expertise and service levels of a capable public utility. This is one reason the Commission promotes the consolidation and regionalization of the water and wastewater industry.

In addition, the Recommended Decision balances the benefits and detriments of the Transaction in a way that favors municipal ownership, which will cause many acquisitions to be disapproved – contrary to the Legislature’s intent when enacting Section 1329. Benefits of the Transaction are discounted on the grounds that such benefits would occur whenever a utility acquires a municipal system. *See, e.g.*, R.D. at 128 (the “benefits claimed by PAWC are general benefits anticipated by an acquisition like the one proposed of the Brentwood system and are not supported by specific evidence”). Detriments of the Transaction, however, are not similarly discounted on the ground that such detriments occur whenever a utility acquires a municipal system. For example, the Recommended Decision places great weight on the Borough’s low cost of capital – due to the fact that municipalities do not need to pay shareholders. R.D. at 128.

Municipalities can also keep rates low because they do not need to pay taxes, nor are they required to set rates based on the cost of service. In weighing the benefits and detriments of a transaction, the Commission should consider *all* benefits and detriments, not just those that support municipal ownership. *McCloskey*, 195 A.3d at 1067. *See also* PAWC St. No. 1-R at 8-11.

In balancing the benefits and detriments of the Transaction, the Recommended Decision is heavily influenced by the incorrect assertion that “Brentwood is not operating a struggling system.” R.D. at 127. Even if Brentwood were not a struggling system, neither Section 1329 nor the affirmative public benefits test require a system to be “struggling” for an acquisition to be approved. In *City of York*, the Supreme Court approved an acquisition of two utilities that were not struggling.

The Commission should weigh all the benefits of the Transaction against all the detriments of the Transaction in a fair, unbiased manner. If it does, the Commission will find the benefits of the Transaction substantially outweigh the detriments for: the public-at-large, the Borough of Brentwood, and PAWC. Although the question is closer, the benefits of the Transaction also outweigh the detriments for: Brentwood’s existing customers, PAWC’s existing water customers, and PAWC’s existing wastewater customers. Balancing the benefits and detriments of the Transaction as a whole, it is therefore clear that the net benefits of the Transaction outweigh the net detriments.

Consequently, the Commission should reverse the Recommended Decision and find that the Transaction satisfies the affirmative public benefits test.

B. EXCEPTION 2: PAWC PROVED, BY A PREPONDERANCE OF THE EVIDENCE, THAT ALL SYSTEM ASSETS WILL BE USED AND USEFUL IN THE PUBLIC SERVICE AND THAT THE TRANSACTION WILL NOT RESULT IN FREE SERVICE TO UPSTREAM MUNICIPALITIES.

The Recommended Decision states:

Most importantly, this recommended denial is a direct result from PAWC's failure to separate from rate base and the purchase price, the value of the assets used to provide service to non-jurisdictional entities. PAWC failed to conduct a Cost of Service Study which removes from the fair market value, the costs associated with the free utility service Brentwood provides to the upstream municipalities. Some unknown portion of the Brentwood [inflow and infiltration] originates in upstream flows and PAWC is in error to argue that the facilities are used and useful.

If the Application is approved, assets owned by a certificated public utility would be used to provide wastewater conveyance service to non-customers and without charge. PAWC cannot and did not justify why it should be allowed to provide free utility service to some entities while its customers in Brentwood are forced to pay for service that they will not enjoy. No Brentwood customer benefits from the free service given to the Borough of Whitehall and the City of Pittsburgh.

R.D. at 126-127 (note omitted). PAWC excepts to these findings. First, all System assets are used and useful for providing public utility service to Brentwood's customers. Second, the record clearly shows that PAWC will not provide the upstream municipalities with free utility service.

1. ALL SYSTEM ASSETS ARE USED AND USEFUL FOR PROVIDING PUBLIC UTILITY SERVICE TO BRENTWOOD'S CUSTOMERS.

"Used and useful" is a flexible concept. James J. Hoecker, *'Used and Useful': Autopsy of a Ratemaking Policy*, 8 Energy L.J. 303, 310 and 333 (1987).

Generally speaking, the case law regards costs incurred and investments made used and useful if: (1) there is a direct and immediate benefit to customers; traditionally, the investment is in a plant that is operational now or in a future test year or in the period during which the rates may reasonably be expected to be in effect; (2) the investment or expense, even if not affording an immediate tangible benefit, meets certain secondary benefit criteria, such as reasonably foreseeable plant completion, a necessary cost of continuing business (including land acquisition to enhance gas reserves or other reasonable plans and commitments to dedicate property to public service), or assets held in reserve to ensure service reliability; or (3) the expenditure is necessitated by the projected immediate needs of the ratepaying public.

Id. at 312.

The record demonstrates that all of the System's assets (including the trunklines) are used and useful to provide service to Brentwood customers. Tr. 152, 372. First, all System assets convey Brentwood sewage through the Borough to the downstream municipalities for conveyance

to the ALCOSAN regional wastewater treatment plant for treatment. No portion of the trunklines in Brentwood is used solely to convey wastewater from upstream municipalities to downstream municipalities. *Id.* Since the trunklines are used to provide service to Brentwood's customers, there is no reason to exclude them from the purchase price or from PAWC's rate base.

Second, the trunklines provide a direct and immediate benefit to System customers because they are used to convey wastewater from upstream municipalities to downstream municipalities, and ultimately to the ALCOSAN wastewater treatment plant for treatment. The trunklines are part of a mutual assistance system. This mutual assistance system allows Brentwood to send its wastewater through the trunklines of downstream municipalities to receive wastewater treatment service at the ALCOSAN wastewater treatment plant.

The Recommended Decision was incorrect in stating that no Brentwood customer benefits from the service to upstream municipalities. Because upstream municipalities can convey their wastewater through Brentwood's trunk lines, Brentwood's customers are likewise able to use downstream municipalities' conveyance facilities at no additional cost to receive wastewater treatment service at ALCOSAN. Brentwood would not have wastewater treatment service if it did not participate in the comprehensive ALCOSAN system. PAWC St. No. 2-R at 11; Tr. 152. The ability to receive wastewater treatment service is clearly a benefit to System customers. It is therefore reasonable for Brentwood's customers to bear the burden of paying for the assets that are used and useful in providing them with public utility service. The Commission should exercise its discretion to find that the trunklines are used and useful in providing service to System Customers, even though the trunklines are not used exclusively by System Customers.

2. THE ALJ ERRED IN CONCLUDING THAT APPROVAL OF THE TRANSACTION WILL RESULT IN FREE SERVICE TO UPSTREAM MUNICIPALITIES.

The OCA contended that the Transaction would result in PAWC providing free service to the Upstream Municipalities. OCA Main Brief at 46. PAWC argued that it would not. PAWC Reply Brief at 30-33. The ALJ apparently agreed with the OCA. This was error.

The record in this case clearly establishes that PAWC would not be providing free service to the upstream municipalities if the Transaction is approved. In the Application, PAWC proposed a tariff in which the upstream municipalities would not be charged a tariffed rate. Second Amended Appendix A-12. This does not mean that PAWC will provide free service to the upstream municipalities. To the contrary, PAWC will receive consideration for this service.

If the Transaction is approved, PAWC will provide service to the upstream municipalities as a member of the ALCOSAN regional interceptor system. All municipalities in the ALCOSAN regional interceptor system are subject to uniform Other Z Agreements that have been executed between ALCOSAN and the municipalities. These agreements, which have been in effect since 1949, contain a complex series of bargained-for exchanges of consideration between the parties.

The Other Z Agreements do not contemplate charges akin to tariffed rates for the use of intermunicipal trunk lines. PAWC St. No. 2-R at 9. This means that PAWC cannot charge upstream municipalities a tariffed rate. PAWC will nonetheless receive valuable consideration in return for conveying the upstream municipalities' wastewater through its trunklines. This consideration includes, but is not limited to, the right to convey PAWC's wastewater through the trunklines of downstream municipalities without charge. The mutual consideration contained in the Cooperation Agreement and the Other Z Agreements irrefutably rebuts any argument that PAWC will not receive consideration for the service provided to the upstream municipalities.

The facts of this case are easily distinguishable from the facts in *Phila. Suburban Water Co. v. Pa. Pub. Util. Comm'n*, 808 A.2d 1044 (Pa. Cmwlth. 2002), cited by the OCA. OCA Reply Brief at 27. In that case, a municipality paid a utility for fire hydrant service, but the utility contractually agreed to make a payment to a municipal fund in the amount of the municipality's payment for those services. The Commonwealth Court of Pennsylvania ("Commonwealth Court") found that this pay-back arrangement resulted in free service to the municipality.

In this case, in contrast, the various members of the ALCOSAN regional interceptor system agreed to participate in a large mutual assistance network. They agreed to a mutual exchange of consideration for their participation in the network. The fact that they agreed not to charge each other something akin to a tariffed rate does not negate the fact that they mutually exchanged consideration for their participation in the network. This consideration negates any claim that the conveyance service they provide to one another is free.

As part of the Application, PAWC submitted several contracts to the Commission for approval pursuant to Section 507 of the Code, including the Cooperation Agreement, by which PAWC will assume certain rights and obligations of Brentwood pursuant to the Z Agreement. The consideration exchanged between the parties to the Cooperation Agreement is reasonable and should be approved by the Commission pursuant to Section 507. ALCOSAN and more than 80 municipalities have determined that the bargained-for consideration in these agreements is reasonable when they entered into these agreements. These agreements have been in place for over 70 years and lay the groundwork for addressing wastewater treatment issues in the Pittsburgh area. In addition, these agreements promote the Commission's policy of regionalization and consolidation of wastewater treatment service in the ALCOSAN region. The Commission therefore should approve the bargained-for exchange of consideration in the Cooperation

Agreement, rather than disapproving the entire Transaction simply because PAWC will not charge the upstream municipalities a tariffed rate.

The Commission should not issue a decision that would effectively prevent any municipality in the ALCOSAN system from selling its wastewater system to a public utility. Many of the other collection systems in the ALCOSAN regional interceptor system are also older systems experiencing many of the same challenges as Brentwood's System. PAWC St. No. 1-R at 6-7. Other communities in the ALCOSAN system may wish to sell their systems as a way of addressing these issues (and for other reasons). A Commission decision adopting the ALJ's Recommended Decision, however, would effectively prevent any municipality in the ALCOSAN system from selling its system. Adopting the Recommended Decision's position would not just be contrary to the facts and the law, it would be contrary to the public interest.

C. EXCEPTION 3: THE RECOMMENDED DECISION ERRED BY FAILING TO RULE ON THE NUMEROUS OTHER ISSUES PRESENTED IN THIS CASE.

The Application requested more than just approval of the Transaction; PAWC also asked the Commission to: approve several contracts pursuant to Section 507 of the Code, 66 Pa. C.S. § 507, and approve a fair market value for ratemaking purposes pursuant to Section 1329, 66 Pa. C.S. § 1329. During this proceeding, I&E, OSBA and the OCA did not just ask the Commission to deny the Application; they also proposed conditions in the event that the Commission approved the Application and they raised other issues (such as whether PAWC should be required to change its customer notice in future Section 1329 acquisitions).

The Recommended Decision erred by failing to rule on these other issues. As a result, the Commission does not have the benefit of the ALJ's reasoning on the many issues that must be considered if the Commission disagrees with the Recommended Decision and finds that the Transaction benefits the public in a substantial way, that all of the assets of the System are used

and useful in the public service, and that the Transaction will not result in the provision of free service to municipalities.

PAWC respectfully submits that the Commission should resolve each of these issues as set forth in PAWC's Main Brief and Reply Brief. For the Commission's convenience, each issue, its resolution, and the rationale for that result, are summarized below. Additional information can be found in the cited portions of PAWC's Main Brief and/or Reply Brief.

1. Section 1329 Issues

a. Fair Market Value for Ratemaking Purposes

The negotiated purchase price is lower than the average of the appraisals by the buyer's Utility Valuation Expert ("UVE") and the seller's UVE. Accordingly, the negotiated purchase price of \$19,364,443 is the fair market value for ratemaking rate base purposes under Section 1329. No Party disputes this result. PAWC's Main Brief at 33; PAWC's Reply Brief at 26.

b. Tariff and Rates

No Party disputed PAWC's request to make the tariff effective immediately upon Closing. If the Commission approves the Transaction, PAWC requests that the Commission grant this request. PAWC's Main Brief at 34; PAWC's Reply Brief at 26.

c. DSIC

PAWC requested authority to approve the collection of a DSIC in the future, prior to the first base rate case in which the System plant-in-service is incorporated into rate base. The OCA recommended that Brentwood's assets be excluded from the DSIC until the DSIC applies to customers in Brentwood. PAWC accepted this recommendation. PAWC St. No. 3-R at 5.

The OCA also recommended that PAWC file a revised LTIP including Brentwood within ninety days of Closing. OCA St. 1 at 21. The Commission should deny this recommendation.

The Commission is not a super board of directors with the authority to micromanage the affairs of public utilities. *Bell Tel. Co. v. Driscoll*, 343 Pa. 109 (1941); *Metropolitan Edison Co. v. Pa. Pub. Util. Comm'n*, 437 A.2d 76 (Pa. Cmwlth. 1981). The Commission should give the Company the discretion to determine when the cost of filing a revised LTIP is warranted. PAWC's Main Brief at 34; PAWC's Reply Brief at 26-27.

d. Claims for AFUDC and Deferred Depreciation

PAWC seeks authority to accrue AFUDC on post-acquisition improvements, and to defer depreciation on non-DSIC-eligible post-acquisition improvements. PAWC St. No. No. 3-REV at 19. No party opposed this request. The OCA recommended that the Commission not preapprove the recovery of accrued AFUDC or deferred depreciation in this proceeding. OCA St. 1 at 22. PAWC does not object to this recommendation. PAWC's Main Brief at 35; PAWC's Reply Brief at 27.

e. Transaction and Closing Costs

Section 1329 provides that the transaction and closing costs of an acquisition become part of the acquiring utility's rate base. 66 Pa. C.S. § 1329(d)(iv). The OCA recommended that, when PAWC claims its transaction and closing costs in its next base rate case, PAWC should separately identify outside legal fees. In PAWC's Pending Rate Case, PAWC Exhibit 3-C, PAWC separately identified its estimated outside legal fees in its claim for transaction and closing costs.

In addition, the OCA recommended that the Company not be permitted to recover legal and engineering fees for which PAWC will reimburse Brentwood, pursuant to the APA. PAWC is obligated by the APA to reimburse Brentwood for up to \$70,000 in legal and engineering fees. Any ratemaking determination about the recoverability of this cost should be made in that base rate case. PAWC's Main Brief at 36-37; PAWC's Reply Brief at 28.

2. Additional Issues

a. Plant in Service Used to Serve “Non-Customers”

Please see Exception #2, above.

b. Is the Rate Freeze a Rate Stabilization Plan?

Section 7.03(a) of the APA states that PAWC will not increase rates until after the second anniversary of the Closing Date. The OCA contends that this provision is a “rate stabilization plan” as defined in Section 1329(g): “[a] plan that will hold rates constant or phase rates in over a period of time after the next base rate case.” OCA St. 1 at 16; OCA St. 1R at 10.

The Commission previously rejected this argument. *Application of Aqua Pennsylvania Wastewater, Inc. to Acquire the Wastewater System Assets of New Garden Township and the New Garden Township Sewer Authority*, Docket No A-2016-2580061 (Opinion and Order entered Jun. 29, 2017) at 41 (note omitted), *reversed on other grounds, McCloskey, supra*. The Commission should reject it again here. PAWC Main Brief at 40-42; PAWC Reply Brief at 32-34.

c. Should Future Customer Notices Show a Range of Impacts?

The OCA recommended that, in future Section 1329 Applications, PAWC be required to modify its customer notice to show a range of rate impacts. For each customer class, the OCA recommended that PAWC be required to show the rate impact on customers with typical usage, customers using 50% more than typical usage, and customers using 100% more than typical usage. OCA St. 1 at 25. The Commission should reject this argument, *inter alia*, because it is not a condition to approval of the Transaction pursuant to Section 1103 of the Code. Instead, it establishes a rule for *future* 1329 proceedings – a rule that applies only to PAWC. In the absence of a settlement, imposing unique customer notice requirements on a company violates PAWC’s right to equal protection under the law. U.S. CONST. Am. XIV § 1.

Additionally, the proposal is unnecessary. PAWC's customer notice estimates the bill impact in terms of a percentage increase. This percentage increase is applicable to all customer classes and usage amounts. Therefore, a customer with any level of usage could estimate his own impact using the estimated percentage increase that is shown on the customer notice. PAWC Main Brief at 42-43; PAWC Reply Brief at 34-35.

3. Section 507 Approvals

PAWC asked that the Commission approve six agreements pursuant to Section 507. The OCA argued that the Commission should not approve the Cooperation Agreement because that contract does not contain a laundry-list of provisions that the OCA believes are desirable (such as a requirement that PAWC provide notice to Brentwood customers that ALCOSAN is raising its rates). The OCA also argued that the Commission should exercise its discretion pursuant to 66 Pa. C.S. § 508 to reform the Cooperation Agreement to include its wish list of provisions. OCA Main Brief at 49-53.

The Commission should deny the OCA's request to modify the Cooperation Agreement pursuant to Section 508 because that would violate PAWC's due process rights, considering that the possibility of revising any of the six agreements pursuant to Section 508 was never raised until the Main Brief. The Commission should also reject the OCA's request to modify the Cooperation Agreement pursuant to Section 507 because the Cooperation Agreement was to allocate certain rights and obligations of Brentwood under the Z Agreement to PAWC, while Brentwood remained primarily responsible for its municipal rights and obligations under the Z Agreement. PAWC St. No. 1 at 8. Most of the OCA's desired provisions were not in the Z Agreement. Consequently, there is no reason why the Cooperation Agreement should shift those rights and obligations from Brentwood to PAWC.

One responsibility that the Cooperation Agreement did shift from Brentwood to PAWC was the obligation to serve as ALCOSAN's billing agent. The OCA claims that PAWC's proposal to act as ALCOSAN's billing agent is "akin to a pass-through under section 1307(a) of the Public Utility Code; yet, PAWC has not met its burden to show that such a pass-through is warranted." OCA's Main Brief at 51. This argument should be rejected. PAWC proposes to act as a billing agent for ALCOSAN, collecting amounts that ALCOSAN's treatment customers owe to ALCOSAN. PAWC is not asking the Commission to allow PAWC to "pass through" an ALCOSAN charge to PAWC customers. The Section 1307 requirements for a pass-through charge do not apply here. PAWC Reply Brief at 35-38.

4. Preservation of the Z Agreement and Other Z Agreements

In this proceeding, ALCOSAN seeks the preservation and uniformity of the Z Agreement and the Other Z Agreements. ALCOSAN St. No. 1 at 4. PAWC supports this request. PAWC Main Brief at 44; PAWC Reply Brief at 38.

5. Recommended Conditions for Approval

a. Missing Easements and Other Property Rights

I&E recommended that, if the Commission approves the Transaction, it should impose a condition on its approval that would prohibit Closing on the Transaction unless and until Brentwood proves to PAWC that it has: (a) identified all missing easements and property rights, (b) taken action to obtain any missing easements and property rights so they may be conveyed to PAWC at Closing, and (c) borne all costs and expenses for obtaining and conveying all missing easements and property rights. I&E St. No. 2 at 7. Additionally, I&E recommended that, if circumstances beyond Brentwood's control prevent it from transferring all easements and property rights at Closing, PAWC and Brentwood should have the option of Closing, provided that an

escrow account be established to obtain any post-Closing transfers of missing easements and property rights. *Id.* I&E’s recommendation is similar to settlements that PAWC entered into in several previous Section 1329 acquisition proceedings, and PAWC has no objection to it. PAWC Main Brief at 44-45; PAWC Reply Brief at 38.

b. Cost of Service Studies

The OCA recommended that, if the Transaction is approved, PAWC should be required to provide a separate cost of service study (“COSS”) for the System in its next base rate case. Additionally, the OCA recommended that, if the Transaction is approved, PAWC should be required to submit a COSS that removes all costs and revenues associated with the operation of the Brentwood System. OCA St.1 at 22. PAWC has no objection to these recommendations.

In contrast, PAWC disagrees with the recommendation of I&E witness Kubas that, if the Transaction is approved, PAWC should be required to provide a separate COSS for the System in all future rate cases. This COSS would remove the plant and expenses assigned or allocated to “non-customers” and any expenses associated with “non-customer plant.” I&E St. No. 1 at 16-20. PAWC disagrees that a separate COSS should be required for Brentwood in every future rate case. It is premature at this point to determine that a separate COSS will be appropriate in all future rate cases. PAWC St. No. 3-R at 12. Moreover, as discussed above, all assets that PAWC is acquiring are used and useful in providing service to Brentwood customers. It would be inappropriate to exclude a portion of these assets from the rate base and be made non-recoverable to the Company. PAWC St. 3-R at 11. PAWC Main Brief at 45-46; PAWC Reply Brief at 38-39.

c. Rate Freeze

The APA provides that Brentwood’s rates will not be increased until two years following Closing. PAWC committed that, if it files a base rate case that will be effective prior to the second

anniversary of Closing, PAWC will propose an increase for Brentwood customers that will become effective on the second anniversary of Closing and PAWC will calculate its proof of revenues as if the increase to Brentwood revenues were not delayed. PAWC St. No. 3-R at 4. PAWC followed-through on these commitments in its recently-filed base rate case; PAWC proposed that rates for Brentwood's customers increase in August 2024, but calculated PAWC's proof of revenues as if the effective date was not delayed.

In its briefs, the OCA argued that the rate freeze should be disapproved. OCA Main Brief at 54; OCA Reply Brief at 33. This argument should be rejected because OCA's witness did not testify that the rate freeze should be disapproved. A brief should not advocate a position different from the position taken by that party's own witnesses.

The rate freeze provision does not restrict the Commission's authority to set rates. The Commission, however, does not have the authority to micromanage the affairs of public utilities. *Driscoll, Metropolitan Edison Co., supra*. The Commission should allow a public utility to negotiate its best deal with the municipal seller of the utility system and then submit the asset purchase agreement to the Commission for a determination of (a) whether the agreement is reasonable, legal and valid, as required by Section 507, and (b) whether the transaction as a whole is in the public interest, as required by Sections 1102 and 1103. PAWC Main Brief at 47; PAWC Reply Brief.

d. Customer Notice

The OCA argued that the Transaction should be disapproved because the customer notice was deficient (*e.g.*, the rate impact of future PAWC investments in the Brentwood System was not included in the customer notice). OCA St. 2R at 3. This argument should be rejected. PAWC

must issue customer notices that comply with the settlement that was approved by the Commission in the *Steelton Order*. The customer notice in this case did so.

I&E argues that customer notices should include a more accurate range of potential rate increases. However, I&E makes no specific proposal as to how PAWC should carry out this directive. The Commission should not give PAWC ambiguous instructions on how to give customers notice in a future case; such an order would give rise to litigation in the future over whether PAWC complied with the Commission's order.

In any event, the customer notice is not intended to be a "crystal ball" predicting future events. The customer notice serves a very limited purpose. *McCloskey* requires that notice be given to advise customers of the rate impact of the Commission's decision in the application proceeding – nothing more. *McCloskey* states: "[W]hether individualized notice is required depends on whether the outcome of the proceeding binds the Commission to increase rates." 195 A.3d at 1069. *McCloskey* further states: "Because a rate base determination is fundamental to a determination of rates, under [*Barasch v. Pa. Pub. Util. Comm'n*, 546 A.2d 1296, 1305-1306 (Pa. Cmwlth. 1988)], individualized notice has to be given to all ratepayers of the proposed sale as well as an opportunity for them to participate in the Section 1329 proceeding." 195 A.3d at 1069. PAWC Main Brief at 47-51; PAWC Reply Brief at 39-44. The Commission should not acquiesce to OCA demands to disrupt and unravel years of Commission procedures that were meticulously established for the effective and fair processing of Section 1329 applications.

e. ALCOSAN Charges and Discounts

In the Z Agreement, ALCOSAN gave municipalities the option of billing ALCOSAN's customers in return for a payment approximating the amount that ALCOSAN saved in billing expense because the municipality serves as ALCOSAN's billing agent. PAWC Exhibit MS-2

Appendix A-25.3 ¶ 16. Brentwood selected this option and has been acting as a billing agent for ALCOSAN for years.

In the Cooperation Agreement, PAWC agreed to assume this obligation of Brentwood. As compensation for this service, PAWC will receive a payment in an amount approximating the amount ALCOSAN saves in billing expenses. PAWC Exhibit MS-2 Appendix A-25.3 ¶ 2.g. This arrangement would be akin to a consolidated bill by which an electric distribution company bills customers for services provided by an electric generation supplier.

If the Transaction is approved, the OCA recommends that ALCOSAN'S treatment charges be included in PAWC's rates as an operations and maintenance expense. OCA St. 1R at 11; OCA St. 2R at 2. The Commission should reject this approval. The OCA's position is based on a fundamental misunderstanding of the Z Agreement. According to the OCA, Brentwood is the customer of ALCOSAN. OCA Main Brief at 31. That is not the case now, and it will not be the case if the Transaction is approved. Instead, Brentwood's collection-only system customers would remain customers of ALCOSAN for treatment services. There is no reason this cost should be shared with all PAWC's customers by including it in PAWC's rates.

Additionally, the OCA contends that ALCOSAN rates should not be passed on to PAWC's customers without Commission oversight, OCA St. 1 at 24, but the OCA does not explain what the Commission is supposed to review with respect to the ALCOSAN charges. PAWC does not have information as to how ALCOSAN established its charges. Moreover, the OCA fails to explain what the Commission is supposed to do following this review, since the Commission lacks jurisdiction over ALCOSAN. PAWC St. No. 3-R at 6.

The OCA admits that, if the Commission adopts its proposal, Brentwood customers could lose the ALCOSAN low-income discount. To offset the loss of this assistance, the OCA

recommends that the Commission direct PAWC to increase the amount of its low-income discount for wastewater by \$15 per month. OCA St. 1SR at 11. The OCA proposal would turn an ALCOSAN-funded discount into a PAWC ratepayer-funded discount. Tr. 374. It is unreasonable for the OCA to ask PAWC's customers to finance a low-income assistance program to make up for a discount that Brentwood customers will lose *because of another OCA recommendation*. Instead, the Commission should reject the proposal to include ALCOSAN's charges in PAWC's rates, and allow Brentwood customers to remain eligible to receive the discount they currently receive from ALCOSAN. PAWC Main Brief at 51-55; PAWC Reply Brief at 45-47. It is not the role of the Commission to grant every item on OCA's wish list. It is the role of the Commission to treat all parties appearing before it in a fair manner and consistent with the law.

f. Specific Notice for Brentwood Customers Prior to Closing

Both I&E and the OCA recommend that, if the Transaction is approved, PAWC should be required to provide additional notices about the rate impact of the Transaction to Brentwood's current customers. These recommendations should be rejected. Providing customers with a recalculated notice of the Transaction's rate impact, after the Commission approves the Transaction, serves no purpose. Additionally, PAWC provided customers with notice of the Application proceeding from late July to early September, 2023, whereas PAWC did not file its rate case until early November, 2023. Nothing in Section 1329 requires that an acquiring utility provide customers with a second notice, based on subsequent events. PAWC Main Brief at 55-56; PAWC Reply Brief at 47-49.

g. Payment Agent in Brentwood

If the Transaction is approved, the OCA recommended that PAWC be required to arrange for a payment agent in the Borough to collect customer bills. OCA St. 1 at 12; OCA St. 2SR at 8.

PAWC objects to this proposal. In this electronic age, when many people pay bills over the phone and on-line, this recommendation is an unnecessary cost imposed on the Company (and its ratepayers). It is ironic that the OCA opposes approval of the Transaction because it would allegedly increase rates to customers, yet OCA recommends conditions that will further increase those rates. PAWC Main Brief at 56; PAWC Reply Brief at 49-50.

h. Additional Conditions

The OCA's Main Brief included a section that was not part of the common brief outline, as agreed-to by the Parties. This section included two recommended conditions that were not discussed in the testimony of any witness. PAWC objects to the introduction of these issues on the grounds that it violates PAWC's due process rights.

If the Commission considers these issues on the merits, it should deny them. The first recommended condition is that the Commission require PAWC and Brentwood to complete new appraisals that do not include the plant that is not used and useful. This recommendation should be rejected because, as argued above, all assets being acquired in the Transaction are used and useful. Additionally, revising the UVE appraisals after the Commission approves the Transaction serves no purpose. The UVE appraisals are used by the Commission in its decision on a Section 1329 application to determine the amount that can be included in rate base as a result of the acquisition. 66 Pa. C.S. § 1329(c)(2); *McCloskey*. Once the Commission decides to approve the application, and establishes the rate base in its decision, there is no further use for the UVE appraisals. New appraisals would therefore be useless.

The second recommended condition is that, when PAWC submits a new LTIP that includes Brentwood, the Commission should require that the proposed projects be in addition to, and not reprioritize, any capital improvements that PAWC was already committed to undertake

for existing customers. OCA Main Brief p. 57. This proposed condition is not supported by any evidence of record. Considering that Commission decisions must be supported by substantial evidence, *Norfolk & Western Ry. Co. v. Pa. Pub. Util. Comm'n*, 489 Pa 109, 413 A.2d 1037 (1980), the Commission should reject this recommendation because of the lack of an evidentiary foundation. Additionally, the Commission is not a super board of directors with authority to micromanage public utilities. *Driscoll, Metropolitan Edison Co., supra*. The Commission should allow PAWC to prepare its LTIP as it sees fit, and allow all parties to advocate their respective positions in the proceedings on PAWC's revised LTIP. PAWC Reply Brief at 50-52.

IV. CONCLUSION

WHEREFORE, for all of the reasons set forth above, Pennsylvania-American Water Company respectfully requests that the Commission:

- (1) reverse the Recommended Decision, and
- (2) approve the Application filed by PAWC on March 31, 2023 (as amended).

Respectfully submitted,



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