



COMMONWEALTH OF PENNSYLVANIA  
PENNSYLVANIA PUBLIC UTILITY COMMISSION  
COMMONWEALTH KEYSTONE BUILDING  
400 NORTH STREET, HARRISBURG, PA 17120

BUREAU OF  
INVESTIGATION  
&  
ENFORCEMENT

January 29, 2024

**Via Electronic Filing**

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

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

**I&E Reply Exceptions**

Dear Secretary Chiavetta:

Enclosed for electronic filing please find the Bureau of Investigation and Enforcement's ("I&E") Reply Exceptions in the above-captioned proceeding.

Copies are being served on parties per the attached Certificate of Service. Should you have any questions, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink that reads "Carrie B. Wright". The signature is written in a cursive, slightly slanted style.

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CBW/ac  
Enclosures

cc: Administrative Law Judge Katrina L. Dunderdale (via First-Class and Electronic Mail)  
Office of Special Assistants (via email – [ra-OSA@pa.gov](mailto:ra-OSA@pa.gov))  
Per Certificate of Service

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Application of Pennsylvania American :  
Water Company under Sections 1102(a) :  
and 1329 of the Pennsylvania Public :  
Utility Code to Acquire the Collection :  
and Conveyance System Owned by the :                   Docket No. A-2021-3024058  
Borough of Brentwood and to Provide :  
Wastewater Service to the Public in the :  
Borough of Brentwood in Allegheny :  
County, Pennsylvania :

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**REPLY EXCEPTIONS  
OF THE  
BUREAU OF INVESTIGATION AND ENFORCEMENT**

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PA Attorney ID No. 208182

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Dated: January 29, 2024

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## **I. INTRODUCTION AND PROCEDURAL HISTORY**

On November 30, 2023, the Bureau of Investigation and Enforcement (I&E) filed a Main Brief in this proceeding. The history of the proceeding was addressed in I&E's Main Brief<sup>1</sup> and Reply Brief.<sup>2</sup> On November 30, 2023, the Pennsylvania American Water Company (PAWC or Company), the Office of Consumer Advocate (OCA), the Office of Small Business Advocate (OSBA), the Borough of Brentwood (Brentwood or Borough), and the Allegheny County Sewer Authority (ALCOSAN) also filed Main Briefs. On December 14, 2023, PAWC, I&E, OCA, and Brentwood filed Reply Briefs.

On January 17, 2024, ALJ Dunderdale issued a Recommended Decision (RD) which recommended that the Commission deny the Application. PAWC and Brentwood filed Exceptions to the ALJ's RD. I&E now timely files the instant Replies to Exceptions filed by PAWC and Brentwood.

## **II. SUMMARY OF THE ARGUMENT**

PAWC, as the proponent of the Application, bears the burden of proof to establish that it is entitled to receive the approvals being sought in the Application.<sup>3</sup> PAWC's burden includes the obligation to establish a preponderance of evidence which is substantial and legally credible.<sup>4</sup> In order to meet its burden of proof, PAWC must present evidence more convincing, by even the smallest amount, than that presented by any opposing party.<sup>5</sup> To satisfy its burden, PAWC must demonstrate, by a

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<sup>1</sup> I&E Main Brief, p. 1.

<sup>2</sup> I&E Reply Brief, p. 1.

<sup>3</sup> I&E Main Brief, pp. 2-3; 66 Pa. C.S. § 332(a).

<sup>4</sup> PAWC Main Brief, p. 9; *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600, 602 (Pa. Cmwlth. 1990).

<sup>5</sup> PAWC Main Brief, p. 9; *Se-Ling Hosiery v. Margulies*, 70 A.2d 854 (Pa. 1950).

preponderance of the evidence, that its proposed transaction complies with Pennsylvania law and should be approved.<sup>6</sup> Specific to this case, PAWC has the burden of proving that the proposed transaction is in compliance with Sections 507, 1102, 1103, 2102 and 1329 of the Code. PAWC has not met its burden, as demonstrated by the ALJ in her Recommended Decision, because its Application does not comply with any of the applicable sections of the Code.

### **III. REPLY EXCEPTIONS**

No party has attempted to argue that PAWC is not legally, financially, and technically fit to own and operate the Brentwood wastewater system. The crux of the issue in this case relates to whether there will be any substantial affirmative benefits to the transaction.

The ALJ, however, was persuaded by the evidence presented by I&E and OCA and determined based on that evidence that PAWC did not meet its burden in demonstrating that the transaction will promote the public interest by providing affirmative public benefits to all affected entities.<sup>7</sup>

#### **A. REPLY TO PAWC EXCEPTION NO. 1: PAWC DID NOT PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT THE ACQUISITION WILL AFFIRMATIVELY PROMOTE THE SERVICE, ACCOMODATION, CONVENIENCE OR SAFETY OF THE PUBLIC IN SOME SUBSTANTIAL WAY.**

##### **1. The Transaction Does Not benefit the Public at Large.**

In Exceptions, PAWC argues that the ALJ erred in determining that while there

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<sup>6</sup> *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600, 602 (Pa. Cmwlth. 1990).

<sup>7</sup> RD at 129.

were benefits to PAWC and Brentwood, those benefits are largely overshadowed by the detriments of the acquisition as a whole.<sup>8</sup>

The Code requires that the Commission issue a certificate of public convenience as a prerequisite to offering service, abandoning service and certain property transfers by public utilities or their affiliated interests.<sup>9</sup>

The standards for the issuance of a certification of public convenience are set forth in Sections 1102 and 1103 of the Code.<sup>10</sup> A certificate of public convenience shall be granted “only if the commission shall find or determine that the granting of such certificate is necessary or proper for the service, accommodation, convenience or safety of the public.”<sup>11</sup> These provisions have been interpreted by the Pennsylvania Supreme Court in the *City of York v. Pennsylvania Public Utility Commission* for the proposition that to establish that a proposed transaction benefits the public, it must be shown to affirmatively promote the service, accommodation, convenience or safety of the public in some substantial way.<sup>12</sup> To ensure that a transaction is in the public interest, the Commission may impose conditions on granting a certificate of public convenience as it may deem to be just and reasonable.<sup>13</sup>

In Exceptions, PAWC attempts to demonstrate that the acquisition would benefit the public at large. In doing so, PAWC refers to the Commission’s Section 1329

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<sup>8</sup> PAWC Exceptions, pp. 7-8.

<sup>9</sup> 66 Pa. C.S. § 1102(a).

<sup>10</sup> 66 Pa. C.S. §§ 1102, 1103.

<sup>11</sup> 66 Pa. C.S. § 1103(a).

<sup>12</sup> *City of York v. Pa. PUC*, 449 Pa. 136, 295 A.2d 825, 828 (1972).

<sup>13</sup> 66 Pa. C.S. § 1103(a).

Tentative Implementation Order<sup>14</sup> and its Section 1329 Tentative Supplemental Implementation Order.<sup>15</sup> PAWC noting that 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.”<sup>16</sup> PAWC goes on to say that it believes the ALJ did not consider this benefit.<sup>17</sup> This is simply untrue. In fact, the entire premise of the ALJ’s recommendation was that this transaction did not produce any substantial affirmative benefits and, therefore, would not be in the public interest.

Regarding the public interest, the *Tentative Implementation Order* simply notes that that testimony included with the Application should state how the acquisition is in the public interest.<sup>18</sup> The Commission’s *Tentative Supplemental Implementation Order*, is far closer to being on point, but only explains that the question of whether an acquisition is in the public interest is not dependent on the value of the property, but the valuation does play a significant role.<sup>19</sup> Simply put, the use of Section 1329 does not provide any confirmation that an acquisition is the in the public interest. The value of the assets to be acquired is part of the consideration whether the acquisition is a Section 1329 acquisition or not. The likely higher price attached to a Section 1329 acquisition is not

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<sup>14</sup> *Implementation of Section 1329 of the Public Utility Code – Tentative Implementation Order*, Docket No. M-2016-2543193 (Order entered July 21, 2016).

<sup>15</sup> *Implementation of Section 1329 of the Public Utility Code – Tentative Supplemental Implementation Order*, Docket No. M-2016-2543193 (Order entered September 20, 2018).

<sup>16</sup> PAWC Exceptions, p. 8.

<sup>17</sup> PAWC Exceptions, p. 8.

<sup>18</sup> *Implementation of Section 1329 of the Public Utility Code – Tentative Implementation Order*, Docket No. M-2016-2543193, p. 10 (Order entered July 21, 2016).

<sup>19</sup> *Implementation of Section 1329 of the Public Utility Code – Tentative Supplemental Implementation Order*, Docket No. M-2016-2543193, p. 3 (Order entered September 20, 2018).

confirmation that the acquisition is in the public interest. It simply makes the acquisition more attractive for a municipality.

PAWC then notes that it believes the ALJ disagreed that the transaction promotes regionalization but did not consider whether it promoted consolidation.<sup>20</sup> However, this is clearly untrue as one of the ALJ's states "PAWC is correct to point out that it has a record of acquiring and improving wastewater systems and the general benefit of consolidation..."<sup>21</sup> PAWC states that the acquisition "clearly promotes consolidation because the transaction will result in Brentwood's System being combined with PAWC's wastewater system."<sup>22</sup> This argument is curious at best because consolidation alone is simply not enough to show that an acquisition is in the public interest. In every instance in which PAWC acquires a water or wastewater system, that system will necessarily be "consolidated" with PAWC's own system. To the extent the ALJ did not consider this a sufficient benefit to recommend the acquisition be approved, she was absolutely correct in that determination. Consolidation is simply the outcome of the purchase, and not a benefit thereof.

Further, as explained in the I&E Reply brief, reliance on this policy statement at 52 Pa. Code § 69.721 is largely misplaced. While the Commission, no doubt, has a policy favoring consolidation and regionalization of water and wastewater systems, simply reading 52 Pa. Code § 69.721(c) makes clear that this regulation is referring to

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<sup>20</sup> PAWC Exceptions, p. 8.

<sup>21</sup> RD at 123.

<sup>22</sup> PAWC Exceptions, p. 8.

valuation separate and apart from Section 1329, in which the acquired assets are booked at original cost less accrued depreciation.<sup>23</sup> Under this valuation methodology, assets are valued much lower than the fair market valuations under Section 1329 resulting in a much lower purchase price. As Section 69.721(a) notes, regionalization and consolidation should allow utilities to achieve greater economies of scale, meaning that a larger customer base over which to spread costs results in lower costs overall because those costs are spread to more ratepayers. However, under Section 1329, the valuations are much higher which drives up the purchase price and the assets are placed in rate base at a much higher valuation than under prior methodologies. Customers pay a return of and a return on these higher rate base values, which significantly diminishes any economies of scale benefit given that rates continue to rise significantly for both current customers and those customers of the acquired utilities. The goal of regionalization and consolidation is not simply to acquire as many water and wastewater systems as possible and combine them into one system, but to consolidate systems in a way that benefits customers. Here, PAWC has failed to demonstrate that its existing customers or the Brentwood customers will benefit if the acquisition is approved.

PAWC also criticizes the ALJ's determination in which she explains that the acquisition does not benefit the public at large because Brentwood already provides safe and reliable service.<sup>24</sup> PAWC states that even if the transaction only serves to maintain the environmental status quo, it still benefits the public at large.<sup>25</sup>

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<sup>23</sup> 66 Pa. C.S. § 1311(b).

<sup>24</sup> RD at 123.

<sup>25</sup> PAWC Exceptions, p. 9.

If one looks at what would happen if the acquisition is approved versus what would happen if it was not it is clear that service under PAWC's ownership will not be markedly improve from that under Brentwood's ownership. However as explained in the I&E Main Brief, with regard to infiltration and inflow (I&I), which has been an issue for some time with the system, it appears Brentwood is currently taking the necessary steps to correct this issue. In addition, OCA witness DeMarco opined that Brentwood appears to be improving its system and meeting the milestones in the agreements it has entered into.<sup>26</sup>

Moreover, Brentwood is not a troubled system with no access to capital. As explained by Borough Manager Zboyovsky the Borough is not financially in distress.<sup>27</sup> Further, the Borough has not had issues funding infrastructure replacement and the Brentwood system has "good cashflow."<sup>28</sup>

Even under PAWC's ownership, the resolution of the I&I problems faced by the Brentwood system is a long, multi-step process. This process is likely to follow the same pattern under PAWC's ownership as currently followed by Brentwood regardless of who owns the system. PAWC has not alleged that it would markedly depart from the plan Brentwood is currently following to correct I&I. The I&I issues are due in part to upstream municipalities and there is no quick fix on the horizon to resolve these concerns; however, it does not appear that PAWC's ownership will result in much change. There has been no indication that Brentwood will simply cease to work on the

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<sup>26</sup> OCA St. No. 1, p. 10.

<sup>27</sup> Appendix A-13 a p. 5 lines 2-3.

<sup>28</sup> OCA St. No. 1, pp. 14-15.

environmental issues the system faces and there is no evidence that PAWC will resolve the environmental issues at a faster pace than Brentwood. Therefore, looking at what will occur if the transaction is approved versus what will happen if it is not approved suggest that there will not be much difference and certainly does not rise to the level of a substantial public benefit. While PAWC has improved systems with challenges in the past,<sup>29</sup> PAWC has provided no evidence to demonstrate that Brentwood is not capable of doing so on its own and is not currently taking the necessary steps to do so.

Importantly, the ALJ explains:

the Brentwood system is not a total wastewater system – it includes only assets associated with collection and conveyance. The only improvements PAWC 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. To the contrary, the evidence presented shows Brentwood is complying with the various agreements and cooperating with state and local authorities in addressing the issues in a timely manner.<sup>30</sup>

Therefore, it is clear that the ALJ did not err. The service and improvements under PAWC’s ownership, will likely be largely the same as those that could be made under Brentwood’s ownership. As a result, PAWC has not demonstrated that there is an affirmative public benefit to the public at large.

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<sup>29</sup> PAWC Main Brief, p. 20.

<sup>30</sup> RD at 123.

## **2. The Transaction Does Not Benefit the Customers of the Brentwood System.**

PAWC erroneously concludes that the ALJ should not have considered the public input testimony of witnesses who testified that their rates increased significantly after closing of acquisitions in PAWC's subsequent base rate case because that testimony is irrelevant.<sup>31</sup> To say that the impact of these acquisitions on customer's rates is irrelevant and should be ignored is incredibly short-sighted and out-of-touch on PAWC's part considering it is the entity that is collecting this money and filing for these base rate increases. PAWC explains that the testimony is irrelevant because the scope of this proceeding is limited to the impact of the instant transaction alone.<sup>32</sup> The testimony provided at these public input hearings by these customers is most certainly relevant, and to have PAWC insinuate that it should be disregarded is concerning. The testimony in fact demonstrated that based on past history, PAWC has increased rates as a result of these transactions, so going forward, if the past is the best prediction of the future, these customers can assume PAWC will continue to increase their rates as a result of these acquisitions. Simply because PAWC does not like customers pointing out that their rate increases have been high, is no reason for the ALJ to ignore the evidence they provided. PAWC has not disputed these customers testimony; only stated that they believe the Commission should disregard it. Nor did PAWC object to this testimony as irrelevant at the public input hearings. The testimony of these customers must be given weight and

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<sup>31</sup> PAWC Exceptions, p. 13.

<sup>32</sup> PAWC Exceptions, p. 13.

not ignored as PAWC would have. The ALJ was correct to rely on this credible testimony.

PAWC criticizes the ALJ for being “influenced by I&E’s assertion that PAWC’s estimates have not been proven to be accurate predictions of future events.”<sup>33</sup> PAWC explains that its estimates are not intended to be a crystal ball predicting the future, but to notify the customers of the possible rate impact.<sup>34</sup> This statement is troubling for I&E, and I&E submits it should be troubling for the Commission as a whole. PAWC’s aim should be to make its predictions as accurate as possible. PAWC often files base rate cases before the Commission filled with projections and estimates about future costs, improvements, and the rate impact thereof. If PAWC is now telling us their estimates are unreliable and not intended to be a “crystal ball,” what is the Commission to do with the information provided by PAWC when it is asking to increase these customer’s rates.

It is a **fact** that PAWC has typically under-projected the necessary increase to these customers in its customer notices. As I&E witness Kubas demonstrated, PAWC has a proven history of under-projecting the increases necessary for systems acquired under Section 1329.<sup>35</sup> For example, in the Royersford Acquisition, at Docket A-2020-3019634,<sup>36</sup> PAWC projected an increase of \$1,102,000; however, in the first base rate case, PAWC showed an actual increase of \$2,061,092. Similarly, in the Upper Pottsgrove Application, at Docket A-2020-3021460, PAWC projected an increase of

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<sup>33</sup> PAWC Exceptions, p. 14.

<sup>34</sup> PAWC Exceptions, p. 14.

<sup>35</sup> I&E St. No. 1, p. 28.

<sup>36</sup> Note that in the Royersford Application, PAWC reflected the incorrect docket number of A-2020-3014248 on the schedules, which are reflected on I&E Ex. 1, Sch. 4, pp. 1-2.

\$1,002,000. In the first base rate case, PAWC showed an actual increase of \$1,471,196. Finally, in the York Wastewater Application, at Docket A-2021-3024681, PAWC projected an increase of \$17,557,000. In the first base rate case even before the York system was acquired, the actual increase was \$23,248,247.<sup>37</sup> Finally, in the instant Application docket, PAWC witness Everette projected the increase needed would be \$664,000.<sup>38</sup> However, in the current PAWC base rate case before the Commission, the needed increase calculated for Brentwood to be \$1,934,637.<sup>39</sup> Far from PAWC not having a “crystal ball”; these numbers seem almost intentionally misleading to make the acquisition look more attractive than it truly is at the Application docket, while showing the true numbers in the base rate case docket.

PAWC then states the ALJ improperly failed to consider what Brentwood rates would be if the acquisition is not approved.<sup>40</sup> Criticizing the ALJ in this manner is inappropriate. If the acquisition is not approved, Brentwood will remain non-jurisdictional; meaning that the Commission will have no input on and likely no knowledge of what Brentwood will set rates at for these customers. Given that PAWC has now filed a base rate case we do know, however, where rates are likely to be headed for these customers under PAWC’s ownership. It is also true that rates for municipally owned utilities tend to be lower than those of investor-owned utilities. Therefore, to the

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<sup>37</sup> I&E St. No. 1, p. 29.

<sup>38</sup> PAWC St. No. 3 – Revised June 1 AEE-1, p. 3 of 5.

<sup>39</sup> PAWC Volume 3, Exhibit 3-A, page A, at Docket Nos. R-2023-3043189 and R-2023-3043190.

<sup>40</sup> PAWC Exceptions, p. 14.

extent that the ALJ considered what the rates would be under Brentwood ownership it is likely that the same conclusion would have been reached.

As PAWC notes, “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.”<sup>41</sup> If no determination can be made if customers would be financially better off under PAWC’s ownership or Brentwood’s then there is no way for the ALJ to make a determination based on this factor that there is a benefit to PAWC’s ownership that outweighs the harm based on what we now know from PAWC’s as filed base rate case.

PAWC also criticizes ALJ Dunderdale for making the determination that the alleged benefits of 24/7 customer service, on-line bill pay, and customer assistance programs are nominal.<sup>42</sup> PAWC says these alleged benefits should be given modest weight given that they are certain to occur unlike the rate impacts.<sup>43</sup> First and foremost, for PAWC to allege the rate impacts are not certain to occur is absurd. Certainly based on the currently filed base rate case we know that Brentwood customers are going to face large rate increases under PAWC ownership at some point in the future. Furthermore, benefits such as access to PAWC’s 24/7 customer service is, in reality, at best a minor benefit. Issues that arise during normal business hours can already be directed to Brentwood itself, while problems that arise outside of normal business hours can be directed to emergency services such as the police or 911 if warranted. Therefore, for all

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<sup>41</sup> PAWC Exceptions, p. 16.

<sup>42</sup> PAWC Exceptions, p. 17.

<sup>43</sup> PAWC Exceptions, p. 17.

intents and purposes, Brentwood customers already have a form of 24/7 customer service. From the public input testimony it does not appear that Brentwood customers had concerns about after hours customer service and Brentwood can address emergencies without PAWC's oversight. In addition, while on-line bill pay may make it easier for some customers to pay their bills it certainly is not a substantial benefit. Regarding customer assistance programs, I&E would note that while they certainly do benefit payment troubled customers, when coupled with the likely higher rates under PAWC's ownership, it does not appear that the benefit outweighs the detriment of higher rates.

### **3. The Transaction Does Not Benefit PAWC's Existing Wastewater Customers.**

In the RD, ALJ Dunderdale explains that PAWC's customer base will grow by approximately 4,000 customers if this acquisition is approved.<sup>44</sup> PAWC explains that this will provide them with more customers over which to spread costs and then at some point in the future, these customers can help pay for improvements for even more customers.<sup>45</sup>

In theory, the idea of having a larger customer base over which to spread costs would be a benefit. This is because generally what we would expect PAWC to do is hit a point at which the ability to spread costs results in lower cost for its customers. This has not happened. Given the exorbitant prices at which PAWC purchases these municipal systems under 1329, and the frequency with which it does so, there has been no opportunity for PAWC customers to realize the benefits of cost spreading. In fact,

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<sup>44</sup> RD, p. 122.

<sup>45</sup> PAWC Exceptions, p. 18.

PAWC customers rates have continued to climb. Cost spreading only has a benefit if it is done in such a way that it results in lower rates. Therefore, the ALJ was not remiss in determining that this was not a benefit of the transaction. There has been no evidence presented by PAWC that due to economies of scale, PAWC will be able to provide service to Brentwood, or any of its other customers, at a lower rate due to approval of this Acquisition. PAWC's argument that adding 4,000 customers to its customer base results in a benefit of this acquisition falls short.

#### **4. The Transaction Does Not Benefit PAWC's Existing Water Customers**

In Exceptions, PAWC criticizes the ALJ's suggestion that the rate impact may be significant on PAWC water customers. PAWC notes that it estimates the rate impact using the methodology approve in the *Steelton Order* and that the estimate to PAWC wastewater customers is potentially 0.0%.<sup>46</sup> However, PAWC has explained that it has no crystal ball with which to accurately make these determinations.<sup>47</sup> Given PAWC's history of under-projecting the rate increases necessary for these systems and with the evidence in the base rate case demonstrating the revenue deficiency for the Brentwood system, it seems unlikely that in this instance, PAWC's projections would be accurate.

As the ALJ clearly cited to, PAWC's plan is to allocate 42% of Brentwood's wastewater revenue requirement to PAWC water customers.<sup>48</sup> This is a statement that PAWC publicly presented to its ratepayers; therefore, to criticize the ALJ in using

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<sup>46</sup> PAWC Exceptions, p. 20.

<sup>47</sup> PAWC Exceptions, p. 14.

<sup>48</sup> RD at 19.

PAWC's own publicly available information in making her determination is disingenuous. It is clear that the rate impact will be something more than 0.0%.

PAWC then discusses how under Section 1311(c) there will be no impact on water customers unless the Commission finds it in the public interest. PAWC explains that it would be hard to find an event the Commission deemed in the public interest detrimental. While I&E would agree that it would be hard to argue the allocation detrimental if the Commission deemed it in the public interest, the entirety of this argument is based on the faulty premise that this acquisition is in the public interest because it provides substantial affirmative public benefits. As there are no public benefits to the acquisition, it then flows that any allocation of costs resulting therefrom would be detrimental because the acquisition needn't occur in the first place.

## **5. Conclusion**

As demonstrated above and by the RD, PAWC has failed to show that the affirmative public benefits test has been met. With no benefits for either Brentwood customers, or PAWC's existing customers, the Commission must deny this acquisition.

### **B. REPLY TO PAWC EXCEPTION NO. 2: THE ALJ CORRECTLY DETERMINED THAT PAWC DID NOT MEET ITS BURDEN IN PROVING 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 ALJ correctly stated that the recommended denial was also a direct result of PAWC's failure to separate from rate base the value of the assets that were used to

provide service to non-customers.<sup>49</sup>

Regarding the Fair Market Value, in testimony I&E witness Kubas recommended “...the plant, or portion of the plant used to serve ‘non-customers’ should be removed from the requested rate base of \$19,643,443.”<sup>50</sup> Witness Kubas goes on to explain that PAWC failed to provide any analysis that would indicate the amount of plant that is being used by non-customers so he was unable to quantify exactly the amount that should be removed.<sup>51</sup> Because it is impossible to determine the appropriate amount of Brentwood rate base that should be incorporated into PAWC’s rate base, I&E does not believe this acquisition should be approved. However, I&E explained that if the Commission determines that approval is warranted, PAWC should be required to undertake a study that separates this plant used to serve non-customers from the rest of the plant in service so that an accurate rate base can be established. While I&E does not believe that the record evidence supports approval of this acquisition, if the Commission determines that approval is warranted, it is inappropriate to require customers to pay for a return of and a return on rate base that is not used and useful to serve non-customers.

As explained in the I&E Main Brief, because the Brentwood system is a conveyance only system in which Brentwood discharges its wastewater and the wastewater flow of customers who are not Brentwood customers, the “non-customers,” into the Baldwin Borough, Whitehall Borough and City of Pittsburgh systems, all of

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<sup>49</sup> RD at 126.

<sup>50</sup> I&E St. No. 1, p. 13.

<sup>51</sup> I&E St. No. 1, pp. 13-14.

which is eventually combined and treated at the ALCOSAN treatment plant.<sup>52</sup>

I&E remains concerned about the inclusion of plant used to serve these non-customers in rate base as doing so means that PAWC customers pay a return of and return on this plant in their rates. As a result, I&E believes it is in the public interest for PAWC to conduct a study which separates out the plant used to serve those entities who have been deemed customers, versus those who have been deemed non-customers, so that an accurate and appropriate rate base can be determined.<sup>53</sup> Until that occurs, the Commission will have no way to determine the appropriate amount to place into rate base if this acquisition is approved.

PAWC believes the I&E position is inconsistent with Sections 1102 and 1103 of the Public Utility Code, which require the Commission to find that there are affirmative public benefits before an acquisition is approved. As explained in detail above, PAWC has been unable to show there are affirmative public benefits to this acquisition; therefore, regardless of whether or not the study is conducted, I&E submits the acquisition has already failed the affirmative public benefits test. Nevertheless, I&E contends that it would be consistent with Sections 1102 and 1103 to require this study before an acquisition of this type could be approved. This is because it is not an affirmative public benefit to require ratepayers to pay for utility plant that is not used and useful in service to its customers, nor would it be in the public interest to do so.

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<sup>52</sup> PAWC St. No. 2, p. 6.

<sup>53</sup> I&E St. No. 1, p. 14.

Again, for the reasons listed above, I&E does not believe the acquisition passes the affirmative public benefits test. However, even if it were to pass the affirmative public benefits test, I&E continues to believe the acquisition must be denied unless and until a study is provided that separates out the cost of plant used to serve non-customers from that used to serve customers. PAWC has not presented any evidence that shows that anything less would be appropriate.

PAWC explains in its Main Brief that it objects to I&E's recommendation to provide a cost of service study for the Brentwood system and additionally a study that separates out the plant in the Brentwood system that is used to serve non-customers.<sup>54</sup> PAWC objects because its view is that the plant is used and useful. As explained above, I&E disagrees with this designation and continues to recommend PAWC provide a separate cost of service study, not only for the Brentwood system, but to separate out the plant serving what everyone seems to agree are not Brentwood customers. This recommendation is important so that, if the acquisition is approved, neither PAWC's existing customers nor the newly acquired Brentwood customers are paying a return of and on rate base that is not used and useful in service to customers.

In a system such as Brentwood that is interconnected with the ALCOSAN system, it is important to have this cost of service study in each base rate case because of the complexity of the interconnection and to ensure that customers do not bear costs to serve those who are not PAWC customers. Therefore, if the acquisition is approved, I&E recommends the Commission direct PAWC to provide a cost of service study going

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<sup>54</sup> PAWC Main Brief, p. 46.

forward that separates out the Brentwood system. I&E also recommends the Commission direct PAWC to provide a cost of service study that separates out plant used to serve non-customers so ratepayers are not unduly burdened with costs that do not belong to them.

**C. REPLY TO PAWC EXCEPTION NO. 3: THE ALJ DID NOT ERR BY FAILING TO RULE ON NUMEROUS OTHER ISSUES PRESENTED IN THE CASE.**

In its Exceptions, PAWC lists numerous other issues that the ALJ did not issue a ruling on. These include approval of contracts, approval of the fair market value, conditions that should be imposed if the acquisition is approved and issues surrounding customer notice, among other things.<sup>55</sup> PAWC states the ALJ erred because the Commission now does not have the ALJ's reasoning on these issues.<sup>56</sup>

While it is true that the ALJ did not rule on these issues, once the determination was made that the acquisition was not in the public interest, it was no longer necessary as these were all issues that would need to be resolved if the acquisition was approved. The ALJ's job is to present the Commission with a recommendation, not a panoply of options from which the Commission is to pick. In her opinion the acquisition was not in the public interest, and therefore, ruling on these issues was irrelevant. The ALJ was simply doing the job that was asked of her. And similarly, if the Commission agrees with the ALJ, it will not make a ruling on these issues either. Simply because an issue was raised, does not mean the ALJ or the Commission has to rule on that issue if during the course of

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<sup>55</sup> PAWC Exceptions, p. 28.

<sup>56</sup> PAWC Exceptions, p. 28.

the proceeding the issue becomes irrelevant. Here the extraneous issues PAWC is talking about have become irrelevant based on the ALJs ruling.

Therefore, PAWC Exception No. 3, should be denied.

**D. REPLY TO BRENTWOOD EXCEPTION NO. 1: THE ALJ CORRECTLY INTERPRETED AND APPLIED THE LEGAL STANDARD SET FORTH BY SECTIONS 1102 AND 1103 OF THE PUBLIC UTILITY CODE.**

In Exceptions, Brentwood states that the ALJ erred in applying an “especially necessary” standard to the affirmative public benefits review under Sections 1102 and 1103.<sup>57</sup> It appears, however, that Brentwood is misinterpreting the ALJ’s word choice. The ALJ explained that for PAWC to meet its burden it must show the transaction will benefit its current customers, Brentwood customers, and the public at large.<sup>58</sup> The ALJ then explained that these determinations are especially necessary when the acquisitions are occurring under Section 1329.

While Brentwood goes to great pains to criticize ALJ Dunderdale’s word choice, I&E submits this is a distinction without a difference. Whether the affirmative public benefits test is “necessary” or “especially necessary” it remains necessary. Choosing to criticize the use of the non-restrictive modifier “especially” does not change the outcome of the determination. The bottom line is that necessary is an absolute. Nothing can be *more* necessary than necessary no matter the modifier placed before it because necessary is another way to say required. The affirmative public benefits review is **necessary** in all acquisitions before this Commission. Adding the word especially simply has not

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<sup>57</sup> Brentwood Exceptions, pp. 12-13.

<sup>58</sup> RD at 123.

changed the review standard; that standard being does the acquisition provide substantial affirmative benefits.

Brentwood also criticizes the ALJ for giving undue weight to the absence of evidence that Brentwood is not providing adequate service or that Brentwood is unable to procure the resources to fund capital improvements.<sup>59</sup> The other parties, produced evidence that demonstrated that Brentwood was on its own providing safe and reliable service and that it seemed to have the ability to attract capital to make the necessary investments in its infrastructure. This evidence includes the fact that with regard to service, Brentwood's largest issue appears to be infiltration and inflow (I&I) which has been an issue for some time with the system. However, it appears Brentwood is currently taking the necessary steps to correct this issue. As explained in OCA witness DeMarco's testimony:

In 2016 Brentwood entered a two phase Consent Order and Agreements (COA) with ACHD and PADEP. Phase I which required the completion of a Source Reduction Study by Brentwood to see how it most effectively do its part to reduce sanitary sewer overflows and to reduce flows downstream from Brentwood's sanitary sewer system and/or at its connection with the ALCOSAN interceptor system. Phase I June 1, 2018 (PAWC Statement 2 A-14-a p. 12-14).

Under Phase II which began October 6, 2023, Brentwood is to implement source Flow Reduction projects and source reduction studies on the two identified lines. By December 31, 2026 Brentwood should complete its projects to eliminate sanitary sewer over flows (SSO) or enact a Ten Percent Project and submit all studies deemed necessary to PADEP and ALCOSAN (PAWC Statement 2 A-14-a p. 14-16).<sup>60</sup>

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<sup>59</sup> Brentwood Exceptions, 13.

<sup>60</sup> OCA St. No. 1, p. 9.

As OCA witness DeMarco explains, Brentwood appears to be improving its system and meeting the milestones in the agreements it has entered into.<sup>61</sup> In addition, it is also unclear where the excess I&I comes from. As PAWC witness Hufton stated at hearing, “each of the municipalities in the ALCOSAN regional system...are under Consent Orders similar to Brentwood to produce I and I. So it is reasonable to expect that the upstream municipalities have their own I and I challenges.”<sup>62</sup>

With the agreement that the excess I&I is likely due in part to the upstream municipalities, and with the understanding that Brentwood has been meeting the required milestones to lessen or fix the I&I problem, it seems likely that, at most, PAWC would simply maintain the status quo related to the I&I issues this system experiences. Maintaining the status quo is not an affirmative public benefit. PAWC has provided no evidence to show that it would do anything more than what Brentwood is currently doing, and Brentwood has provided no evidence to demonstrate that it cannot continue to work towards the measures it has already been working towards to control I&I.

No doubt, Brentwood’s service is not perfect. However, perfection is not required for service to be adequate. When discussing whether Brentwood was a troubled system OCA witness DeMarco explains:

Borough Manager Zboyovsky does not claim that the Brentwood system is a troubled system (PAWC Statement 1 A-13-a). Brentwood has not violated its portion of the ALCOSAN consent decree. Manager Zboyovsky states that “Financially, the Borough is not in distress.” (A-13 a p. 5 lines 2-3). Bill No. 1308, introduced November 21, 2022 and adopted by the Borough Council and signed by the Mayor on

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<sup>61</sup> OCA St. No. 1, p. 10.

<sup>62</sup> Tr. at 148.

December 12, 2022 notes that Brentwood has had no issue running and maintaining its system (Appendix-A-18-a p.1). In the last five years the Borough has not had issues funding any infrastructure replacement or updates (OCA-II-3). Mr. Kapenstien in his presentation to the Borough states that the Brentwood system has “good cashflow” (OCA-II-19 Exhibit I p 18). Therefore, I do not believe that the Brentwood system is a troubled system. According to Appendix – C, the Borough’s submitted balance sheet shows \$3.058 million of cash on hand.<sup>63</sup>

In fact, apart from the issues with I&I which Brentwood is working to resolve, Brentwood could only point to an incident in November 2022 when there were sewer backups that occurred that it could not address for “a number of weeks.”<sup>64</sup> However, Brentwood has provided no specific evidence that it suffers from a systemic inability to handle incidents or emergencies for its customers. As I&E witness Kubas stated on cross-examination, Brentwood likely could have done a better job handling the November 2022 incident, but no utility is going to do a perfect job.<sup>65</sup>

Curiously, while criticizing the ALJ for relying on the fact that Brentwood has not demonstrated that it cannot provide adequate service while other parties have clearly demonstrated that the Brentwood service is adequate, Brentwood states that the ALJ’s conclusions that its service is adequate and reasonable are contradicted by the record, while also not pointing to any evidence in the record that demonstrates the service is inadequate.<sup>66</sup>

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<sup>63</sup> OCA St. No. 1, pp. 14-15.

<sup>64</sup> Tr. at 343.

<sup>65</sup> Tr. at 344.

<sup>66</sup> Brentwood Exceptions, p. 13.

Brentwood continuously states that there was evidence ALJ Dunderdale ignored, but simultaneously fails to point the Commission to anywhere in the record that this evidence could be found. While it is understandably a tenuous position to be in to argue that the service your client provides is inadequate, if Brentwood's exceptions are to be granted, they must do something more than say that the ALJ is ignoring evidence that it cannot even point to, when the other parties have presented clear evidence that Brentwood's service is adequate.

As Brentwood has failed to demonstrate that ALJ Dunderdale either misapplied or misinterpreted the appropriate standard Brentwood's Exception No. 1 must be denied. The ALJ applied the correct standard and correctly determined that the acquisition must be denied.

**E. REPLY TO BRENTWOOD 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 SUPPORTED BY THE RECORD EVIDENCE AND IS NOT CONTRADICTED BY THE RECORD EVIDENCE**

For largely the same reasons as PAWC, Brentwood excepts the conclusion that was reached by the ALJ that the acquisition does not affirmatively promote the service, accommodation, convenience, or safety of the public and that there was no evidence establishing benefits that would outweigh the harms of the acquisition.

First, Brentwood ask the Commission to essentially ignore the testimony of the individuals at the public input hearing that were concerned about how much their rates would increase if the transaction was approved. Ignoring the testimony of these

customers flies in the face of the Commonwealth Court decision in *New Garden* which noted that these cases involve a substantial property right because they impact a rate increase.<sup>67</sup> To ask that the Commission disregard customers concerns about the rate impact of this acquisition is truly shocking. These public input hearings are important and are open to all of PAWC's service territory because these acquisitions impact each and every PAWC customer. To ask the Commission to disregard important testimony regarding rate affordability is inappropriate. One witness testifying that they believe PAWC is stronger and better equipped to manage Brentwood,<sup>68</sup> does not invalidate other testimony which expresses concern about rate increase.

With regard to Brentwood's argument that the ALJ mischaracterized its current service and capabilities,<sup>69</sup> as demonstrated above the record was rife with testimony regarding the fact that Brentwood's current service is reasonable and it seems to have adequate access to funds need to invest in capital projects. Brentwood points out that I&E witness Kubas noted that PAWC is likely more capable to address system improvements than Brentwood,<sup>70</sup> but this is simply not a sufficient cause to approve the acquisition. PAWC is the states largest water and wastewater provider. No one has argued that PAWC is lacking in expertise or experience operating and improving both water and wastewater systems. As compared to any other municipally run wastewater system, it is likely that it would be concluded that PAWC is "more capable" than the

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<sup>67</sup> *McCloskey v. Pennsylvania Pub. Util. Comm'n*, 195 A.3d 1055, 1068 (Pa. Commw. 2018).

<sup>68</sup> Brentwood Exceptions, p. 16.

<sup>69</sup> Brentwood Exceptions, pp. 17-21.

<sup>70</sup> Brentwood Exceptions, p. 19.

municipality running the system base on PAWC's sheer size and experience. However, that is not the standard by which these acquisitions are to be approved. If it was, there would be no need for this process. Simply because PAWC may be "more capable," doesn't mean Brentwood is not capable of operating and improving this system. The standard is not whether PAWC is more capable, but whether any substantial affirmative public benefits will arise from its ownership. Here Brentwood has failed to demonstrate that it is operating its system in such a poor way that PAWC's expertise will cause those substantial affirmative public benefits to arise.

Again, as demonstrated here and in response to PAWC Exception No. 1, PAWC has simply failed to carry its burden of showing that the transaction will result in affirmative public benefits. Therefore, just as PAWC's Exception No. 1 must be denied, Brentwood's Exception No. 2 must be denied as well.

**F. REPLY TO BRENTWOOD EXCEPTION NO. 3: THE RECOMMENDED DECISION DOES NOT ATTEMPT TO SET A PUBLIC POLICY THAT A MUNICIPALITY CANNOT SELL ITS WASTEWATER ASSETS UNLESS OR UNTIL DIRE CIRCUMSTANCES WARRANT THE SALE**

The ALJ was very clear in her determination that PAWC did not meet its burden to show that this acquisition would affirmatively promote the service, accommodation, convenience, or safety of the public.<sup>71</sup> Never once in the RD, does ALJ Dunderdale indicate that a municipal system must be in dire straits for an investor-owned utility to purchase it.

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<sup>71</sup> RD at 129.

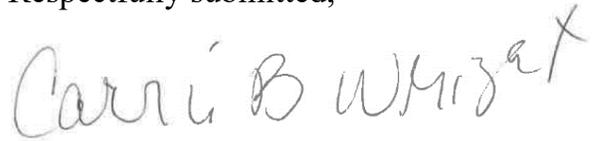
To be clear, part of the ALJ (and the I&E and OCA) analysis demonstrated that Brentwood is currently operating the system in a reasonable manner and that PAWC has not shown that it will operate the system in a markedly different manner. This analysis does not occur because a municipal utility needs to be in terrible circumstance before PAWC can acquire it. The analysis demonstrates whether or not a benefit will arise from the transaction or whether under PAWC's ownership it will simply maintain the status quo. Maintaining the status quo is not a public benefit. Here the record evidence demonstrates that PAWC will only serve to maintain the status quo with regard to this acquisition.

Therefore, the ALJ has not created an inappropriate public policy that a municipal system must be in a dire situation to sell to an investor-owned utility. The ALJ was simply looking at and addressing the factors that must be reviewed when determining if there is a substantial affirmative public benefit to the acquisition. As such Brentwood's Exception No. 3 must be denied.

#### IV. CONCLUSION

Administrative Law Judge Katrina Dunderdale correctly determine that this acquisition produces no affirmative public benefits and is, therefore, not in the public interest and should not be approved by the Commission. I&E requests the Commission adopt ALJ Dunderdale's Recommended Decision and deny the instant Application.

Respectfully submitted,

A handwritten signature in cursive script that reads "Carrie B. Wright".

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**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Application of Pennsylvania-American Water Company under Sections 1102(a) and 1329 of the Pennsylvania Public Utility Code to acquire the wastewater collection and conveyance system owned by the Borough of Brentwood and to provide wastewater service to the public in the Borough of Brentwood in Allegheny County, Pennsylvania :

Docket No. A-2021-3024058

**CERTIFICATE OF SERVICE**

I hereby certify that I am serving the foregoing **Reply Exceptions** dated January 29, 2024, in the manner and upon the persons listed below.

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