

**PENNSYLVANIA  
PUBLIC UTILITY COMMISSION  
Harrisburg, PA 17105-3265**

Public Meeting held June 13, 2024

Commissioners Present:

Stephen M. DeFrank, Chairman  
Kimberly Barrow, Vice Chair  
Ralph V. Yanora  
Kathryn L. Zerfuss  
John F. Coleman, Jr.

Valuation of Acquired Municipal Water  
& Wastewater Systems – Act 12 of 2016  
Implementation

M-2016-2543193

**FINAL SUPPLEMENTAL  
IMPLEMENTATION ORDER**

**BY THE COMMISSION:**

On April 14, 2016, former Governor Tom Wolf signed Act 12 of 2016 (Act 12), which amended Chapter 13 of the Public Utility Code (Code) by incorporating a new section: Section 1329, 66 Pa.C.S. § 1329. Specifically, Section 1329 of the Code establishes a procedure for an acquiring public utility or entity (acquiring utility) and a municipal corporation or authority (selling utility) to use fair market value (FMV), instead of depreciated original cost, when the acquiring utility purchases a water system or wastewater system located in the Commonwealth. Following passage of Act 12, the Commission issued a series of *Implementation Orders* to assist in the administration of Section 1329.<sup>1</sup> To date, the Commission has received approximately 27 applications filed under Section 1329.

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<sup>1</sup> The Implementation Orders include the *Tentative Implementation Order* entered July 21, 2016 (2016 TIO), *Final Implementation Order* entered October 27, 2016 (2016 FIO), *Tentative Supplemental Implementation Order* entered September 20, 2018 (2018 TSIO), and *Final Supplemental Implementation Order* entered February 28, 2019 (2019 FSIO), at Docket No. M-2016-2543193.

Recently, Act 12 has elicited significant interest from the public and policy makers alike. Numerous pieces of legislation have been introduced in the Pennsylvania General Assembly proposing to amend Section 1329.<sup>2</sup> Further, hearings have been recently held by the House Consumer Protection, Technology and Utilities Committee and the Senate Democratic Policy Committee to discuss this topic.<sup>3</sup> The Commission has submitted official testimony and participated in both.

Given the experience gained by the Commission since our last *Final Supplemental Implementation Order* in 2019, we determined that it is appropriate to amend our procedures and guidelines to better inform the interested public of Section 1329 applications, to standardize the weights utilized by the utility valuation experts (UVEs), and to provide the Commission with measures to interpret the reasonableness of acquisition prices. Thus, on February 7, 2024, we entered a *Tentative Supplemental Implementation Order (2024 TSIO)* that included four revisions to the Commission’s existing Section 1329 procedures. The *2024 TSIO* was published in the *Pennsylvania Bulletin* on February 17, 2024. See 54 Pa.B. 906. We invited stakeholders to file comments within 30 days of publication, by March 18, 2024, and reply comments within 45 days of publication, by April 2, 2024.

We received comments from: (1) municipalities, municipal authorities, and municipal associations,<sup>4</sup> including the Township of Warwick (Warwick); the Pennsylvania State Association of Boroughs (PSAB); the Elizabeth Borough Municipal Authority (EBMA), the Borough of Brentwood (Brentwood); the Pennsylvania Municipal Authorities Association (PMAA); the Bucks County Association of Township Officials (BCATO); the Borough of Big Beaver (Big Beaver); Patterson Township (Patterson); the

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<sup>2</sup> These bills include, but are not limited to, HB 626, HB 627, HB 628, HB 629, HB 1205, HB 1308, HB 1862, HB 1863, HB 1864, HB 1865, SB 432, and SB 866.

<sup>3</sup> The House Consumer Protection, Technology and Utilities Committee Hearing was held on December 12, 2023, and the Senate Democratic Policy Committee Hearing was held on January 22, 2024.

<sup>4</sup> We refer to these comments collectively as the “municipality comments” herein.

City of Beaver (Beaver); Towamencin Township (Towamencin); the Pennsylvania State Association of Township Supervisors (PSATS); the Borough of West Mayfield (West Mayfield); the Borough of Eastvale (Eastvale); the Allegheny County Boroughs Association (ACBA); and the Chester Water Authority (CWA); (2) public utilities, including Aqua Pennsylvania, Inc. (Aqua) and Pennsylvania-American Water Company (PAWC); (3) advocates, including the Pennsylvania Water Environment Association (PWEA); the Pennsylvania Office of Consumer Advocate (OCA); the Stop Predatory Water System Pricing Group (SPWSPG); the Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania (CAUSE-PA); and the Pennsylvania Office of Small Business Advocate (OSBA); (4) members of the legislature, including the Honorable State Senator Carolyn Comitta; the Honorable State Representative John Lawrence; and the Honorable State Representative Bryan Cutler; and (5) individuals, including William Ferguson; Peter Mrozinski; Art Schwabenbauer; Residents of New Garden Township (NGT Residents); Keith Sauer; Henry Yordan, Julie Frissora, and Robert Swift (Yordan, *et al.*); James Cawley; 415 Pennsylvania Residents (PA Residents); Michael Knoll; Ruth Kranz-Carl and William Carl; Barbara Weer; Kofi Osei; Richard Young; Teri D'Ignazio, Bradley Gray, Carter Gray, Timothy Lord, Timothy D'Ignazio, and Wendy Lord (D'Ignazio, *et al.*), and Timothy Smeltzer.

We received reply comments from: (1) public utilities, including Aqua and PAWC; (2) an advocate, namely the OCA; and (3) and individuals, including Mrozinski; Henry Yordan, *et al.*; Cawley; and Osei.

## DISCUSSION

After considering the comments and reply comments to the *2024 TSIO*, the Commission issues this Final Supplemental Implementation Order (Order or *2024 FSIO*) to improve upon the Commission's Section 1329 guidelines and processes. To the extent that we do not address a particular comment or reply comment, it has been duly considered and is not adopted without further discussion. *See Consolidated Rail Corp. v. Pa. Pub. Util. Comm'n.*, 625 A.2d 741 (Pa. Cmwlth. 1993); *see also University of Pennsylvania v. Pa. Pub. Util. Comm'n.*, 485 A.2d 1217 (Pa. Cmwlth. 1984).

### **I. The 2024 TSIO Generally**

The *2024 TSIO* contained four proposals to modify the Commission's existing Section 1329 guidelines and processes, including modifications for public hearings, rate impact notice, default weights for appraisals, and a reasonableness review ratio (RRR). We sought comments on each of these modifications and input regarding the timeframe to effectuate the changes. In addition to addressing these areas, a number of comments and reply comments address the nature of the *2024 FSIO*, the intent of Section 1329, and the future of Act 12. Some comments and reply comments also identify pending and upcoming Section 1329 applications that commentors believe will be impacted by the *2024 FSIO*. We discuss these comments and reply comments below.

#### **A. Comments On The 2024 TSIO Generally**

##### **1. Municipality Comments**

###### **a. Warwick**

Warwick is concerned that for-profit companies target well-run, well-funded water and sewer authorities. Warwick states that Act 12 was intended to offer distressed communities, rather than affluent areas, the option to sell. Warwick Comments at 1.

**b. PSAB**

PSAB notes that boroughs have been evaluating the viability of their water and wastewater systems and that entertaining offers to sell have become more prevalent. PSAB supports allowing local governments the full ability to determine what works best for their community and that borough officials are elected to make informed and necessary decisions for constituents. PSAB explains that local governments' budgets are stretched thin, that Act 12 has allowed local governments to receive a market-based FMV for their systems, and that the FMV gives communities a more equitable way to sell municipal assets. Thus, PSAB supports this method of valuation rather than the outdated depreciated original cost method. PSAB points out that many acquisitions approved under Section 1329 allowed the selling community to make critical investments in their communities, such as eliminating municipal debt, investing in capital projects, funding their pension systems, reducing taxes or avoiding tax increases, providing improved municipal services, and funding stormwater improvements. PSAB states that Act 12 allowed the Borough of Steelton to receive a fair price for their system and, as a result, the Borough eliminated their debt service tax and restructured sewer rates such that the funding goes right back to the community. PSAB also states that the Section 1329 application process should continue as a viable option to enable municipalities to sell their systems at a price that is fair and equitable. PSAB Comments at 1-3.

**c. Brentwood**

Brentwood notes that municipal governments are critical because they oversee the day-to-day operation of a locale. Brentwood points out that municipal officers are elected and that local citizens have tangible ways to respond when their needs are not being met. Brentwood states that the water and wastewater hazards plaguing Pennsylvania's water systems are increasingly dangerous and avers that the *2024 TSIO* threatens to make the sale of municipal water systems far more difficult. Brentwood also

states that the *2024 TSIO* does not serve the public and asks the Commission to reconsider it. Brentwood Comments at 2-3, 9-10.

In particular, Brentwood notes that the *2024 TSIO*'s pre-application requirements are a Commission overreach and represent improper usurpation of the role of a municipality's duly-elected officials. Brentwood states that many selling utilities are not public utilities as they offer and sell their wastewater treatment and collection services only to their own municipal residents and that, in these circumstances, the Commission has no authority to dictate the procurement process because it is governed by municipal codes, such as the Borough Code. Brentwood also notes that the Borough Code delineates procedures for the sale of its wastewater system, governs how Brentwood must advertise a sale to its communities, and requires municipal leaders to accept the highest bid, and that the *2024 TSIO* purports to improperly override the Borough Code and constrain municipal leaders into giving their constituents only limited information about a transaction in the way the Commission deems appropriate. Brentwood further explains that municipal leaders are better suited to decide how to communicate with their constituents and understand problems facing their communities. *Id.* at 3-5.

Brentwood also comments that, by imposing new duties on applicants, such as additional public hearings and an affirmative declaration on rate impact, the Commission appears to intend that approval of a Section 1329 application will be conditioned on compliance with the revised Checklist. Brentwood notes that regulatory pronouncements take two forms: statements of policy and substantive regulations. Brentwood explains that policy statements are mere interpretations of existing rules and need not comply with notice-and-comment and regulatory procedures to be valid, while a substantive regulation establishes standards of conduct that carry the force of law, otherwise known as a binding norm, and that regulations are binding only if they are promulgated following notice-and-comment and regulatory procedures. Brentwood further explains that, to determine whether an agency's pronouncement is a substantive regulation or a policy statement,

courts look at the language of the pronouncement, the manner of implementation, and the effect of the pronouncement on the agency. *Id.* at 5-6.

Brentwood states that, although the *2024 TSIO* is framed as an amendment of procedures and guidelines that are within the Commission's purview, the actual language purports to impose binding norms. Brentwood points out that the requirement to hold at least two in-person public hearings before an asset purchase agreement (APA) is executed is not in the statute. Brentwood states that the *2024 TSIO* is drafted as a substantive regulation that establishes standards of conduct, but is not a valid substantive regulation with binding force because the Commission did not follow the proper regulatory procedures. Brentwood argues that the *2024 TSIO* requirements cannot be administered as prerequisites for submission and approval of a Section 1329 application because, if used as a prerequisite, courts will not hesitate to invalidate it on the ground that the agency did not use proper procedures to adopt it. *Id.* at 5-6.

**d. PMAA**

PMAA states that the municipal authority model is perfectly suited for providing services on a regional level. PMAA notes that a municipal authority can be created by any county, borough, city, or township. PMAA explains that an authority manages all aspects of the authority's operation via a board of directors, that authority meetings are conducted in public pursuant to the Sunshine Act, which ensures transparency, and that an authority operates only in the best interests of the communities they service. PMAA also explains that many PMAA members will be impacted by the Commission's ultimate decision regarding the *2024 FSIO*. PMAA questions whether the Commission's proposals are an attempt to stop a repeal of Act 12. PMAA Comments at 1, 4.

**e. BCATO**

BCATO notes that it strongly opposes the efforts of Aqua to acquire the Bucks County Water and Sewer Authority sanitary infrastructure and that concerns from local government officials and ratepayers led to the termination of the acquisition. BCATO states the issues related to Act 12 involve public agencies in need of critical technical or management skills and not enabling the growth of regulated utilities in exchange for short-term financial benefits for local government. BCATO Comments at 1.

**f. Beaver**

Beaver notes that it owns, operates, and maintains a sanitary wastewater collection and conveyance system as well as the Beaver Falls Wastewater Treatment Plant, and that seven municipalities contribute flow to be treated at the plant. Beaver explains that, after extensive discussions with its leadership, staff, and the public, it decided to pursue a sale of the system. Beaver also explains that it conducted an evaluation to determine the qualitative and quantitative factors in reference to selling or maintaining ownership of the system. Beaver states that its careful and well-thought-out decision to sell was the result of the following considerations: Beaver wanted to exit the business of providing sanitary sewer service and focus on core governmental functions while ensuring safe and reliable service at affordable rates, to generate revenue that would help secure Beaver's financial stability, and to use the sale proceeds to help prevent Beaver from being named a distressed community by the Department of Community and Economic Development or being in Act 47 status, which could lead to receivership. Beaver explains that it issued a request for qualifications to select a pool of buyers and, after preparation and negotiation of an APA, it requested bids. Beaver Comments at 1-3.

Beaver also explains that it determined that Aqua's bid was in the best interest of Beaver and its residents and, after holding multiple public input hearings, it voted to authorize the City's solicitor to prepare an ordinance/resolution to accept Aqua's bid. Beaves notes that it held two readings of the proposed ordinance to approve the APA, provided notice to Beaver residents, and published notice in the Beaver County Times. Beaver further explains that it entered into an APA with Aqua on October 21, 2021, and authorized Gannet Flemming to prepare the FMV appraisal on June 16, 2022. Beaver notes that four contributing municipalities filed a writ of summons against Beaver in response to the anticipated sale, but that the parties engaged in mediation and reached a settlement and the matter will be discontinued upon the closing of the APA. Beaver also notes that Aqua filed its Section 1329 application with the Commission on February 17, 2023, and that Beaver personnel have spent countless hours addressing the requirements of the application and responding to discovery requests from the OCA and the Commission's Bureau of Investigation and Enforcement, and has incurred substantial costs in doing so. Beaver states that, since it is well past the negotiation stage and has an agreement in place for the sale of its system, it will be very much impacted by the 2024 *FSIO*. *Id.* at 2-3.

**g. Towamencin**

Towamencin similarly notes that it owns, operates, and maintains a sanitary wastewater collection and conveyance system as well as the Towamencin treatment plant, and that six municipalities contribute flow to be treated at the plant. Towamencin explains that, after extensive discussions with its leadership, staff, and citizens, it decided to sell the system. Towamencin also explains that it conducted an evaluation to determine the qualitative and quantitative factors in reference to selling or maintaining ownership of the system. Towamencin states that its decision to sell was the result of the following considerations: Towamencin wanted to exit the business of providing sanitary sewer service and focus on core governmental functions while ensuring safe and reliable

service at affordable rates, to generate revenue that would help secure Towamencin's financial stability, and to avoid the increasingly complex environmental challenges of operating the system. Towamencin explains that it issued a request for qualifications to select a pool of buyers, issued a request for bids, determined that NextEra Water Pennsylvania, LLC's (NextEra) bid was in the best interest of Towamencin and its residents, and voted to authorize the City's solicitor to prepare an ordinance to accept NextEra's bid. Towamencin also explains it executed an APA with NextEra on June 14, 2022, but that NextEra exited the wastewater business, and Towamencin, NextEra, and PAWC executed an Assignment and Assumption of the APA on March 23, 2023. Further, Towamencin notes that PAWC filed a Section 1329 Application with the Commission on May 16, 2023, and that PAWC and Towamencin have spent countless hours at significant cost to complete this process. Towamencin Comments at 1-3.

Towamencin states that the legislative history of Section 1329 reflects a determination by the General Assembly that FMV acquisitions of municipal wastewater systems further the public interest. Towamencin points out that the sale of wastewater systems by municipal corporations to investor-owned public utilities help facilitate necessary infrastructure improvements and ensure the continued provision of safe and reliable service to customers at reasonable rates. Towamencin also notes that the Commission has relied upon the General Assembly's determination that acquisitions of municipal wastewater systems under Section 1329 further the public interest in its decisions. Overall, Towamencin does not support the *2024 TSIO*. *Id.* at 3-4, 8.

#### **h. ACBA**

ACBA comments that it generally opposes efforts to limit the authority of municipalities to manage and control matters relating to powers expressly delegated to local governments. ACBA Comments at 1.

**i. CWA**

CWA notes that it has been pursued by for a hostile takeover since 2017 and that for-profit utilities weaponize Act 12 and attempt to use it to boost their profits at the expense of ratepayers. CWA states that the repeal of Act 12 is imperative to prevent the exploitation of the Commonwealth’s citizens, but that the legislature has avoided taking action on the request for a repeal. CWA also states that it appreciates the Commission’s willingness to encourage public discussion about Act 12. CWA asks that the comments of its Chairman from the January 22, 2024 hearing regarding the unintended consequences of Act 12 be considered in this proceeding. CWA Comments at 1-2.

**2. Public Utility Comments**

**a. Aqua**

Aqua notes that Act 12 was enacted to encourage the consolidation of the highly fragmented water and wastewater industry and provides benefits to selling municipalities that may be struggling financially, the environment, the acquiring utility, and customers. Aqua also notes that Act 12 provided for a new methodology for setting the ratemaking rate base when an application for an acquisition’s approval is filed with the Commission. Aqua commends the Commission for its continued initiatives to make improvements to the Section 1329 process. Aqua Comments at 2-3.

**b. PAWC**

PAWC states that, before considering any proposed changes to the Section 1329 process, the Commission should review and expressly acknowledge the history and intent of Section 1329. PAWC points to several areas of the *2016 TIO*, *2016 FIO*, *2018 TSIO*, and *2019 FSIO* where the Commission discussed the General Assembly’s intent with respect to Section 1329. PAWC Comments at 2-7.

First, PAWC notes that, in the *2016 TIO*, the Commission explained that Section 1311(b) of the Public Utility Code, 66 Pa.C.S. § 1311(b), discourages acquisitions of water and wastewater systems owned by municipal corporations or authorities because the value of the property is defined as the original cost of construction less accumulated depreciation rather than the acquisition cost and that Section 1329 established an alternative process for ratemaking purposes for valuation to remedy this situation. The Commission also stated that Section 1329 mitigates the risk that a utility will not be able to fully recover its investment when water and wastewater assets are acquired from a municipality or authority by allowing enhanced rate base adjustments based upon the lesser of the FMV or the negotiated price. *Id.* at 3.

In addition, PAWC notes that, in the *2018 TSIO*, the Commission stated that Section 1329 works to (1) provide certainty as to the value of acquired utility property; (2) remove regulatory barriers to the prudent sale of public water and wastewater assets; (3) protect a Seller from having to offer public assets for sale at below-market rates; and (4) allow a Buyer to recover market-based investment in those public assets through regulated rates. The Commission also stated that Section 1329 encourages a realistic approach to the sale of public assets based upon the FMV. PAWC points out that the Commission expressed the hope that it could set appropriate guidelines to reduce variances in FMVs and increase public confidence in purchase prices, but concluded in the *2019 FSIO* that Section 1329 does not contain valuation guardrails. *Id.* at 4-7.

Moreover, PAWC notes that the Commission has considered the interplay between Section 1329 and Section 1311(c) in conjunction with Section 1329 is in the public interest because otherwise, larger viable public utilities would be discouraged from acquiring municipal water and wastewater systems and contravene the legislative intent and the Commission's policy of encouraging consolidation and regionalization. *Id.* at 7.

PAWC also addresses Commonwealth Court decisions on Section 1329, including *McCloskey v. Pa. Pub. Util. Comm'n*, 195 A.3d 1055 (Pa. Cmwlth. 2018) (*McCloskey*) and *Cicero v. Pa. Pub. Util. Comm'n*, 300 A.3d 1106 (Pa. Cmwlth. 2022) *allocatur pending*, Nos. 568-570 MAL 2023 (filed October 26, 2023) (*Cicero*). PAWC states that *McCloskey* requires the Commission to address rate impact when deciding whether an acquisition satisfies the affirmative public benefits test and that customers of the buyer and seller have a due process right to individualized notice of a proposed acquisition. PAWC further states that, in *Cicero*, the Commonwealth Court found the known harms of the transaction at issue outweighed the benefits, in part because the system was already providing the same or similar benefits without the rate increase that would occur if the transaction was approved. PAWC Comments at 7-9.

Moreover, PAWC addresses the results of prior Section 1329 proceedings, noting that the City of McKeesport was able to avoid insolvency by selling its wastewater system and that the City of York was able to eliminate long-standing debts, avoid significant tax increases, build a reserve, ensure customers have access to low-income grant and discount programs, and provide municipalities with a reliable bulk treatment provider by selling its wastewater system. PAWC also notes that Section 1329 acquisitions, such as the sale of the Valley Township water treatment and distribution system and the Borough of Kane's wastewater system, have promoted regionalization and consolidation consistent with the Commission's Policy Statement at 52 Pa. Code § 69.721. PAWC states that the *2024 FSIO* should not prevent similar success stories and that the legislature intended Section 1329 to be a meaningful tool for municipalities. PAWC also states that the relevant issue is whether the Commission can manage rates to be just and reasonable going forward, not whether a municipal entity is entitled to the full value of its property. PAWC suggests that the Commission recognize its statutory duty to implement Section 1329 consistent with the legislature's intent, not to change or nullify the law because only the legislature can change a statute. *Id.* at 9-11.

### **3. Advocate Comments**

#### **a. CAUSE-PA**

CAUSE-PA comments that it is concerned with the pace and trajectory of water and wastewater acquisitions under Section 1329 and the resulting financial effects on consumers. CAUSE-PA notes that the regionalization and consolidation of water and wastewater systems can produce economies of scale, improve water quality and safety for struggling systems, and increase access to important consumer protections, but that, under Section 1329's valuation structure, these benefits have quickly given way to substantial rate impacts that exacerbate rising infrastructure and water treatment costs and threaten the ability of low and moderate income Pennsylvanians to afford life-sustaining water and wastewater services. CAUSE-PA Comments at 2.

CAUSE-PA notes that financial impacts have not been adequately conveyed to selling utilities or the public and have not been fully considered in determining whether a purchase under Section 1329 is in the public interest. CAUSE-PA states that it is particularly concerned about the impact on economically vulnerable customers, who often shoulder a disproportionately high financial burden as a result of a high-cost purchase. CAUSE-PA notes that low-income families in Pennsylvania already struggle to afford water and wastewater service and are regularly forced to make impossible tradeoffs between necessities. CAUSE-PA also states that water and wastewater services are increasingly unaffordable across the Commonwealth and that low-income families now regularly pay well more than 10% of their household income for these services alone with few programs available to help offset the cost. *Id.* at 2-5.

Moreover, CAUSE-PA points out that critical infrastructure investments needs have driven substantial rate increases, but that the acquisition of healthy and financially stable publicly-owned water and wastewater systems under Section 1329 and the full recovery of those acquisition costs through rates is also a contributing factor to the unaffordability of water and wastewater services. For example, CAUSE-PA notes that PAWC proposed to recover \$27.5 million in 2020, \$28.9 million in 2022, and \$25.9 million in 2023 from ratepayers in order to cover the cost of its acquisitions. CAUSE-PA states that Pennsylvania’s investor-owned water and wastewater utilities often charge higher rates compared to municipally owned utilities, which leads to increased hardships on low-income customers when publicly-owned systems are acquired. CAUSE-PA explains that investor-owned utilities are entitled to earn a return on their investment, which is added to the utility’s rates, and that the cost of capital is often lower for municipally owned utilities, which have greater access to low or no cost municipal financing, grants, and other public funds to help pay for infrastructure projects. CAUSE-PA also explains that, when a municipally owned utility with lower residential rates is acquired by an investor-owned utility, there are often promises to shield the selling utility’s customers from further rate increases for a period of time following a rate increase, but that any agreed-upon rate freeze will inevitably come to an end and the acquiring utility will eventually seek to consolidate various rate schedules into a single, unified rate – sometimes causing severe rate shock for customers of the acquired system. *Id.* at 5-6.

**b. OSBA**

The OSBA states that it is concerned regarding the size of the premiums above depreciated original cost that have been incorporated into the acquisition price of municipal wastewater systems in certain instances. The OSBA recognizes that some premiums may be necessary to effectuate the transfer of under-capitalized and underperforming municipal utility systems to investor-owned water and wastewater

utilities that are better equipped in terms of management and capital to deliver safe and reliable service. The OSBA notes that the critical question is whether the size of the premium is reasonable and that premiums are a matter of public interest because customers are expected to pay for the acquisition costs through rates. The OSBA also notes that, for a municipal utility in need of new infrastructure, the inclusion of a large premium in rate base compounds challenges related to improving service in the acquired area in a cost-effective manner. Additionally, the OSBA claims that the acquisition process is fraught with perverse incentives that are contrary to the public interest because parties to Section 1329 acquisitions are incentivized to seek as high of a negotiated price as possible as long as the full acquisition price is approved for inclusion in rate base. The OSBA states that such a price does not represent a fair and genuine compromise in a normal economic sense, but is biased toward the upper end of prices. The OSBA notes that the absence of a normal economic incentive for the buyer to negotiate as low a price as possible for the asset means that the Commission cannot rely upon the negotiated price as a guide to ensuring just and reasonable rates. OSBA Comments at 1-3.

#### **4. Legislature Comments**

##### **a. Honorable Senator Comitta**

Senator Comitta comments that access to affordable service is growing out of reach for many residents and families and that, due to these concerns, Willistown Township voted to terminate an agreement to sell its sewer system. Senator Comitta states that Section 1329 is in need of meaningful reform and that she supports the Commission's willingness to revise current procedures and guidelines for Section 1329. Further, Senator Comitta notes that clean, reliable, and affordable water and wastewater service is a basic necessity for all Pennsylvanians. Comitta Comments at 1-2.

## **5. Individual Comments**

### **a. Mr. Mrozinski**

Mrozinski comments that Act 12 incentivizes the sale of healthy municipal utilities and that the buying utility and selling municipality are biased toward a sale, making them incapable of providing a fair cost/benefit analysis. Mrozinski argues that Act 12 has failed and should be repealed. Mrozinski Comments at 1.

### **b. Mr. Schwabenbauer**

Schwabenbauer notes that his water/sewer bill from PAWC has increased over 70% in the past two or three months. Schwabenbauer notes that he is protesting the increase as excessive because he is not receiving enhanced services that account for the amount. Schwabenbauer encourages PAWC to rethink its policies and roll back price increases. Schwabenbauer Comments at 1.

### **c. NGT Residents**

The NGT Residents ask the Commission to stop predatory pricing and improve transparency in water and sewer privatizations. They state that Act 12 has encouraged municipalities to sell healthy, well-run systems for an influx of money. The NGT Residents state that New Garden Township is an example of how Act 12 is being abused, noting that the Township raised rates 30% before the sale and that Aqua raised rates 85% after the sale, resulting in a 149% increase. They also note that the justification for the sale was based on vague and misleading information. NGT Residents Comments at 1.

**d. Mr. Sauer**

Sauer comments that Act 12 has allowed investor-owned private companies to take over municipal water and wastewater systems for a higher value than is fiscally responsible. Sauer states that Aqua and PAWC pay inflated prices for municipal systems and pass the costs on to ratepayers with rate increases every other year. Sauer points to Exeter Township's wastewater treatment plant as an example, noting that PAWC paid \$93.5 million for the system. Sauer states that the sale resulted in broad change, including the elimination of the homestead exemption, a 24% tax increase, and a 171% increase in combined water and wastewater bills with no tangible benefit in the product that is being delivered. Sauer includes a table to demonstrate what a family of four pays for water and wastewater service, noting that billing periods range from 27 to 35 days. Sauer states that PAWC filed for a rate increase merely 11 months after the last rate increase. Sauer also notes that other municipalities pay less per year for the same level of service. Additionally, Sauer also points to the case in Towamencin Township, where the board voted to sell and the residents are suing the board because they do not want the sale to go through. Sauer states water and wastewater is a monopoly and that Act 12 should be repealed by the legislature. Sauer Comments at 2-4, 6-15.

**e. Yordan, et al.**

Yordan, *et al.* comment that an administrative order is unlikely to meaningfully protect the citizens of Pennsylvania from the ravages of Section 1329 acquisitions by investor-owned utilities. They state that acquisitions of healthy systems have resulted in gigantic rate increases without any improvement in the quality of service or in financial viability. They also state that financially healthy systems have access to bond markets to finance upgrades at lower costs than for-profit utilities. Additionally, they state that most local officials of financially healthy communities choose to sell municipal water and wastewater assets because Section 1329 provides an irresistible incentive to raise revenue for the municipality without having to transparently raise taxes. Yordan, *et al.* claim that

the 2024 *TSIO* gives the impression that the Commission is reforming Section 1329 to relieve legislators of repealing the statute. Yordan, *et al.* Comments at 1-2.

**f. Mr. Cawley**

Cawley, who was a former Commissioner of the Commission, states that, overall, Section 1329 is a corruption of public utility ratemaking and is contrary to the fair balance and public interest emphasis of the Public Utility Code and its predecessors, noting that it restores pre-1913 monopoly pricing for existing and acquired water and wastewater customers and has caused extreme rate increases approaching \$100 million annually. He notes the Act 12 was misleadingly sold as a necessary incentive for large water companies to acquire distressed and impoverished municipal water and wastewater systems and that, if the sales pitch was true, the existing Section 1327(a) could have been amended to allow for contributed property to be included in their valuation for acquisition purposes, which would have cured the utilities' only legitimate complaint about Section 1327. He notes that Section 1329 allows limitless purchase prices, unconstitutional marginalization of the Commission, and windfalls for large water company investors and a handful of municipalities. Cawley Comments at 3-4.

Cawley points out that the Commission must interpret and apply the Public Utility Code to avoid constitutional challenges and that the Commission reconciled Sections 1329(c)(2) and 1329(g) consistent with the mandated tenor of the Public Utility Code to regulate public utilities in the public interest. He urges the Commission to continue reconciling Section 1329's provisions, especially Section 1329(c)(1)(i)-(ii) in Section 1308 rate cases, to avoid violating the Pennsylvania and U.S. Constitutions and ensure that every public utility rate is just and reasonable. He states that the delegation of municipal property valuation for ratemaking purposes to private persons and entities is irredeemably unconstitutional. *Id.* at 4-5.

Cawley also addresses the history of public utility valuation from 1913 to 2015. He notes that, in 1913, the shareholders and bondholders of Pennsylvania's investor-owned public utilities earned a return on the fair value of the utility's property used to provide customer service, or rate base. He explains that the concept of fair value originated in U.S. Supreme Court dictum, but that the Court soon rejected figures derived from earnings as measures of fair value and committed to a reproduction cost rate base until 1934 when it sustained an original cost valuation of a bridge by the Pennsylvania Public Service Commission and pointed out the absurdities reached by reproduction cost valuations in two other cases. He also explains that, after the enactment of the Federal Natural Gas Act of 1938, the Court declared that the Federal Power Commission need not consider reproduction cost and then declared that it is not theory, but the impact of the rate order, which counts. *Id.* at 5-7.

Cawley notes that, in early cases, the Pennsylvania Public Service Commission gave considerable weight to original cost, but used reproduction cost if the utility's accounting records were deficient, and that, in 1923, the Commission moved toward a reproduction cost base to follow the U.S. Supreme Court. He explains that the legislature enacted the Public Utility Law and inexplicably authorized the Commission to fix the fair value of a utility's property, but omitted criteria set forth in the earlier act. He states that this led to clashes with the Superior Court regarding the meaning of fair value, which resulted in the preservation of the valuation standards from the 1913 act in which reproduction cost played a very large part until the late 1940s when the Superior Court acceded to the Commission's compromise position of giving equal weight to both depreciated original cost and depreciated reproduction cost. *Id.* at 7-9.

He further explains that, in the following 35 years, expert witnesses argued about the appropriate fair value of the utility's rate base because precise numbers were impossible and that, in 1975, a Pennsylvania Senate committee recommended adoption of valuation at the property's original cost less depreciation, noting that the rate of return must be raised to adjust for the fact that the return will be calculated on the older, original cost of the investment rather than its speculatively determined present-day value. He points out that this change was not adopted until the amendment of Public Utility Code Section 1311(b) by Act 153 of 1984 applicable to all public utility property. *Id.* at 9-10.

Regarding Section 1329, Cawley states that the prime sponsor of Act 12 based the need for the legislation on troubled municipal water and sewer systems and an alleged disincentive to acquire those systems created by the existing law. He notes that Act 12 introduced a foreign concept to Pennsylvania public utility regulation by using FMV as a basis for valuing utility property for ratemaking purposes and that, contrary to the memo, it was not confined to distressed systems. He also notes that the memo referred to Section 1327 as a law relating to valuation as discouraging acquisitions of distressed systems, but that, if the large acquiring water companies failed to recover the purchase prices they paid for distressed systems, it was not the fault of Section 1327 and the alleged villain was the Public Utility Commission for disallowing portions of the purchase prices as unreasonably excessive or improper for inclusion in the acquiring water companies' rate bases for ratemaking purposes. *Id.* at 12-15.

He further states that the problem was easily cured by further amending Section 1327 with the same language that they suggested in the new Section 1329(d)(5). He notes that the FMV was cloaked in a patina of respectability by having independent appraisers establish it under national appraisal standards and that the memo failed to explain that the Commission could review, but not change the FMV or exclude the ratemaking rate base amount from inclusion in the utility's next base rate case because it already approved that amount in the Section 1329 proceeding. *Id.* at 15-17.

Cawley notes Aqua's argument in the proceeding involving the acquisition of New Garden Township's that the mandatory term "shall" in Section 1329(c)(2) and the definition of FMV in Section 1329(g) as the average of the two utility valuation expert appraisals conducted under subsection (a)(2) were clear and definitive that the Commission had no role in determining the ratemaking rate base except to adopt the lesser of the FMV as determined by the UVEs' appraisals and the purchase price. He also notes the Commission's holding that Section 1329 is reconcilable with Sections 505 and 1103(b), 66 Pa.C.S. § 505, 1103(b), and consistent with Pennsylvania Rule of Statutory Construction 1971(c), 1 Pa.C.S. § 1971(c), because it permits the Commission and parties to develop a record pertaining to the review and analysis of the FMV appraisals of UVEs. Cawley also states that the Commission properly reconciled Section 1329 by entertaining I&E's and OCA's suggested adjustments to the appraisals that determined FMV and by partially adopting those changes to unavoidably inflated valuations prepared under a constitutionally repugnant process. *Id.* at 17-21.

Moreover, Cawley explains that FMV has been found incompatible and improper for public utility rate base valuation. He explains why eminent domain and commercial methods of valuation were found wanting and therefore rejected. He states that FMV was never used in Pennsylvania to value either public utility or municipal property for ratemaking purposes until the enactment of Act 12. He also states that Act 12 forced the Commission to return to 1975 ratemaking with the same time-consuming, expensive dueling of experts that was previously criticized. He notes that an examination of the cost, market, and income approaches reveals that history has repeated itself. He further points out that all three approaches are the standard methods of commercial valuation, which are equally unsuitable for valuing public utility property for ratemaking purposes. *Id.* at 21-28.

Cawley asserts that Section 1329 is unconstitutional for three reasons. First, he explains that the just and reasonable standard satisfies the constitutional requirement precluding regulatory commissions from exercising their ratemaking authority in a manner that confiscates utility assets and that just and reasonable rates do not constitute a taking under the U.S. Constitution. He also explains that Section 1329 prevents the Commission from determining whether the ratemaking rate base is just and reasonable and, instead, orders the Commission to adopt, without inquiry or modification, the lesser of two figures determined by the buyer and seller. Next, he states that instead of balancing the needs of public utility investors and customers as Section 1301(a) of the Public Utility Code and the Pennsylvania and U.S. Constitutions require, Section 1329 dictates the municipal seller's value for ratemaking purposes. He also states that, although the Commission has reconciled the first mandate under a rule of statutory construction and may attempt to do so regarding the second mandate, neither mandate can be reconciled constitutionally with Section 1301(a)'s requirement that every rate be just and reasonable. Lastly, he notes that Section 1329 unconstitutionally delegates the Commission's authority to determine valuation to private individuals and entities lacking political responsibility and accountability. He also notes that the General Assembly improperly delegated the Commission's authority to value municipal property for ratemaking purposes to UVEs or, if the purchase price is less than the FMV, to the investor-owned utilities. *Id.* at 29-36.

Finally, Cawley recommends that, if the large water companies can lobby the legislature for single tariff pricing, the Distribution System Improvement Charge, fully projected future test years, liability of water customers for sewer revenue deficiencies, enactment and amendment of Section 1327, and Act 12, the Commission, as the Legislature's expert agency, should urge the legislature to repeal Act 12 and amend Section 1327 to allow for the inclusion of contributed property in a municipal system's valuation for purposes of computing an appropriate acquisition adjustment. *Id.* at 37-40.

**g. Mr. Knoll**

Knoll comments that PAWC purchased the Exeter Township water and wastewater system and that, in 2023, he used half the amount of water, but paid more. Knoll notes that a billing cycle is between 28 and 35 days, which is inconsistent. Knoll also notes that PAWC's rate increase request contains three elements of alternative ratemaking, including a revenue decoupling mechanism, an environmental surcharge, and wastewater winter averaging. Knoll states that the revenue decoupling mechanism will assign a surcharge if monthly water usage falls below the budgeted usage to make up for the revenue loss and that this request is not fair because it does not have the resident's best interest in mind. Knoll asks the Commission to determine if the rate increases are legitimate and notes that rate increase requests are not sustainable for customers. Knoll also explains that abnormally high water rates affect him directly and that he questions how he will pay this utility bill. Knoll states that Act 12 was intended to help struggling municipalities that could no longer provide quality service, but was instead used by private companies to make extreme profits. Knoll Comments at 1-2.

**h. The Carls**

The Carls state that Act 12 is flawed and that private utilities should not be allowed to pay FMV for municipal water and wastewater systems. They also state that Act 12 is a burden on ratepayers because rates have skyrocketed after each purchase, while profits have soared. The Carls note that they are ratepayers for CWA and hope that the *2024 FSIO* will deter a private utility from acquiring CWA. They also note, however, that the *2024 TSIO* does not fundamentally alter the ability of private utilities to pay FMV and do not require a vote by ratepayers as to whether they approved the sale or consequences that deny the acquiring utility the ability to pay a large amount and increase rates. Carls Comments at 1-2.

**i. Mr. Young**

Young notes that he lives with his wife in a senior citizen community in Valley Township on a fixed income. Young explains that, in 2016, his water and sewer rates were reasonable and paid quarterly and that the water and sewer system was very well managed. Young also explains that PAWC bought the system about two years ago and offered a low introductory rate for about a year before putting new rates into effect. Young states that his water and sewer bill is now monthly and are equivalent to what he paid quarterly. Young calls the rates predatory pricing and asks for Act 12 to be repealed because ratepayers need relief. Young Comments at 1.

**j. Ms. Weer**

Weer comments that she is encouraging that the Commission recognizes that ratepayers are at risk for escalating rates due to Act 12. Weer notes that she is a resident of a retirement community in West Grove. Weer states that local municipal officials are not able to protect residents from increased rates resulting from the privatization of public water and sewer services and that the Commission is in a better position to do so. Weer also states that local officials are new to a municipality by the time a water or sewer system becomes distressed or targeted by a purchase and that they cannot be expected to determine the utility's value on a municipal scale or a regional scale. Weer asks the Commission to take action before contracts are binding for privatization, noting that expenses increase every year and that she cannot imagine what would happen if rates increased like in New Garden Township. Weer Comments at 1.

**k. Mr. Osei**

Osei notes that Section 1329 is fundamentally broken and that it is incumbent on the General Assembly to repeal the law. Osei states that there are other more appropriate acquisition procedures for Section 1329 applications and that the Commission has routine lawsuits over Section 1329. Osei Comments at 1.

**I. D’Ignazio, *et al.***

D’Ignazio, *et al.* state that friends in New Garden are aghast at what they pay for sewer and water and that they are worried about Act 12 due to being in a 50-mile span subject to further Act 12 allowances. They claim that Act 12 is enabling profit driven companies to game the system with unfair advantage over well-run companies that offer the best customer service and value. They ask the Commission to strengthen Act 12 by insisting that the sale prices do not exceed the depreciated value and banning non-disclosure agreements. They further ask the Commission to support a repeal of Act 12 and state that non-action has targeted them as a family. They also ask when a utility is considered a monopoly. D’Ignazio, *et al.* Comments at 1.

**B. Reply Comments On The 2024 TSIO Generally**

**1. Public Utility Reply Comments**

**a. PAWC**

PAWC reiterates the benefits of Section 1329 in opposition to OSBA’s perceived concern with the incentives in Section 1329 transactions. PAWC Reply Comments at 12.

In addition, PAWC does not agree with the comments of Cawley, who generally opposes the existence of Section 1329. PAWC reiterates the importance of Section 1329 and its proven success in remedying non-compliant systems, improving safety and reliability and ensuring environmental and economic benefits to customers.

PAWC Reply Comments at 15-18.

## **2. Advocate Reply Comments**

### **a. OCA**

The OCA explains that the comments filed present two different pictures. The OCA notes that investor-owned utilities and some municipalities suggest that Section 1329 is a success story, while comments from consumers and low-income advocates show the reality, which is the fiction that value can only be found at extremely high multiples of depreciated original cost, the rate impact that this has had already on existing customers of the buyer and seller, and the impact on bloating the investor-owned utilities' rate bases, all of which benefits shareholders who bear no negative consequences of the high purchase prices. OCA Comments at 1.

## **3. Individual Reply Comments**

### **a. Mr. Mrozinski**

Mrozinski believes that Act 12 incentivizes both the selling municipality and the purchasing utility to seek the highest sale price. Mrozinski explains that a utility is an asset which the municipality can sell at any price it can negotiate; however, the Commission must determine how much of the sale price is to be added to the rate base based on quantifiable public benefit. If the sale is being justified by the benefits of the influx of money, Mrozinski asserts that these benefits must be quantified and weighed against the quantitative harm caused by the rate impact. Mrozinski further explains that any claimed benefits must be specific, and funds must be formally committed to these promised benefits prior to the sale. Mrozinski Reply Comments at 2.

Mrozinski explains that, in the case of New Garden Township, despite promises to use sale proceeds to offset future tax increases, the Township announced in late 2023 its plans for a 127% real estate tax increase. Mrozinski asserts that, except for a new regional police station, none of the sale proceeds have been used for any public benefit.

Four years after sale closure, over 75% of the \$29.5 million sale price sits stagnant in an interest-bearing account. *Id.* at 2-3.

**b. Yordan, et al.**

Yordan, *et al.* assert that the General Assembly does not believe that FMV acquisitions automatically promote the public interest and explain that the General Assembly left the burden of proving substantial public interest in each case before the Commission and the courts. Yordan, *et al.* state that the law in Pennsylvania still places the burden of proof on the acquiring utility to demonstrate that the acquisition will benefit the public, a very high hurdle for healthy systems run by healthy municipalities with ample financing capability. Yordan, *et al.* Reply Comments at 2.

**c. Mr. Cawley**

Cawley asserts that Act 12 should be repealed. He notes that PAWC and Aqua fail to mention the high rates caused by Section 1329. He asserts that the primary problem is the ultimate effect on rates of excessive purchase prices unchecked by the Commission's usual practice of approving a reasonable positive acquisition adjustment where the depreciated original cost of the acquired facilities is less than the purchase price of the facilities. Cawley Reply Comments at 2-3.

Cawley explains that Section 1329 was specifically designed to avoid the inconvenient need for an acquiring utility to convince the Commission that the difference between the depreciated original cost and the purchase price should be allowed as a positive acquisition adjustment. He states that Section 1329 avoids that troublesome process by excluding the Commission altogether and requiring it to adopt the lesser of the FMV or the purchase price. *Id.* at 3.

Cawley believes that rationalizations for Section 1329 should only apply to troubled systems, not healthy systems, as allowing a premium over a healthy system's book value in the purchase price requires the acquired customers to pay a second time for their system, including the value of the contributed property, often with no improvement in service or quality. He asserts that the socialization of costs is proper when non-viable or distressed systems need rescuing and therefore a positive acquisition adjustment is granted to incentivize a public utility to acquire the system. He explains that financially healthy and well-managed municipal corporations and authorities may have good reasons for selling their systems, but that it is unreasonable to expect the acquiring public utility's customers to pay an excessive price for their assets, especially when they often include considerable contributed property, and the sale proceeds can be used for any purpose. He also asserts that the legislative history of Act 12 does not support the notion that municipal corporations or authorities need to be consolidated and regionalized, let alone healthy ones. *Id.* at 3-5.

**d. Mr. Osei**

Osei asserts that the General Assembly made Section 1329 acquisitions subject to Section 1102 of the Public Utility Code, 66 Pa.C.S. § 1102, and the determination of public interest is in the Commission's purview. Osei asserts that the Commission should deny Section 1329 applications that are not in the public interest. Osei explains that Towamencin Township sold their system to NextEra against the wishes of the residents and the projected rates have increased significantly. Osei Reply Comments at 1-2.

**C. Conclusion On The 2024 TSIO Generally**

Overall, and with respect to certain proposals in the 2024 TSIO, which we discuss in the respective sections of this Order, some commentors have expressed concern regarding the nature of the 2024 FSIO. We clarify that the 2024 FSIO is nothing more than an order designed to identify how the Commission intends to implement

Section 1329 in future adjudications. As with the *2016 FIO* and the *2019 FSIO*, this *Implementation Order* sets forth the Commission’s guidelines and processes for applications filed with the Commission pursuant to Section 1329. *2016 FIO* at 3; *2019 FSIO* at 1, 3.

The Commission has a longstanding practice of entering implementation orders to address newly enacted statutes. For instance, when Chapter 14 of the Public Utility Code, 66 Pa.C.S. §§ 1401, *et seq.*, was enacted in 2004, the Commission entered a series of implementation orders to set forth its Chapter 14 guidelines and processes. With respect to those implementation orders, the Commission explained:

Since the *Implementation Orders* are not adjudications, they should not be construed to have created “binding norms” that have the force of law. If they are so interpreted, then the *Implementation Orders* would be illegal because they are in the nature of unpromulgated regulations. *See, e.g., Pa. Human Relations Commission v. Norristown Area School District.*, 374 A.2d 671, 679 (Pa. 1977), *Hardiman v. Commonwealth, Department of Public Welfare*, 550 A.2d 590 (Pa. Cmwlth. 1988).

A statement of policy is defined in the Commonwealth Documents Law as:

any document, except an adjudication or a regulation, promulgated by an agency which sets forth substantive or procedural personal or property rights, privileges, immunities, duties, liabilities or obligations of the public or any part thereof, and includes, without limiting the generality of the foregoing, any document interpreting or implementing any statute enforced or administered by such agency.

45 Pa.C.S. § 501 (“Statement of Policy”) (Emphasis added). These *Implementation Orders* fit within this definition. Accordingly, the Commission agrees with the argument of [Philadelphia Gas Works] that the *Implementation Orders* at issue constitute policy statements setting forth how the Commission intends to interpret Chapter 14 in future adjudications and rulemakings. Nevertheless, the Implementation Orders provide guidance to parties by the agency charged with its implementation and, as such, any party that deviates from that guidance runs the substantial risk of being in violation of Chapter 14 and the initiation of appropriate enforcement measure to secure compliance with this new law.

*Chapter 14 Implementation*, Docket No. M-00041802F0002, 12-13 (Declaratory Order entered November 21, 2005). The same is true of the Commission’s *Implementation Orders* pertaining to Section 1329, including the *2024 FSIO*.

Additionally, it is well-within the Commission’s authority to periodically revise its guidelines and processes for Section 1329. An agency may revise its policies in interpreting its statutory mandates, and past interpretations of a statute do not bind the Commission to a particular interpretation, especially when changes are made in consideration of the public interest. *Elite Industries v. Pa. Pub. Util. Comm’n*, 832 A.2d 428, 431-432 (Pa. 2003). Implementation is an evolving process where there is an ongoing need to resolve issues that arise. *Chapter 14 Implementation* at 10.

We explicitly contemplated changes to our implementation orders in the *2016 TIO* where we stated, for example, that the Application Form for Registration as a Utility Valuation Expert and the Application Filing Checklist will be changed as the Commission deems necessary. *2016 FIO* at 17. We also previously modified the Section 1329 guidelines and processes based on our experience in applying the provisions of Section 1329 from 2016 to 2018. *2019 FSIO* at 2. Given that we have since gained

more extensive experience in applying the requirements of Section 1329, additional modifications to the guidelines and processes are appropriate in the *2024 FSIO*.

To offer further clarification regarding the nature of the *2024 FSIO*, and address the concerns raised by municipalities regarding their role in Section 1329 acquisitions, we note that the guidelines and processes delineated in our implementation orders are not intended to impact any separately existing guidelines and processes for municipalities given that acquiring utilities are the applicants in Section 1329 proceedings before the Commission. For instance, while we encourage reasonable cooperation between selling utilities and acquiring utilities for Section 1329 applications, acquiring utilities are ultimately responsible for the items in Appendix A, the Application Filing Checklist. Moreover, as we stated in the *2016 FIO*, if any of the information requested in the Application Filing Checklist is unavailable for a particular acquisition after a reasonable search or simply does not exist, applicants are expected to include with applications verified statements to that effect and the Commission will consider the verified statements in its review of the completeness of the applications. *2016 FIO* at 39.

We also recognize commentors' concerns regarding the intent of Section 1329 and the future of Act 12. In this *2024 FSIO*, as in the Commission's prior Section 1329 implementation orders, we have duly considered the intent of the General Assembly with respect to Section 1329. The Commission is without the authority to modify or repeal Act 12 as the modification or repeal of statutory provisions of the Public Utility Code can only be effectuated by the General Assembly. Section 1329 remains a tool for municipalities to receive FMV compensation for their assets and ensure that their customers receive safe and adequate service from a capable public utility. Section 1329, however, does not alter the requirements of Chapter 11 of the Public Utility Code in that all proposed acquisitions must be necessary or proper for the service, accommodations, convenience, or safety of the public, *i.e.*, be in the public interest. 66 Pa.C.S. § 1103(a); *City of York v. Pa. Pub. Util. Comm'n*, 295 A.2d 825 (Pa. 1972); *see 2018 TSIO* at 3.

Further, with respect to the pending and upcoming Section 1329 applications that commentors believe will be impacted by the *2024 FSIO*, we are cognizant of the fact that APAs and Section 1329 applications are in various stages of negotiation and filing, respectively. However, the application of any changes to the existing Section 1329 process that the Commission may adopt via this *Implementation Order* will only apply to those Section 1329 applications filed after the entry date of this Order as explained herein. No utility will have to refile pending Section 1329 applications as those will be addressed on the merits when the Commission undertakes its review of the applications. Accordingly, we recognize that the unique facts and circumstances of each application must be evaluated in a Section 1329 proceeding, and we will take the dates on which APAs were signed and applications were filed into consideration as appropriate.

## **II. Public Hearings**

In the *2024 TSIO*, we proposed requiring selling utilities and acquiring utilities to conduct at least two in-person public hearings prior to executing an APA. We stated that the public hearings should address the proposed acquisition, describe the potential rate impacts, provide the opportunity for public comment, and be held at venues within the municipal boundaries of the selling utility, or at the nearest reasonable venues with notification to the Commission. We also stated that the acquiring utility or selling utility should be required to notify the selling utility's customers of the public hearing. We proposed to revise the Application Filing Checklist to include public hearings and an attestation that the public hearings were held. *2024 TSIO* at 3-4.

## **A. Comments On Public Hearings**

### **1. Municipality Comments**

#### **a. PSAB**

PSAB supports including public meetings in the Section 1329 process. It notes that many of its members are already having public meetings to consider the issues in their communities. PSAB suggests referring to public meetings, rather than public hearings, due to legal responsibilities that may bring added expenses, such as stenographers. PSAB Comments at 2.

#### **b. Brentwood**

Brentwood states that transparency is critical and that public hearings should be held before decisions are made by municipalities. Brentwood notes, however, that the Commission lacks the authority to require that municipalities hold public hearings or to dictate how municipalities do so because municipal codes, such as the Borough Code, govern municipalities. Brentwood comments that, even if the Commission was permitted to require public hearings, the proposed public hearing requirement is vague. Brentwood states that the word “prior” is ambiguous and that the *2024 TSIO* does not specify whether the examples of effective notice are exhaustive or detail whether selling and acquiring utilities are limited to telling the public about the proposed acquisition and its rate impacts or permitted to give more information, including how rates might change absent the transaction or the environmental hazards that prompted a selling utility’s decision to explore a sale. Brentwood Comments at 3-5, 7.

#### **c. PMAA**

PMAA notes that the public hearing requirement does not identify the time in which to notify a selling utility’s customers of public hearings. PMAA suggests a public 90-day notice so that ratepayers have a reasonable timeframe to prepare. PMAA also

suggests that public hearing procedures include an announcement of intent, disclosure of relevant information, a reasonable amount of time for ratepayers to analyze all information and data, and time set on the agency to allow ratepayers to present concerns. PMAA further suggests boosting transparency by requiring public disclosure, public hearings, and public input before the execution of an APA, ensuring that a qualified representative from the acquiring and selling utilities are present at the hearings to respond to ratepayer inquires, and requiring public bidding when appropriate. PMAA also recommends a prohibition on non-disclosure agreements. PMAA states that more than two public hearings are necessary with at least one being held before bids are solicited. Ultimately, PMAA states that the General Assembly should require a public referendum prior to a sale under the law. PMAA Comments at 2.

**d. BCATO**

BCATO states that it concurs that the proposed revisions will improve the general public's awareness of applications. Specifically, BCATO notes that two public meetings are appropriate to allow for greater participation. BCATO suggests minimum notification timelines, noting that, in its case, notice was only provided one week in advance. BCATO also suggests that the notification utilizes a region's most effective communication approaches, not just newspaper notice. BCATO Comments at 2.

**e. PSATS**

PSATS comments that it appreciates the Commission's efforts to provide greater transparency with in-person public hearings and supports the flexible options for notifying the public about hearings, including social media posts, community newsletters, and direct outreach through text or e-mail. PSATS recommends establishing a minimum timeframe between the notice and hearings to ensure time for affected ratepayers to participate, noting that several weeks is sufficient. PSATS Comments at 1.

**f. CWA**

CWA states that the selling utility should be required to notify the selling utility's customers of public hearings. CWA suggests that at least one public hearing be held in every quarter that a sale of a utility is being planned or contemplated. Additionally, CWA recommends that notice to all residents and ratepayers be given twice, at least six weeks before a public hearing, via letters or postcards, bill inserts, and at least one other method such as e-mail, text, or phone call. CWA further recommends that notice to all residents in a municipality be delivered twice, at least six weeks before a public hearing, by advertising in local newspapers and at least three of the following: posting in areas of high foot traffic, community news letters, faith community bulletins, public service announcements, social media posts shared with community groups and municipalities, local radio and television stations, communications to local community groups, and postings with local community centers. CWA Comments a 2-3.

**2. Public Utility Comments**

**a. Aqua**

Aqua supports the Commission's proposal of holding two public input hearings on a transaction under Act 12. In particular, Aqua agrees with the language that leaves flexibility in the venue because selling utilities vary. Aqua also agrees with the description of a public meeting because community leaders should help decide where the best location is to communicate with their residents. Aqua notes that it intends to comply with these requirements in good faith to make sure the public is informed. In anticipation of comments which may request more definitive definitions and prescriptive language for public hearings, Aqua points out that there are a limited number of acquiring utilities that use FMV and, if there are future examples provided in applications that suggest buyers and sellers are not acting in a good faith effort to comply the public hearing requirements as drafted, it could be easily remedied in the future. Aqua Comments at 3-4.

**b. PAWC**

PAWC comments that it does not oppose this proposal. PAWC explains that most municipalities considering the sale of their water or wastewater systems already offer the public multiple opportunities to ask questions and express their views about a proposed transaction before an APA is signed. PAWC suggests that the Commission specify that hearings held by the selling municipality are adequate to satisfy this guidance. PAWC also notes that it understands that the required public hearings do not need to be like the public input hearings that are held during rate cases and that an opportunity for the public to comment and ask questions at a meeting of the governing body of the municipality would meet the requirement. PAWC asks the Commission to clarify that the required public hearings need not be in the nature of a judicial or formal evidentiary proceeding. PAWC also suggests that the Commission promulgate regulations establishing uniform requirements for public hearings in order to ensure that the same requirements apply to all acquiring public utilities and that Commission staff cannot withhold acceptance of an application on the basis that Commission staff has a different notion of the public hearing requirements than the Commission itself. PAWC Comments at 19.

**3. Advocate Comments**

**a. PWEA**

The PWEA strongly supports public notice requirements and communication with ratepayers prior to the sale of a water or wastewater system. With regard to the requirements to schedule and conduct at least two in-person public hearings, the items to be addressed at public hearings, and the notification to the selling utility's customers of the public hearing, the PWEA suggests that the language "should" be changed to "shall." The PWEA also states that the venues proposed for public hearings in the *2024 TSIO* are acceptable. PWEA Comments at 1-2.

**b. OCA**

The OCA supports the requirement to hold at least two in-person hearings before the execution of an APA and the Commission's notice and substantive requirements for the hearings. The OCA proposes a few changes to ensure uniformity for the public and stakeholders. OCA Comment at 2.

With respect to notice, the OCA suggests that direct notification be done by phone call, text, letter, or e-mail, and that the acquiring utility cooperate with the selling utility to ensure that customers of the selling utility are properly identified to receive direct notice. The OCA also suggests that public meetings be scheduled separately from the regular business meetings of a selling municipality to comply with the *2024 TSIO* because regular business meetings involve many agenda items and restrict the ability for the public to comment on the proposed transaction. *Id.* at 2-4.

The OCA states that the basis for the bill impact information should be the revenue requirement associated with the ratemaking rate base, calculated by the acquiring utility. The OCA notes that this information is provided in the Section 1329 application but could be provided earlier as part of the bill impact information offered at the public hearings. The OCA also notes that using the revenue requirement calculation based on the proposed purchase price would provide important information because it can be compared to the revenues collected from the seller's customers using the rates at closing, and any shortfall and future rate impact on the seller's rates and bills would provide clear information about what the rate impact will be from the purchase price. The OCA also states that bill impact information should be in plain language without unnecessary information or legal information. In particular, the OCA asks that the bill impact be shown without any rate freeze that is not binding and may lead to confusion among affected customers. The OCA does not recommend using the existing Section 1329 notice because it does not provide full and complete information that would fulfill the

requirement that customers receive information about bill impacts. The OCA offers three specific recommendations regarding what information should be provided to the seller's customers. *Id.* at 4-5.

First, for wastewater acquisitions, the OCA recommends that the bill impact reflect the full impact of the revenue requirement calculated by the buyer that identifies the shortfall, if any, between the revenues collected through the seller's rates and the calculated revenue requirement. The OCA states that the full bill impact should not be reduced by any Section 1311(c) shift that the buyer may propose in future rate cases. The OCA also recommends showing the rate impact if all of the revenue requirement was collected from the selling utility customers. In this regard, the OCA states that there could be information about a shift of the wastewater revenue requirement to water customers under Section 1311(c), but that it should be emphasized that it is within the Commission's discretion whether any shift would be approved and the amount. The OCA further states that any request under Section 1311(c) should not be portrayed as relieving the seller's customers from paying the revenue requirement that results from the sale. The OCA states that this recommendation for public hearings is consistent with the Commission's directive regarding the rate impact notice. *Id.* at 5-6.

Next, the OCA recommends that the bill impact information be provided for different usage levels. The OCA suggests using 3,200 gallons per month, 5,000 gallons per month, and 10,000 gallons per month, as an example. The OCA notes that this range is based on information in *Penn State Extension: Estimating Water Needs*, and that these ranges are a reasonable approach to show the impact of the transaction on customers at different usage levels. *Id.* at 6-7.

Additionally, the OCA recommends that the calculations of rate impact include any capital expenditure commitments that the acquiring utility is committing to in the APA and the related revenue requirement. The OCA states, for instance, that, if an acquiring utility commits to invest a minimum amount of capital expenditures for a number of years in the service area of the selling utility, the additional revenue requirement impact should be included in the rate impact calculation to understand the impact of the capital expenditure commitments in the APA. The OCA provides an example of the revenue requirement calculation at closing and includes Year 1 capital expenditures in Attachment A to its comments. *Id.* at 7-8.

The OCA further recommends that the notices provided to the customers of the buyer and seller as part of the application proceeding before the Commission should include this information as well. *Id.* at 27.

**c. SPWSPG**

SPWSPG comments that public input and participation are needed before a contract is signed to sell a water or wastewater system. SPWSPG states that two public meetings are insufficient and suggests that the public be involved from the moment the local government decides to consider a utility sale. SPWSPG also states that the public must be notified and provided with an opportunity to comment at every stage. SPWSPG suggests holding at least one public hearing before bidding, providing full and complete disclosure of the impacts of the sale and the analysis for the sale recommendation, and providing equal time for members of the public opposing the sale to present their case at a public meeting. SPWSPG Comments at 1.

**d. CAUSE-PA**

CAUSE-PA supports the Commission's proposal to require more robust public engagement but recommends that the Commission go further to ensure selling and acquiring entities elicit meaningful and informed public input in a timely manner, which informs the entities' ultimate decision on a proposed sale. CAUSE-PA Comments at 8.

First, CAUSE-PA urges the Commission to require selling and acquiring entities to host at least one public input hearing before the terms and conditions of a potential sale are fully negotiated. CAUSE-PA also suggests a second or subsequent public input hearing later in the process, but before a final APA is signed, to present the details of a proposed sale and to review the projected impact on customers of both the acquired and acquiring entities. CAUSE-PA states that, at this hearing, the entities should be required to explain how they addressed concerns raised at the initial public input hearing, and permit consumers to respond and provide further comment on the details of the proposed sale, and require the selling and acquiring entities to include an explanation of how they addressed consumer concerns raised at each of the public input hearings as part of any subsequent application for approval of a proposed sale. CAUSE-PA further suggests requiring formal transcripts from the hearings to be publicly available and attached to Section 1329 applications, and requiring acquiring entities to demonstrate in their application how the terms and conditions of a sale are responsive to the input gathered in public hearings. *Id.* at 8-10.

Next, CAUSE-PA urges the Commission to require stand-alone public input hearings and eliminate the option for hearings to be held during a broader public meeting or open house hosted by the acquiring or selling utility. CAUSE-PA states that the gravity of a proposed sale of publicly-owned water and wastewater systems and the resulting impact on rates necessitate individualized consideration that can be reviewed by the Commission to determine whether a proposed sale appropriately balances the benefits

against the harms. CAUSE-PA also states that allowing an acquisition to be one of many agenda items may diminish participation and limit the time needed to present and allow comment and discussion. CAUSE-PA further suggests that the selling entity be required to include regular updates on a potential or pending sale as a standing agenda item at all general public meetings for the duration of the sale. *Id.* at 9-10.

Moreover, CAUSE-PA recommends that the Commission require decision-makers of the selling and acquiring utilities to attend public hearings to ensure customer questions are answered. CAUSE-PA also suggests requiring that all relevant rate impact information be presented in advance of and during hearings and allowing adequate time for public comment as well as the submission of written comments. CAUSE-PA recommends that public hearings be accessible and inclusive, meaning that selling and acquiring utilities provide an interpreter for non-English speakers and those using American Sign Language and that hearings be held in a central location that is accessible to the entirety community with consideration to the proximity of public transit options. CAUSE-PA also notes that larger regions may require more public input hearings and that it does not object to a hybrid option as long as anyone accessing the hearing remotely can comment. CAUSE-PA asks the Commission to establish detailed accessibility guidelines, perhaps through a working group. *Id.* at 10-11.

Further, CAUSE-PA requests that the Commission address how selling and acquiring entities communicate with consumers about public hearings. CAUSE-PA asks the Commission to require the selling utility to send its customers a direct, written, plain language notice at least 30 days in advance of each public hearing and require the acquiring utility to post notice on its website, social media, and in local newspapers or newsletters. CAUSE-PA states that none of the listed options in the *2024 TSIO* will adequately reach a selling entity's customers base alone. CAUSE-PA also suggests that public input hearing notices include a plain language rate impact statement and a chart

identifying anticipated rates impacts at different usage levels. CAUSE-PA notes that the Commission could hold a working group to develop a template for notice. *Id.* at 11-12.

#### **4. Legislature Comments**

##### **a. Honorable Senator Comitta**

Senator Comitta supports public hearing requirements and asks the Commission to expand the number of required public meetings beyond two, especially considering that when rate increases are sought, multiple public input hearings are held. Senator Comitta also notes that any meetings must be scheduled to ensure ample opportunity for review and comment for all members of the public. Comitta Comments at 1.

##### **b. Honorable Representative Lawrence**

Representative Lawrence recommends clarifying the requirement to schedule and conduct at least two in-person public hearings prior to executing an APA. Representative Lawrence also states that the requirements for the public hearings to address the proposed acquisition, describe the potential rate impacts, provide the opportunity for public comment, and be held at appropriate venues are vague. In this regard, Representative Lawrence suggests specifying that a representative from the OCA be required to attend and present to the audience. Additionally, Representative Lawrence states that holding public hearings at a meeting of a township board of supervisors or township zoning hearing board where the acquisition is on the agenda, a meeting or open house held by a municipal water or wastewater utility, or an investor-owned utility company is insufficient. Representative Lawrence notes that allowing the acquiring utility to fulfill this requirement is problematic and that the term “open house” is too vague. Thus, Representative Lawrence suggests that the Commission clearly spell out what constitutes a public hearing focusing on a publicized meeting subject to the Sunshine Act and the Right-to-Know Law. Representative Lawrence also suggests that the meeting be held at a large facility, livestreamed, and recorded to view on the municipality's website.

Further, as it pertains to advertising the public hearings, Representative Lawrence states that it is not clear whether a combination of the methods identified in the *2024 TSIO* or just one method is sufficient. Representative Lawrence suggests that, at minimum, public hearings be advertised online, in the newspaper, and via mail to all affected ratepayers at least two weeks prior to the hearings. Lawrence Comments at 1-3.

**c. Honorable Representative Cutler**

Representative Cutler supports efforts to bolster public notice and informed decision-making by local communities, but suggests that there is room to enhance and strengthen transparency and public input. Representative Cutler notes that acquisitions have a large impact on the communities served by the acquiring and the to-be-acquired systems that are not felt until it is too late in the process to change. Representative Cutler states that the proposal to require multiple public meetings is a positive step and that the public interest is best served by ensuring that meetings are publicized in multiple clear and conspicuous manners so that community participation is meaningful. Further, Representative Cutler asks the Commission to take measures that ensure meaningful public input and contemplative deliberation and that protect existing ratepayers of public utilities from impact that are truly not in the public interest. Cutler Comments at 1.

**5. Individual Comments**

**a. Mr. Mrozinski**

Mrozinski states that a selling utility should be required to notify the public when it seeks buyers and to hold a public meeting to justify that decision. Mrozinski also suggests that the selling utility explain all bids to the public and hold a meeting when a bid is selected to provide the timeline for negotiating the APA. Mrozinski states that the negotiations must be transparent with regular updates to the public. Additionally, Mrozinski agrees that at least two public hearings should be held but suggests that a ratepayer advocate should host one of the hearings. Mrozinski states that quantitative

information and data concerning the impact of the sale must be provided to the public at least 30 days before the first public hearing, including access to all settlement discussions. Mrozinski also states that the rate impact should be made available to the public at least 30 days before the first public hearing. Mrozinski Comments at 2-3.

**b. Mr. Ferguson**

Ferguson notes that the current structure of public meetings effectively silences any opposition and that the meetings are akin to a sales presentation. Ferguson states that, when the sale is announced, there should be a complete disclosure of the impacts of the sale and the analysis for the sale recommendation. Ferguson notes that information should not be withheld due to nondisclosure agreements. Ferguson agrees that a minimum of two public meetings should be held. Ferguson contends that those opposing the sale should have an equal opportunity to present their case at the public meetings. Ferguson states that the first public meeting should not be held until 30 days after the disclosure so that the ratepayers have time to understand the information and that there should be 30 days between the two public meetings. Ferguson Comments at 2-3.

**c. NGT Residents**

The NGT Residents state that public meetings should be required from the very start and that public involvement only after the APA has been finalized is too late for the public to have real input. NGT Residents Comments at 1.

**d. Mr. Sauer**

Sauer asks that the Commission require any potential acquisitions to include at least two public meetings and to make one meeting available via telephone for those who are unable to travel. Sauer suggests that the Commission, along with a neutral water company representative, be present at the meetings to field questions. Sauer also suggests there be a minimum of 30 days from the last public meeting until the comment

period closes to give residents the opportunity to formulate their comments. Sauer states that the Commission needs to take public comment seriously because there is municipal government temptation in selling water and wastewater systems due to the huge cash windfall without raising taxes. In this regard, Sauer notes that public systems are owned by the people and stresses the importance of public comment. Sauer states that transparency should be improved, that there should be a ban on non-disclosure agreements, and that public bidding should be required. Sauer Comments at 3.

**e. Yordan, *et al.***

Yordan, *et al.* notes that three public meetings were held for the Willistown Township sale. They state that the bidding process was conducted months before the meeting without informing ratepayers, that Aqua had been selected as the winner, and that the presentation was presented by a firm that was hired with a fee arrangement contingent upon the closing of the sale. They claim that bias was evident in the presentation and state that no rate impact notice was provided at the time of the public meeting. They also state that the next two meetings had a compressed timeframe that prevented community awareness and organizing efforts. Additionally, Yordan, *et al.* note that public meetings are appropriate for transactions that dispose of a valuable asset, but that additional time is needed for public comment. In this regard, they state that six weeks was not sufficient for the Willistown ratepayers to gather and analyze facts. They suggest requiring three public meetings, notice to ratepayers 30 days before the first meeting, and 60 days between all meetings. They state that all meetings should appear on the original notice. They also state that the meetings should be hosted by the selling utility and be conducted as a hearing, not an open house, so that statements are recorded. They ask that transcripts be made available on the selling utility's website within five business days and request a live stream option. Further, Yordan, *et al.* suggest that the acquiring utility be required to submit the notice for the meetings with the application

along with a sworn affidavit stating that the meeting notice was mailed to arrive on time and that three meetings took place. Yordan, *et al.* Comments at 5-7.

**f. Mr. Cawley**

Cawley states that the Commission's public hearing proposal is sensible. Cawley Comments at 1-2.

**g. The Carls**

The Carls question what the result of public hearings will be and whether there are any consequences if every ratepayer at the meeting argues against an acquisition. They state that the requirements have no teeth. They further state the proposals are nothing and that they are perfectly happy with their water and rates. Carls Comments at 2.

**B. Reply Comments On Public Hearings**

**1. Public Utility Reply Comments**

**a. Aqua**

Aqua reiterates that it supports the Commission's proposal of holding two public hearings on a proposed transaction. Aqua believes that the local community leaders should retain their rights and flexibility to communicate with their constituents and residents regarding the sale of water or wastewater assets and believes that the PUC proposed language accomplishes this while still setting a minimum requirement. Aqua further supports the proposed language that leaves flexibility in the description of the venue because selling utilities come in all different shapes, sizes and resources. Aqua agrees with the description of a public meeting so that the community leaders that are making the decision to sell can help decide where the best location is to communicate with their residents. Aqua Reply Comments at 3.

**b. PAWC**

PAWC does not oppose the proposal relating to public hearings as set forth in the 2024 *TSIO*. However, PAWC believes that, requiring public hearings in the form of a quasi-judicial or formal evidentiary proceeding and mandating that those hearings be stand-alone and not combined with other business impedes a municipal entity's power under applicable municipal codes and local home rule charters. PAWC asserts that, until an application is filed with the Commission, there is nothing for the Commission to regulate and the Commission has no statutory basis to regulate a municipality's procurement process. PAWC Reply Comments at 4.

PAWC does not agree with CAUSE-PA's suggestion that the Commission be more prescriptive in the requirements concerning public hearings. PAWC believes that CAUSE-PA is advocating for impermissible binding norms through an implementation order and questions the Commission's authority to micromanage municipal entities in the municipal procurement process. *Id.* at 14-15.

**2. Advocate Reply Comments**

**a. OCA**

The OCA does not agree with PAWC that a municipality's existing public meetings are adequate to satisfy a public hearing requirement. The OCA asserts that the use of existing public meetings that are held in the normal course of business would not have the same notice requirements as envisioned in the Commission's 2024 *TSIO* and as set out in the OCA's Comments. The OCA agrees with CAUSE-PA's suggestion to use standalone public hearings. OCA Reply Comments at 2.

The OCA believes that the selling and acquiring entities should be required to demonstrate in their application how the terms and conditions of a proposed sale are responsive to the input gathered during the public hearings. *Id.* at 2.

The OCA agrees with several other commenters that, to ensure the public's voice is heard, a public hearing should be held before the system is put out for bid and at each point in the process. The OCA agrees that there should be minimum notification times to ensure data can be reviewed before the hearing, that there should be 90 days' notice before the public hearing to ensure there is time to analyze the information and participate, and that there should be transparency in the transaction. The OCA agrees with PAWC that public hearings need not be judicial or formal evidentiary hearings, but notes that transcripts of the hearings would be valuable. The OCA agrees with Mr. Mrozinski that before an application is filed with the Commission at least two public hearings should be held with quantitative information and data concerning the rate impact provided at least 30 days before the first hearing. *Id.* at 3-4.

The OCA further agrees that the public interest is best served by ensuring the public meetings are publicized in multiple clear and conspicuous manners so that community participation is meaningful. The OCA agrees with Representative John Lawrence that effective notice could include at least an advertisement in a newspaper of general circulation, a notice on the website of the affected municipality, and a mailing to affected ratepayers. *Id.* at 4.

The OCA asserts that comments filed by a number of customers, who have experienced the lack of transparency, inaccurate information, and meetings that present only one side of the issues, provide sufficient experience over the last eight years for the Commission to move forward with specific notice requirements. The OCA believes that the content of the current formal notice should be revised to provide a full and complete picture of the rate impact and that the timing of the notice in an application case should move to when the application case is filed so that all customers are made aware from the start that the application has been filed. *Id.* at 5-6.

### **3. Individual Reply Comments**

#### **a. Mr. Mrozinski**

Mrozinski asserts that the current communication procedures fall far short of providing the clear and detailed information necessary for meaningful public input. Mrozinski believes that public meetings after an agreement has been reached on the terms of the APA are formatted to sell the idea of the sale to the public, not to seek meaningful public input. Mrozinski explains that these meetings are too often not well publicized and provide at best only vague discussions of the rate impact versus potential benefits. Mrozinski Reply Comments at 1.

Mrozinski asserts that public meetings must meet at least the following requirements: at least two in-person hearings, the public must have access to an advocate; the selling municipality must actively publicize all public meetings, the public must be given full disclosure of the rate impact of the full selling price as well as the rate impact of any promised capital improvements, the total rate impact must be compared to all other reasonable options, and a detailed plan for use of the sale proceeds providing a quantitative benefit analysis. *Id.* at 1-2.

#### **C. Conclusion On Public Hearings**

Numerous parties commented on the 2024 TSIO's proposal to require selling utilities and acquiring utilities to conduct at least two in-person public hearings prior to executing an APA. Of note, Senator Comitta, Representative Cutler, PSAB, BCATO, PSATS, Aqua, PWEA, the OCA, and CAUSE-PA each filed comments indicating varying levels of support to the proposal.

We believe the breadth of the comments provided in general substantiate the adoption of the Commission’s proposal regarding requiring selling utilities and acquiring utilities to conduct at least two in-person public hearings prior to executing an APA. As we stated in the *2024 TSIO*, the Commission believes this modification will assist in better informing the public of the transaction between the acquiring utility and the selling utility. Further, we stated hosting such hearings will give the public the opportunity to question both transacting parties, and better prepare the public to participate in any eventual application at the Commission. Finally, we stated that bolstering such public input opportunity before the filing of the proceeding is further supported given the six-month statutory timeframe the Commission currently has to adjudicate perfected Section 1329 applications. We contend, from our review of the comments, that all these assertions hold true. Therefore, we believe the public hearing proposal and associated revisions necessary to the Application Filing Checklist, warrant adoption in this Order.

In particular, when an acquiring utility and selling utility agree to use the procedure established by Section 1329, they are required to schedule and conduct at least two in-person public hearings prior to executing an APA. The public hearings should address the proposed acquisition, describe the potential rate impacts, provide the opportunity for public comment, and be held at venues within the municipal boundaries of the selling utility, or at the nearest reasonable venues, with Commission notification.<sup>5</sup> Such public hearings may include a public meeting held by the municipal government in which the transaction is on the agenda as well as other meetings or open houses hosted by either the acquiring utility or selling utility.

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<sup>5</sup> In-person hearings may also permit hybrid access via telephone or video streaming.

Additionally, the acquiring utility or selling utility are required to notify the selling utility's customers of the public hearing. Examples of effective notice include local newspapers, community newsletters, faith community bulletins, public service announcements, social media posts shared with community groups and municipalities, local radio and television stations, posting in areas of high foot traffic, communications to local community groups, and posting shared with local community centers. Direct outreach to concerned residents may also be considered as notice, whether through a phone call, text, letter, or e-mail.

We also request that acquiring utilities identify in their direct testimony the ways in which they responded to input received at public hearings, if any.

We modify Appendix A, Application Filing Checklist, as follows:

14. Buyer Testimony:
  - c. Identify in Buyer direct testimony the ways in which the buyer has responded to input received at the public hearings referenced in Checklist Item 26, if any.
26. Public Hearings. Provide a verification statement that at least two in-person public hearings were scheduled and conducted prior to executing the APA, and that:
  - a. The public hearings addressed the proposed acquisition, described the potential rate impacts, provided the opportunity for public comment, and were held at venues within the municipal boundaries of the Seller, or at the nearest reasonable venues, with Commission notification.
  - b. The Buyer or Seller notified the Seller's customers of the public hearings.

Acceptance of an application is not dependent upon the content of the responses to these new Checklist Items, but will only note whether the Checklist Items have been completed. As stated in the *2019 FSIO*, the Bureau of Technical Utility Services (TUS) does not review the veracity or substantive quality of information that applicants submit to fulfill the Application Filing Checklist; it evaluates whether the Application Filing Checklist is complete. *2019 FSIO* at 9.

### **III. Rate Impact Notice**

In the *2024 TSIO*, we stated that the acquiring utility and the selling utility should be required to verify, or declare under affidavit, as follows: both parties acknowledge the selling utility is aware of the potential rate impacts the transaction may have on the selling utility's customers, including the overall dollar and percentage impact implicated from stand-alone rates from the transaction price; the selling utility has publicly communicated such implications on rates through notices issued to its existing customers; and both parties understand the Commission may shift rate allocations in a manner different from any commitments made in the underlying application. We proposed that the verification or affidavit be part of the Application Filing Checklist and prerequisite to having a perfected application. *2024 TSIO* at 4-5.

#### **A. Comments On Rate Impact Notice**

##### **1. Municipality Comments**

###### **a. PSAB**

PSAB comments that transparency and accurate information are vital to rate impact notice and that it supports the rate impact notice requirements in the *2024 TSIO*. The PSAB notes that the requirements will be an additional expense, but that it will help to provide needed information to ratepayers. PSAB Comments at 2.

**b. Brentwood**

Brentwood comments that the rate impact notice proposal requires one-sided, incomplete information to be provided to the selling utility's customers and does not require selling utilities to advise customers of the rate impacts or tax increases they might face absent the transaction. Brentwood states that rate impacts are likely regardless of whether a transaction is approved and that requiring one-sided information regarding how a transaction price might impact rates will not provide impacted customers with a clear understanding of the situation. Brentwood also states that the rate impact notice proposal threatens to create a speculative and lopsided record because it does not account for the benefits of a transaction. Lastly, Brentwood claims that the proposal positions municipalities and acquiring utilities for failure by requiring them to swear under penalty of perjury the overall dollar and percentage impact implicated from stand-alone rates from the transaction price, which is theoretical and out of their control because the Commission decides rates. Brentwood Comments at 7-8.

**c. PMAA**

PMAA questions whether the Commission's intent is for items 1 and 3 to include acknowledgment and understanding by the selling utility's customers via effective public notice and public input, and whether the Commission's intent is for future customers and existing customers of the acquiring utility to be given a copy of the APA, including all technical appendices, and the rate impact notice. PMAA asserts that customers should see all language in the APA and that summaries may not provide a clear understanding of stand-alone rate impacts. PMAA Comments at 2-3.

**d. BCATO**

BCATO states that it concurs that the proposed revisions will improve the general public's awareness of applications. Specifically, BCATO notes that the rate impact notice is of significant value to the existing customer base. BCATO questions whether the potential impact on rates would be at maximum or capped value, whether the selling utility's notice would include acknowledgement of the buyer, and whether mailing would be the method of notice with a minimum timeline. BCATO Comments at 1-2.

**e. PSATS**

PSATS recommends that notice of a proposed sale or offer be made at least 180 days prior to the sale to promote transparency and provide greater opportunity for public input. PSATS also recommends flexible options for notice like those used for the public hearing notice, stating that these methods have the best opportunity for ratepayers to be made aware of the sale. Additionally, PSATS supports requiring the seller to be aware of the potential rate impacts and to communicate this to existing customers. PSATS asks whether the notice would be through mailed notices included with bills or sent by other methods. PSATS Comments at 1.

**2. Public Utility Comments**

**a. Aqua**

Aqua supports the requirement for a verification or affidavit in which both parties acknowledge that the selling utility is aware of the potential rate impacts the transaction may have on its customers. Aqua notes that this requirement will underscore full transparency and encourage a dialogue about potential rate increases that will likely occur, whether or not a sale occurs. Aqua states that it agrees this verification or affidavit should be included within the initial application. Aqua Comments at 4.

Regarding the requirement for a verification or affidavit stating that the selling utility has publicly communicated such implications on rates through notices issued to its existing customers, Aqua notes that the current practice is that notice to existing and acquired customers occurs after the initial application is filed and after conditional acceptance. Aqua states that requiring notice with the initial application could be interpreted as requiring individual notice before an application is filed and a second individual notice during conditional acceptance. Aqua states that its current notices include information regarding the filing date, the estimated protest period, and the estimated Public Meeting date, and that these dates are unknown before an application is conditionally accepted. As such, Aqua recommends that the Commission clarify that current formal notice to customers remains unchanged and that the verification or affidavit for this requirement will occur after conditional acceptance, but before final acceptance, of an application. *Id.* at 4-5.

Regarding the requirement for a verification or affidavit stating that both parties understand that the Commission may shift rate allocations in a manner different from any commitments in the underlying application, Aqua supports this proposal as it encourages dialogue on the Commission's rate setting authority. Aqua agrees that this verification or affidavit should be part of the initial application. *Id.* at 5.

Further, Aqua supports communicating rate impacts to acquired customers on a full cost of service basis. Aqua notes that its notices to customers in all FMV applications were provided on a full cost of service, or stand-alone, basis. Aqua also notes that providing the stand-alone rate fully informs customers of the potential rate impact that may occur through a FMV application. Aqua states that utilities using FMV should also be able to provide other rate impact estimates in the notice in addition to the stand-alone rate impact. Aqua Comments at 5-6. Aqua notes that the Commission has stated that the Section 1329 valuation could have a highly unlikely rate effect of \$0, that equally unlikely is a full allocation of all costs to a rate division consisting of only the

customers of the acquired municipal system, and that the more likely outcome is indeterminate found somewhere between possible extremes. For this reason, Aqua suggests showing the stand-alone rate impact and alternate examples in the rate impact notice. Aqua further stated that full cost of service should be shown, but that some form of cost sharing within the wastewater revenue requirement alone or the water revenue requirement alone can occur, which would show a lower rate impact and may be more in line with the outcome of a base rate proceeding. *Id.* at 6.

**b. PAWC**

PAWC suggests a modification in the rate impact notice proposal. PAWC explains that, in *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 (Order entered October 3, 2019), the Commission approved a settlement establishing a methodology for PAWC to use when estimating the rate impact of an acquisition for purposes of providing customer notice and that this methodology is different from the methodology required by the *2024 TSIO* and the methodology used by at least one other acquiring public utility. PAWC states that the *2024 TSIO* requires a notice of the rate impact from stand-alone rates, defined as rates that do not include any Section 1311(c) water/wastewater cross subsidization, and that the settlement requires PAWC to use the Section 1311(c) allocation from PAWC's prior base rate case. PAWC asks the Commission to establish a uniform formula for rate impact through formal regulations to ensure a level playing field between competitors and to ensure that Commission staff cannot withhold acceptance of an application on the basis that staff disagrees with the method of calculating the projected rate impact. PAWC Comments at 20-21.

In addition, PAWC states that customer confusion would result if the customer notice required by the *2024 FSIO* must be calculated in a different manner than the notice sent to customers at the time a Section 1329 application is filed. PAWC also states that the Commission has already issued an order directing a utility to calculate the customer notice in Section 1329 applications in a certain way and that methodology should also be used for the customer notice required by the *2024 FSIO*. PAWC further asks the Commission to recognize that rate projections may vary over time based on changing facts and circumstances and that the buyer and seller affiants, in regard to the rate projections, should be required to confirm only that the projections were reasonable and based on the best available information that was reasonably available at the time of the projection. In addition, PAWC recommends that the Commission attach a *pro forma* verification and a *pro forma* affidavit as exhibits to its Order. *Id.*

### **3. Advocate Comments**

#### **a. PWEA**

The PWEA supports the verification of the three items in the *2024 TSIO* with the initial application. However, the PWEA suggests changing the language “should require” to “shall require”. PWEA Comments at 2.

#### **b. OCA**

The OCA states that it agrees with the Commission and the intent to fortify the public notice requirements. The OCA refers to the items it proposed for public hearings regarding bill impact information and recommends that this information also be included in the notices that are included with the filed application and directly provided to customers of the buyer and seller pursuant to *McCloskey*. Specifically, the OCA asks that the notices include clear information about the bill impacts of the proposed ratemaking rate base, at different usage levels, and including the first-year capital expenditures. In a wastewater application, the OCA suggests that the notice to the seller’s customers also

show the bill impact at the full revenue requirement of the ratemaking rate base without any proposed shift under Section 1311(c). The OCA also suggests that the notice to the buyer's customers reflect the impact if there is a full shift of the revenue requirement for the acquisition from the seller's customers to the water customers. The OCA asserts that this approach will provide the full potential rate impact. OCA Comments at 8-9.

**c. CAUSE-PA**

CAUSE-PA urges the Commission to further clarify how a selling utility proves it has "publicly communicated" a potential rate impact to its customers. CAUSE-PA states that, without further clarification, the selling and acquiring entities could obfuscate this requirement to minimize opposition to a proposed sale. CAUSE-PA asks the Commission to require the selling utility to send written, plain-language notice to consumers of its planned public input hearing that includes a plain language rate impact statement and chart showing the anticipated rate impact for customers at different usage levels, both before and after the expiration of any contractual terms which may delay a rate increase on the selling utility's customers. CAUSE-PA states that the notice should explain that the Commission may shift resulting rate allocations in a manner that conflicts with any commitments made by the acquiring utility. Again, CAUSE-PA suggests that the Commission develop a template for this notice. CAUSE-PA Comments at 13.

In addition to written direct notice, CAUSE-PA asks the Commission to require the following information to be made available on both the selling and acquiring utility's websites: (1) a plain language statement of rate impacts, including a chart of anticipated rate impacts for customers with various usage levels, (2) transcripts from the public hearings, (3) any bill inserts, notices, brochures, or educational materials related to the proposed sale, (4) a copy of any written public comments, letters, or other correspondence received regarding support for or opposition to a proposed sale, (5) an analysis of the rate impact on low-income customers of the acquiring and selling utility,

and a mitigation plan to assist economically vulnerable customers including creation or expansion of universal service programming, and (6) the availability of translation / interpretation services. Regarding the analysis of the rate impact on low-income customers, CAUSE-PA recommends that the Commission require entities to analyze the rate impact of a proposed acquisition on low-income customers of both the selling utility and acquiring utility. CAUSE-PA states that entities should use Census data to identify the percentage of the acquired customer base with income at or below 150% of the Federal Poverty Level (FPL) and identify the water and wastewater burden of households at each low-income tier (0-50% FPL, 51-100% FPL, 101-150% FPL) at anticipated rates. CAUSE-PA states that the analysis should be included as part of an entity's application and that applicants should be encouraged to include an explicit plan within their application to mitigate any identified economic impact to these vulnerable groups of customers, including but not limited to the creation or expansion of universal service programming and other measures to ensure that customers of the selling and acquiring companies will be able to connect with and maintain affordable water and wastewater service in their homes. *Id.* at 13-14.

CAUSE-PA also states that language access must be considered for providing this essential information to customers and that all notices should be translated in Spanish and should include information in multiple languages about the availability of additional translation services when calling the utility. *Id.* at 15.

#### **4. Legislature Comments**

##### **a. Honorable Senator Comitta**

Senator Comitta supports enhancing notification requirements. Senator Comitta notes that ratepayers frequently report that they do not learn of sales until it is too late and without clear information on what the sale of the water/wastewater system means for their rates or how they can engage in the process. Senator Comitta states that requiring rate impact notices to be communicated to customers well-ahead of time is a positive step. Comitta Comments at 1.

##### **b. Honorable Representative Lawrence**

Representative Lawrence recommends that the requirement for the acquiring utility and selling entity to verify or declare under affidavit three clauses be changed to a requirement for declaration under affidavit only. In addition, Representative Lawrence states that the rate impact notice should include language to clearly state that promises to freeze rates may be unenforceable. Representative Lawrence also notes that the rate impact notice should be available and discussed at public hearings. Further, Representative Lawrence states that ratepayers would find the rate impact notice to be of more value if a comparison of potential outcomes was included with a prediction of utility rates in two years and five years and upgrades or repairs included. Representative Lawrence proposes that the rate impact notice include anticipated rates if the municipality retains ownership of the system and makes all necessary and prudent investments and anticipate rates if the municipality sells the system to an investor-owned utility that then makes all necessary and prudent investments in the system. Representative Lawrence suggests that the OCA calculate this analysis. Lawrence Comments at 3-4.

**c. Honorable Representative Cutler**

Representative Cutler comments that the proposal to require rate impact notice would be best utilized prior to public input hearings. Representative Cutler states that allowing the public to fully comprehend the fiscal impact of a pending decision is essential to meaningful debate and discussion. Cutler Comments at 1.

**5. Individual Comments**

**a. Mr. Mrozinski**

Mrozinski notes that it is important to communicate the stand-alone rate impact. Mrozinski states that the stand-alone rate impact should be communicated to the public at least 30 days prior to the first public hearing. Mrozinski also recommends that there be a written guarantee that the disclosed rate will not be exceeded at the first rate increase after the closing of the sale. Mrozinski Comments at 3.

**b. Mr. Ferguson**

Ferguson states that notice should be provided before a sales contract is signed. Ferguson suggests that the rate impact should be a ‘not to be exceeded guarantee’ through the first rate case after an acquisition. Ferguson also suggests that, if the actual increase is in excess of the guarantee, it should be phased-in equally over the next three rate cases. Ferguson notes that non-binding estimates are usually low and that the companies should be able to make reliable forecasts. Next, Ferguson suggests that the timing and rate impact of investments should be fully disclosed. Ferguson Comments at 3.

**c. NGT Residents**

The NGT Residents suggest that the Commission can go further to ensure the sale is for the true benefit of the community, not just a sale for convenience and a large sum of money, by fixing the RRR to one for all future sales. NGT Residents Comments at 2.

**d. Mr. Sauer**

Sauer points to PAWC's purchase of the system in Butler, Pennsylvania, for which residents in Exeter Township received notice of a 7% wastewater and 0.8% water increase. Sauer questions why rates in Exeter Township would increase as a result of this acquisition. Sauer also questions why rate increase notices for such acquisitions are sent to ratepayers in unrelated parts of the state. Sauer Comments at 2, 5.

**e. Yordan, et al.**

Yordan, *et al.* state that customers' ability to influence the decision to sell is meaningful only before the APA is signed. They claim that current procedures require mailing a rate impact notice at the end of an application review just before it is declared final and that the 2024 *TSIO* would move notice to the filing of the application. They opine that this change is not meaningful and would have a tangible impact if it required the selling utility to deliver the rate impact notice to acquired customers 30 days before the first public meeting. They state that the rate impact notice should detail potential impacts and that spreadsheets detailing how the rate impact calculation was made should be posted on the municipality's website 30 days before the first public meeting. Additionally, Yordan, *et al.* recommend that the acquiring utility be required to submit with its application the text of the rate impact notice and a sworn affidavit stating that the rate impact notice was mailed from a post office located near the selling utility 33 days before the first public meeting as well as a sworn affidavit stating that spreadsheets detailing rate impact calculations were made available on the selling utility's website by the date of the first public meeting. Yordan, *et al.* Comments at 7-9.

**f. Mr. Cawley**

Cawley states that the Commission's rate impact notice proposal is sensible. Cawley Comments at 1-2.

**g. The Carls**

The Carls ask what will prevent an acquiring utility from providing a notice specifying a certain percentage rate increase and later increasing it or changing it. They state that the rate impact notice has no teeth. They further state the proposals are nothing and that they are perfectly happy with their water and rates. Carls Comments at 2.

**B. Reply Comments On Rate Impact Notice**

**1. Public Utility Reply Comments**

**a. Aqua**

Aqua asserts that the Commission should be wary of adopting the degree of detail on rate impacts and specificity that some of the commenters request during a FMV application as there are numerous factors that influence and impact how rates are ultimately established in a future base rate case that includes a system acquired under Section 1329. The details of any future rate increase are not known with specificity at the time of the application. Aqua believes that being transparent about the uncertainty of future rate increases is just as important as transparency in communicating what the estimated rate increases might be. Aqua Reply Comments at 4-5.

**b. PAWC**

PAWC supports a rate impact notice that provides a reasonable projection of the rate impact of the acquisition for customers in a meaningful and easy-to-understand format based on the best available information at the time of the projection. PAWC emphasizes that FMV rate base is the only rate issue being finally decided by the Commission at the acquisition application stage and, accordingly, notice of the potential rate base impact is the only direct customer notice that should be required at the application stage. PAWC explains that other ratemaking issues are not decided until the

subsequent base rate cases for which separate notices will be given. PAWC believes that the OCA proposes to include in the rate impact notice many things that are not directly related to rates including first year capital expenditure commitments made in an APA. PAWC Reply Comments at 4-5.

PAWC reiterates that, where the Commission has already issued an order instructing a utility how to calculate customer notice, that methodology should continue to be used. PAWC asserts that this would reduce customer confusion and ensure increased uniformity to implement an approach to rate impact notice that is the same as the notice sent to customers at the time a Section 1329 application is filed. PAWC believes it would also ensure consistency with the Commission's prior order concerning rate impact methodology. *Id.* at 5-6.

PAWC does not agree with CAUSE-PA's proposal to include formal requirements concerning timing, accessibility, and content for the rate impact notice. PAWC believes the rate impact notice should be limited to providing customers with notice of the application for the proposed acquisition with the FMV rate base only. *Id.* at 14-15.

## **2. Advocate Reply Comments**

### **a. OCA**

The OCA disagrees with PAWC as the notices used in an application including a Section 1329 valuation were not designed to provide a full and complete picture of the impacts of a potential transaction, before any APA has been negotiated. OCA believes that the rate impact materials should provide more information in clear, non-legal language. OCA Reply Comments at 6-7.

The OCA submits that it is incumbent upon the buying and selling utilities to appropriately analyze and present the impact of the transaction on consumers' rates in a fair, transparent, and clear manner. The OCA supports the CAUSE-PA proposal that the rate impact statement and chart be provided with plain language notice that is provided directly to consumers before and after the expiration of any contractual terms which may delay a rate increase on the acquired utility's customers. *Id.* at 8.

### **3. Individual Reply Comments**

#### **a. Yordan, *et al.***

Yordan, *et al.* believe that a rate impact notice should be moved up to the time of the initial public meeting of acquired customers, earlier than the filing of the application. Yordan, *et al.* assert that this rate impact notice, however, would not replace the rate impact notice currently sent weeks before the Commission litigation begins. It would be an additional rate impact notice. Yordan, *et al.* Reply Comments at 4.

Yordan, *et al.* disagree with Aqua that the rate impact notice should contain estimated allocations of cost under Act 11. Yordan, *et al.* explain that costs allocated to the acquiring utility's existing customers will be offset by costs allocated to newly acquired customers from other acquisitions completed by the acquiring utility. *Id.*

Yordan, *et al.* also do not agree with Aqua's argument that the discussion of the rate impact from the acquisition needs to be accompanied by discussion of the rate increase that would occur if the system remained in municipal hands. Rather, they state that the *McCloskey* rate impact calculation is the cost to ratepayers of the initial acquisition price. The selling municipality already owns the system and the municipal ratepayers do not have to pay anything for it. If the system remains under municipal ownership, there is no initial rate impact, rather, rate increase imposed by the

municipality would be attributable to future capital requirements or future increases in operating costs. *Id.* at 5.

### C. Conclusion On Rate Impact Notice

Regarding the first rate impact notice proposal in the 2024 TSIO, we conclude that it is appropriate to confirm, as part of the initial Section 1329 application, that the selling utility is aware of the potential rate impacts the transaction may have on its customers, including the overall dollar and percentage rate impacts implicated from stand-alone rates that recover the acquiring utility's estimated annual gross revenue requirement for the acquired system from the selling utility's customers.<sup>6</sup> With respect to the third rate impact notice proposal, it is likewise appropriate to confirm, as part of the initial application, that both parties understand the Commission may shift rate allocations in a manner different from any commitments made in the underlying application.

More so than rate impacts, these matters go to the overall nature of a proceeding under Section 1329. Therefore, we will add provisions addressing these matters to Checklist Item 23, which currently addresses whether there is an affiliation between the buyer and seller, whether the APA was negotiated at arm's length, and how customers will benefit from the acquiring utility's ownership of the system, among other things. We modify Appendix A, Application Filing Checklist, as follows:

23. Additional Verification Statements:

- e. Provide a verification statement that the Seller is aware of the potential rate impacts the transaction may have on the Seller's customers, including the overall dollar and percentage rate impacts implicated from stand-alone rates that

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<sup>6</sup> A stand-alone rate is one that does not include any subsidization of gross revenue requirement, including Act 11 of 2012 water/wastewater cross subsidization, or any subsidization by customers other than the selling utility's customers. Gross revenue requirement is the acquiring utility's estimated cost of service for the acquired system.

recover the Buyer's estimated annual gross revenue requirement for the acquired system from the Seller's customers.

- f. Provide a verification statement that the Buyer and Seller understand the Commission may shift rate allocations in a manner different from any commitments made in the underlying application.

We also conclude that it is prudent to fortify Section 1329 notices.<sup>7</sup> In particular, as it pertains to the second rate impact notice proposal from the *2024 TSIO*, we agree with the OCA that notices to a selling utility's customers must show bill impacts at the full, *i.e.*, gross, revenue requirement of the ratemaking rate base without any proposed shift under Section 1311(c). This information should prove informative for the selling utility and its customers, as it will make it more certain both have a clear and informed understanding of the rate implications from the transaction.

We believe it is likewise prudent to fortify the notices for an acquiring utility's customers. For water applications, rate impact notices must reflect rates that recover the acquiring utility's estimated annual net revenue requirement for the acquired system from the acquiring utility's existing water customers.<sup>8</sup> This replaces the current requirement that notice provided to customers potentially affected by the proposed transaction must be based on the results of the most recently adjudicated base rate case, as noted by PAWC.

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<sup>7</sup> Although we encourage reasonable cooperation between acquiring utilities and selling utilities to effectuate notice, acquiring utilities, as the applicants in Section 1329 proceedings, are ultimately responsible for fulfilling the Commission's notice requirements. *2016 FIO* at 18-19; *2019 FSIO* at 30, n. 7. Thus, the rate impact notice provisions of this Order are not intended to impact any separately existing notice requirements for municipalities.

<sup>8</sup> Net revenue requirement = gross revenue requirement - revenues at current rates. This value is expected to be the portion of the acquiring utility's cost of service that may be allocated to other customers in a future rate proceeding.

For wastewater applications, we agree with the OCA that rate impact notices must reflect bill impacts as if there is a full shift of the revenue requirement for the acquisition from the seller's customers to water customers. We clarify that the revenue requirement is the acquiring utility's estimated annual net revenue requirement for the acquired system. Also, for wastewater applications, rate impact notices must reflect water and wastewater rates that recover the acquiring utility's estimated annual net revenue requirement for the acquired system from the acquiring utility's existing water and wastewater customers, respectively. While an acquiring utility cannot recover its entire net revenue requirement from both existing water and wastewater customers simultaneously, as noted by the OCA, this approach will provide the full potential impact to each set of customers.

We further agree with OCA and CAUSE-PA that notices must include clear, plain language information about rate impacts. We also agree with Representative Lawrence that notices should clearly state that promises to freeze rates may be unenforceable. While we may impute revenues in rate proceedings that involve rate freezes to mitigate revenue requirement impacts, we recognize that rate freezes frustrate our efforts to apply gradualism and consider affordability when designing rates. For example, rate freezes may mask multiple authorized rate increases until the end of the rate freeze period, when ratepayers would suddenly experience the cumulative effect of delayed increases. Attempting to mitigate this affordability concern raises serious concerns about discriminatory ratemaking treatment for an acquiring utility's existing customers that do not receive the same advantage of frozen rates and that may be responsible for providing the revenue that enables more gradual rate increases. Acquiring utilities or selling utilities that wish to hold rates constant, or phase rates in, for a period of time after the next base rate case should file a rate stabilization plan with working papers for consideration with their Section 1329 application, as permitted by Section 1329(d)(1)(v).

We modify the Application Filing Checklist, which currently contains a provision for notice in Checklist Item 18.d, as follows:

18. Rates

- d. Provide a copy of the notification ~~sent, or~~ which will be sent by the Buyer, to affected customers describing the filing and the anticipated effect on rates, including:
  - i. For the Seller's customers, the overall dollar and percentage rate impacts implicated from stand-alone rates that recover the Buyer's estimated annual gross revenue requirement for the acquired system from the Seller's customers.
  - ii. For the Buyer's customers, the overall dollar and percentage rate impacts implicated from the following rates: (1) for **water** applications, rates that recover the Buyer's estimated annual net revenue requirement for the acquired system from the Buyer's existing water customers, or (2) for **wastewater** applications, both water and wastewater rates that recover the Buyer's estimated annual net revenue requirement for the acquired system from the Buyer's existing water and wastewater customer, respectively.
  - iii. Clear, plain language information about rate impacts.
  - iv. A statement that any promise to freeze rates may be unenforceable.

Notice, however, remains part of the Commission's conditional acceptance directives. As Aqua explained, if notice was provided before conditional acceptance, notices would not contain information like the application filing date, the estimated protest period, and the estimated Public Meeting date for an order entered by the Commission.

We also encourage, but do not require, acquiring utilities to inform selling utilities of reasonably estimated rate impacts for the selling utility to consider, based on financial and operation data evaluated by the acquiring utility when it made its offer to purchase the selling utility's system. Acquiring utilities should provide selling utilities with estimates and supporting working papers, including the potential rate impacts that the transaction may have on the selling utility's customers, assuming the acquiring utility's highest proposed purchase price and stand-alone rates that recover the acquiring utility's estimated gross revenue requirement for the acquired system from the selling utility's customers, prior to execution of an APA. While the rate impacts in the notices required to be sent by the acquiring utility by the Commission may differ from these estimates due to changes in cost of service for the acquiring utility or selling utility during the negotiation and due diligence, or other changes, the estimates will assist selling utilities in evaluating rate impacts and communicating rate impacts to their customers. We are adding the following provision to Checklist Item 18:<sup>9</sup>

- e. Provide a verification statement addressing whether the Buyer provided the Seller with estimates and supporting working papers, including the potential rate impacts that the transaction may have on the Seller's customers, assuming the Buyer's highest proposed purchase price and stand-alone rates that recover the Buyer's estimated gross revenue requirement for

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<sup>9</sup> As we noted with respect to the recommendations regarding public hearings or public meetings, acceptance of an application is not dependent upon the content of the response to this Checklist Item, but whether the Checklist Item has been completed.

the acquired system from the Seller's customers, prior to execution of the APA.

We are also modifying Appendix B, Standard Data Requests, as follows to reflect the items discussed above:

4. Provide an estimate of the annual gross revenue requirement of the municipal system under the Buyer's ownership. Provide the assumptions for the annual revenue requirement, including expected rate of return, expected depreciation expense, O&M expenses, etc.
5. Provide an estimate of the annual revenues of the municipal system under the Buyer's ownership. Provide the assumptions for the annual revenues, including both operating revenues and non-operating revenues.
6. Provide an estimate of the overall dollar and percentage rate impacts implicated from stand-alone rates that recover the Buyer's estimated annual gross revenue requirement for the acquired system from the Seller's customers.
7. Provide an estimate of the overall dollar and percentage rate impacts implicated from the following rates:
  - a. For water applications, rates that recover the Buyer's estimated annual net revenue requirement for the acquired system from the Buyer's existing water customers.
  - b. For wastewater applications, both water and wastewater rates that recover the Buyer's estimated annual net revenue requirement for the acquired system from the Buyer's existing water and wastewater customers, respectively.

#### **IV. Default Weights For Appraisals**

In the *2024 TSIO*, we proposed that UVEs weigh each valuation result evenly: one-third for cost, one-third for market, and one-third for income. We also noted that applicants would have an opportunity to seek Commission authority to deviate from these default weights for good cause and that such good cause would need to be included in the acquiring utility's Section 1329 application. *2024 TSIO* at 5-6.

##### **A. Comments On Default Weights For Appraisals**

###### **1. Municipality Comments**

###### **a. PSAB**

PSAB states that it does not oppose mandating UVEs to use the cost, market, and income approaches for valuation evenly. PSAB requests that applicants be allowed to seek Commission approval to deviate from default weights for good cause and notes that good cause should include distressed systems. PSAB Comments at 2.

###### **b. PMAA**

PMAA questions whether appraisers should apply all ten current Uniform Standards of Professional Appraisal Practice (USPAP) as opposed to only USPAPs one through four, and whether the methods used for the preferred valuation approaches need reform. PMAA states that further context on the proposal is needed to better understand its impact on future acquisitions and that it is concerned that the proposal allows exceptions. PMAA Comments at 3.

**c. BCATO**

BCATO states that it concurs that the proposed revisions will establish more consistent and expected weighting of valuation methods. Specifically, BCATO notes that there is a need for an equitable basis for the evaluation of different formats and their impacts. BCATO asks that the Commission provide the public with the ranges for the three approaches seen on recent docket packages. BCATO Comments at 1-2.

**d. PSATS**

PSATS comments that its membership has taken a position to oppose public utility acquisitions of municipal systems at FMV instead of book value and that the proposed changes to the default weights for appraisals would be a step in this direction. PSATS notes that legislation is needed to eliminate FMV appraisals. PSATS Comments at 1-2.

**2. Public Utility Comments**

**a. Aqua**

Aqua states that it agrees with the Commission that default weighting should be required unless adequate justification is provided by the UVE to deviate from the default weighting. Aqua Comments at 7.

**b. PAWC**

PAWC comments that it does not oppose the proposal for default weight appraisals. PAWC Comments at 21.

### **3. Advocate Comments**

#### **a. PWEA**

The PWEA supports requiring some level of consistency when establishing FMV. The PWEA also supports limiting the discretion in the weights for assessments. PWEA Comments at 2.

#### **b. OCA**

The OCA fully supports the Commission's proposal for equal weighting of the three appraisal methods. The OCA also supports the option to seek authority to vary from these default weights "for good cause shown" in an application when filed. In this regard, the OCA notes that it is clear uneven weighting is not supported by any analysis and the use of uneven weighting should be eliminated or strictly limited by the Commission's approach. OCA Comments at 9-10.

In addition, the OCA provides a recommendation to refine the cost approach. The OCA explains that the Section 1301 requirement for rates to be just and reasonable must be given effect when valuing property under Section 1329 and, thus, the FMV for ratemaking rate base must reflect rates that are just and reasonable. The OCA notes that Section 1329 does not direct which method must be used by a UVE and that the Commission has the discretion to prescribe the method. The OCA also explains that the USPAP prescribes four different methods that can be used under the cost approach and that, under USPAP Rule 7-3, the appraiser "must analyze the relevant economic conditions that exist on the effective date of the valuation." The OCA suggests that the Commission require UVEs to set forth the economic conditions of the sale in their appraisals. The OCA notes that, in the public utility/muni-owned/muni-authority-owned system context, the economic conditions are natural monopoly-owned systems for which consumers have already paid for and/or are paying for the existing infrastructure in rates, that there does not exist a competitive market for these assets, and that they are invested

in and paid in for under rate regulation and government control. The OCA explains that, under these undisputable economic conditions, as required by USPAP Rule 7-3, the Commission should require a UVE's cost approach analysis to use only the original cost new less depreciation (OCNLD) method. In this regard, the OCA points out that the Commission stated, in the *2019 FSIO's* Appendix C, that the OCNLD method of valuation can be utilized under the USPAP cost approach. *Id.* at 10-12.

Moreover, the OCA states that the Commission should consider the intent of Section 1329(a)(4)'s mandate that a licensed engineer conduct an assessment of the tangible assets of the selling utility and that such assessment be incorporated into the UVE appraisal under the cost approach. The OCA notes that Section 1329(a)(4) requires a rejection of the replacement cost less depreciation (CORLD) method because the CORLD method does not require an estimate of costs of identical utility property under present prices, but rather permits the assumption of the replacement of existing property with similar new property having the nearest equivalent utility to the property being valued. The OCA also notes that the CORLD method should be contrasted with the reproduction cost method less depreciation (RCNLD), which requires a valuation of existing utility property under present prices. The OCA explains that, based on this, Section 1329(a)(4) focuses the cost approach only the OCNLD, trended original cost less depreciation (TOCLD), and RCNLD methods. *Id.* at 12-13.

The OCA notes that it is well-settled that, under Section 1301 of the Public Utility Code, utility property is to be valued under original cost new less accumulated depreciation. The OCA also notes that the OCNLD method of valuation was developed after years of litigation under the prior statutory standard of fair value, which typically involved three cost valuation methods – original cost new (OCN), trended original cost (TOC), and reproduction cost method (RCN). The OCA further notes that, from these cost valuation methods, to determine the appropriate measure of value, the Commission would typically deduct accrued depreciation and depletion, resulting in the OCNLD,

TOCLD, and RCNLD valuations. The OCA states that, in the *Guide to Utility Ratemaking*, the Commission acknowledged that rates can vary substantially depending on the cost valuation method used and that *McCloskey* provides that the Commission must take into consideration the effect of rates if the sale is approved. *Id.* at 12-14.

The OCA continues that the Commission must recognize that the OCNLD method is least likely to overvalue or undervalue utility property. The OCA asserts that the Commission should not overlook the history of controversy prior to 1984 regarding which method should be used to fix just and reasonable rates or the fact that the General Assembly settled that controversy by enacting Section 1311(b) to require cost-based valuation of utility property for ratemaking using the OCNLD method and that Section 1311(b) is still existing law today. The OCA notes that, by amending Section 1311(b) to include subsection (b)(2) in 2018, the General Assembly reaffirmed the OCNLD standard without any caveat or carveout for Section 1329's required cost approach for valuation of utility property. The OCA also notes that, pursuant to the rules of statutory construction, every statute must be construed, if possible, to give effect to all of its provisions. The OCA states that Section 1311(b) can be construed to be given effect under Section 1329(a)(3)'s mandate to use the cost approach and Section 1329(a)(4)'s mandate to incorporate the Engineer's Assessment of existing system assets into the cost approach and that, under this statutory construction approach, the Commission is able to construe Code Sections 1329, 1301, and 1311(b) in a way that gives meaning to all provisions, while remaining consistent with USPAP Rule 7-4, which the Commission has previously concluded permits the use of the OCN method. *Id.* at 14-16.

The OCA asks the Commission to find, based on this analysis, that the OCNLD is the appropriate method of valuation under the cost approach required under Section 1329(a)(3). The OCA notes that the cost approach is not the sole method of valuing utility property under Section 1329 and that UVEs determine the value of the property also using the income and market approaches, which by necessity, results in a higher valuation of the system assets added to the rate base than compared to the valuation produced under the OCNLD method alone. The OCA also recognizes that valuing the assets at FMV rather than original cost alone will usually result in a higher price for the assets added to the rate base. *Id.* at 16-17.

**c. CAUSE-PA**

CAUSE-PA states that it does not take a position on the appraisal practices of evaluators to establish a FMV. CAUSE-PA Comments at 15.

**4. Legislature Comments**

**a. Honorable Senator Comitta**

Senator Comitta notes that she appreciates the Commission's consideration of guiderails to enhance uniformity in the process and better protect consumers. Senator Comitta states that she is interested in learning about the proposed default weights for appraisals, but that without more context and information on how they will be used, it is difficult to gauge their potential impact and benefits. Comitta Comments at 2-3.

**b. Honorable Representative Cutler**

Representative Cutler comments that he appreciates the attempt to appropriately weight valuation appraisals. Representative Cutler notes that this measure plays to the strength of the Commission given the Commission's long-standing experience with quarterly earnings reports and calculating reasonable rates of return for public utilities. Cutler Comments at 1.

**5. Individual Comments**

**a. Mr. Mrozinski**

Mrozinski states that the estimate of the market approach segment of valuation should be the depreciated value. Mrozinski Comments at 3.

**b. Mr. Ferguson**

Ferguson comments that the issue regarding how appraisals should be weighted was presented without any context. Ferguson asks how the FMV will be impacted and how changes to the default weight for appraisals would have affected prior acquisitions. Ferguson states that the Commission should not be given this flexibility until it is clear how it will be used. Ferguson Comments at 3.

**c. Mr. Cawley**

Cawley states that the default weighting proposal is an attempt to bring rationality and fairness to an irredeemably unconstitutional law designed to usurp the Commission's fundamental authority and end-run the Commission's statutory duty to ensure that every public utility rate is just and reasonable, and that the proposal suffers from needless complexity caused by the statute's unprecedented switch from depreciated original cost to FMV. Cawley Comments at 1-3.

**d. The Carls**

The Carls ask what will change if UVEs use the three approaches to valuation. They state that it still allows acquiring utilities to offer large amounts of money to municipalities, although it will be calculated a bit differently. Carls Comments at 2.

**e. Mr. Smeltzer**

Smeltzer notes that the objective of an appraisal is to impartially and objectively assess the value of the subject property, but that employing a default weighting structure where each valuation methodology is assigned a fixed 33% weight undermines this core purpose. Smeltzer also notes that, while most UVE appraisals tend to distribute weightings evenly, it is imperative that discretion lies with the appraiser. In addition, Smeltzer states that, if the Commission is concerned about the independence of appraisers, it calls for a fundamental reevaluation of the UVE process. Smeltzer also states that the process should ideally involve three independent appraisers selected by the PUC, rather than the buyer or seller, and on a rotational basis form a preapproved list in order mitigate any perceived bias. Smeltzer Comments at 1.

**B. Reply Comments On Default Weights For Appraisals**

**1. Public Utility Reply Comments**

**a. Aqua**

Aqua does not agree with OCA's change to the cost approach which recommended only using original cost new less depreciation. Aqua explains that the method of determining the value under Section 1329 is FMV and not the standard of value of original cost. Aqua Reply Comments at 5-6.

**b. PAWC**

PAWC believes that OCA goes beyond the scope of the *2024 TSIO* in its comment that with respect to default weights for appraisals, the cost approach should only use OCNLD as the method of valuation. PAWC asserts that this is plainly incompatible with the statute and, if adopted, would be a nullification of the statute. PAWC explains that the statute is designed to remedy Section 1311(b), which worked to discourage the acquisition of municipally owned water and wastewater systems because Section 1311(b) requires that the Commission value acquired property at the original cost of construction less accumulated depreciation for rate setting purposes. PAWC further explains that Section 1329 seeks to examine valuation from a market perspective which enables a seller to price its public assets at a market value based on reasonable business valuation principles and enables a buyer to recover its investments in those public assets at that market-based value. Overall, PAWC asserts that returning to OCNLD for the cost approach would abandon the legislative aims of the statute which is to encourage a realistic approach to the sale of water and wastewater assets based upon the FMV of those assets. PAWC Reply Comments at 6-7.

**2. Advocate Reply Comments**

**a. OCA**

The OCA agrees with the proposed default weight for the appraisals proposed in the *2024 TSIO*, along with its recommendation regarding the analysis to be used for the cost approach. OCA Reply Comments at 12.

### C. Conclusion On Default Weights For Appraisals

The majority of the commentors support the proposal in the *2024 TSIO* to establish default weights for appraisals. Therefore, we adopt the default weights as proposed in the *2024 TSIO* here. UVEs are required to weigh each valuation result evenly: one-third for cost, one-third for market, and one-third for income.<sup>10</sup> We are not adopting the OCA's proposal regarding the cost approach.

We reiterate that weighing each valuation result evenly will prevent UVEs from artificially inflating or deflating the results of high or low appraisals, respectively. The default weights will also serve to standardize the process.

We are also adopting the proposal in the *2024 TSIO* that permits an applicant to seek Commission approval to deviate from the default weights for good cause shown. The acquiring utility must include a request for deviation in its Section 1329 application in order for the Commission to consider the request.

We modify Appendices A, C, and D, Application Filing Checklist, Additional Guidelines for UVEs, and UVE Direct Testimony Template, respectively, to reflect these default weight provisions. The Application Filing Checklist is modified as follows:

27. If seeking a deviation from the default weights established in the *2024 Final Supplemental Implementation Order*, provide the request supported by good cause.

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<sup>10</sup> This will be calculated as follows: Valuation Result = (Cost Approach Result + Income Approach Result + Market Approach Result) / 3. The Valuation Result is rounded to the nearest dollar.

The Additional Guidelines for UVEs are modified as follows:

4. UVE materials submitted in support of a request for Section 1329 fair market valuation must:
  - a. Weigh each valuation result evenly: one-third for cost, one-third for market, and one-third for income, calculated as follows: Valuation Result = (Cost Approach Result + Income Approach Result + Market Approach Result) / 3. The Valuation Result is rounded to the nearest dollar.
  - b. If the UVE deviates from the default weights, the UVE must show good cause and explain the basis of the individual weight given to the cost, market, and income approach.

The UVE Direct Testimony Template is modified to as follows:

**Q. Did you use the default valuation weights of one-third each for cost, market, and income?**

**A. Yes/No.**

**Q. If you did not use the default weights of one-third each for cost, market, and income, explain how ~~did~~ you developed the weighting applied to each approach in your appraisal and why ~~are~~ the individual weights you chose are appropriate for this proposed transaction?**

**A.** For the cost approach I chose a weighting of \_\_\_%. It is my opinion that this weighting is appropriate for the cost approach because...  
For the market approach I chose a weighting of \_\_\_%. It is my opinion that this weighting is appropriate for the cost approach because...  
For the income approach I chose a weighting of \_\_\_%. It is my opinion that this weighting is appropriate for the cost approach because...  
Or, N/A.

## **V. Reasonableness Review Ratio (RRR)**

In the *2024 TSIO*, we recommended publishing a Reasonableness Review Ratio (RRR) as a guidepost for analyzing and eventually making a final determination on the overall prudence of Section 1329 applications. We explained that the RRR would be as follows: Reasonableness Review Ratio = Enterprise Value (EV) / Net Property, Plant, & Equipment (Net PP&E). We noted that the published RRR would be comprised of the average of the RRR barometer group information set scraped four times a year and that the EV and Net PP&E information would be comprised of values for each indicator at the end of all four quarters. We explained that the data set would begin in quarter one of 2017, given that this would be the first full calendar year dating back to the passage of Act 12, and that the average would be rolling, so each RRR would include four new quarters and eliminate the four oldest quarters. We included the results for the EV, Net PP&E, and RRR in Appendix A to the *2024 TSIO*. *2024 TSIO* at 6-8.

### **A. Comments On RRR**

#### **1. Municipality Comments**

##### **a. PSAB**

PSAB states that it opposes the implementation of a RRR because it will lead to undermining the FMV as set forth in Act 12. PSAB notes that the RRR will provide the Commission with a guideline to reject a locally negotiated sale price based on the FMV appraisal process and that the RRR will erode the local decision-making process and reduce benefits received by selling communities. PSAB Comments at 2.

**b. Brentwood**

Brentwood comments that, although the RRR is a non-binding guidepost, it undermines Borough Code, which requires boroughs to accept the highest bid, because it encourages bidders to present identical bids based on the RRR regardless of the system's assets and needs. Brentwood also comments that the RRR ignores the needs and desires of municipalities to sell a water system and is problematically imbalanced against municipalities. Brentwood states that the RRR eliminates the analysis already required by well-settled case law providing that the overall prudence of Section 1329 applications is determined by considering the substantive affirmative public benefits of the transaction. Brentwood claims that the law requires a holistic analysis of a transaction that goes well beyond future rates and considers fact-specific circumstances affecting each transaction. Further, Brentwood notes that the RRR disregards the votes of duly-elected municipal leaders by acting as a standardized test for transactions and ignoring a water system's assets, needs, and environmental conditions to focus instead on a comparison of investor-owned utilities sales. Brentwood Comments at 8-9.

**c. PMAA**

PMAA asserts that there is no clear guidance on how the Commission will use the RRR and that the RRR of 1.68 is too high because the only reasonable price for ratemaking purposes is the actual depreciated book value of the system, less contributed assets. PMAA suggests an RRR of 1.0. PMAA also notes that the RRR is non-binding and that it should be binding. Further, PMAA questions whether higher premiums will be approved. PMAA states that the RRR does not eliminate the FMV and that protecting the public should be the highest priority. PMAA Comments at 3.

**d. BCATO**

BCATO states that it concurs that the proposed revisions will assist the Commission in its ultimate review and analysis of Section 1329 dockets. Specifically, BCATO notes that the RRR is a valuable evaluation for the Commission. BCATO also notes that, as an advocate of public ownership, it is aware of the extra costs regulated utilities bring to customers. BCATO states that it has been told that the 1.68 value is significantly below the FMV deals already approved. BCATO asks for an explanation for this gap and justification. BACTO Comments at 1-2.

**e. Beaver**

Beaver comments that purchase price is just one aspect of a Section 1329 application that the Commissions should consider. Beaver suggests that the Commission consider the condition of the municipality and the system as well as the positive impact the sale will have on the municipality when determining the overall prudence of a sale. Beaver notes that it has historically experienced significant financial difficulties and that, because of its financial condition, it will not be able to keep up with the growing capital needs of its sanitary wastewater collection and conveyance system and the Beaver Falls wastewater treatment plant. Beaver also notes that, if it sells the system to Aqua, the capital needs will be met and the proceeds from the sale will help prevent the city from being named a distressed community by the Department of Community and Economic Development (DCED) or being in Act 47 status, which could lead to receivership. Beaver states that its revitalization plan depends on the proceeds of its pending sale of the system to Aqua. Beaver Comments at 4-5.

Further, Beaver states that it is troubled and that this fact should be given greater weight by the Commission than the RRR. Beaver explains that it lacks the financial, managerial, or technical ability to operate its system, that it has been unable to fill critical positions at the plant, does not provide for capital planning, and has experienced many

serious safety and environmental deficiencies over the last two years. Beaver also explains that selling the system to Aqua will ensure that it is safe and that increasing environmental regulations are met. Beaver Comments at 4-5. Beaver states that its position is consistent with the Commission's prior findings in the *2018 TSIO* that the development of water and wastewater service throughout the Commonwealth over the years has led to the creation of large numbers of geographically dispersed water and wastewater systems owned by municipal corporations or authorities and that, for these systems, sale to a larger well-capitalized and well-run regulated public utility or entity can be prudent because it can facilitate necessary infrastructure improvements and access to capital markets, and, ultimately, it can ensure the long-term provision of safe, reliable service to customers at reasonable rates. *Id.* at 5.

**f. Towamencin**

Towamencin comments that the RRR is a significant change to the process of Section 1329 applications that is beyond the power of the Commission to effectuate through a TSIO. Towamencin states that the Pennsylvania Supreme Court has explained the difference between a general statement of policy and policies that have the force of law. In this regard, Towamencin notes that an agency may establish binding policy through rulemaking procedures or adjudications and that a general statement of policy is merely an announcement to the public of the policy which the agency hopes to implement in future rulemakings or adjudications. Towamencin also notes that a substantive rule establishes a standard of conduct that has the force of law, while a general statement of policy does not establish a binding norm. Towamencin states that the *2024 TSIO* is not a general statement of policy, that it would have a substantive effect on how Section 1329 applications are processed as the Commission would be taking into account a factor that is not currently provided by Section 1329, that it does not announce the Commission's intentions for the future, and that it seeks to establish a binding norm that changes Section 1329 applications. Additionally, Towamencin states that the intent of the

General Assembly is clear that Section 1329 encompasses a preference for acquisitions of municipally-owned water and wastewater systems by investor-owned public utilities and that the legislative history must be taken into account when considering the reach of the *2024 TSIO*. Towamencin further states that the Commission cannot, without further directive from the General Assembly, exercise its power when that power was clearly not conferred upon it by the General Assembly and that the General Assembly would not expressly confer or necessarily imply that the Commission holds the power to act against its stated preference for acquisitions of water and wastewater systems. Towamencin, therefore, opposes the *2024 TSIO* and the RRR in particular. *Id.* at 4-6.

**g. PSATS**

PSATS notes that it does not fully understand the RRR, but would support it if it will limit unreasonably high FMV appraisals and sales. PSATS Comments at 2.

**h. CWA**

CWA suggests that utility assets be classified as distressed or non-distressed with distressed referring to a utility that is facing severe challenges or conditions that hinder its ability to function effectively and can be characterized as: rapidly failing or facing significant unsustainable operational and/or financial issues that impact its ability to provide essential services to its service area, or being in a state of functional crisis or significant disrepair requiring immediate attention and intervention to address challenges and ensure the provision of vital services to the community. CWA states that the valuation method proposed should be used for distressed assets, but that the RRR for non-distressed assets should be 1.0. CWA Comments at 3.

## 2. Public Utility Comments

### a. Aqua

Aqua notes that it generally agrees with the RRR, but that using a 10-year average for the RRR would reduce the overall RRR using the existing data. Aqua also notes that, since FMV transactions span multiple years from the bid process to the ultimate processing of an application with the Commission, the RRR at the time the acquiring and selling utility enter into an APA may be different than the RRR that is published at the time the transaction is before the Commission for decision. Aqua states the RRR that should apply to a transaction is the RRR that was in place at the time the acquiring and selling utility enter into an APA. Additionally, Aqua asks the Commission to clarify that the RRR dictates what is allowed in ratemaking rate base and does not impact the purchase price of a transaction since acquiring and selling utilities may enter into agreements with purchase prices greater than the RRR and the difference between the two would be goodwill. Aqua Comments at 7-8.

Aqua also asks for guidance stating that evidence of affirmative public benefits for water and wastewater acquisitions is compliance with the guardrails associated with the RRR. Aqua notes that the RRR is meant to address the impact on customer rates and that it believes the Commission should provide further guidance and weighting on what constitutes additional evidence of affirmative public benefits. Aqua lists the following as examples: addressing operational, staffing, managerial and financial issues; consolidating water and wastewater systems; economies of scale; charging appropriate rates to ensure maintenance and replacement of infrastructure; accelerated infrastructure replacement plans; training for employees and emergency response best practices; asset management; water quality compliance; addressing sanitary sewer overflows, consent orders, notices of violation; cyber security planning and execution; and standard operating procedures and safety protocols. *Id.* at 8-9.

**b. PAWC**

PAWC states that it is concerned, generally and with respect to the RRR, that the Commission is seeking to establish binding norms. PAWC recommends that the Commission's FSIO clearly state that it does not establish binding norms. PAWC points out that, when implementing Chapter 14, the Commission expressly stated that implementation orders should not be construed to create binding norms. PAWC states that, if the Commission intends to strictly enforce any of its proposals, it must adopt a regulation, rather than an implementation order. PAWC Comments at 12-13.

PAWC states that it is particularly concerned that the Commission will apply the RRR as a binding norm, which would be contrary to the Commission's prior interpretation of Section 1329 that Section 1329 does not contain valuation guardrails. PAWC explains that the purchase price of most if not all Section 1329 acquisitions have been less than the average of the two appraisals completed by UVEs and, thus, it is unclear why valuation guardrails are needed. PAWC also notes that the proposal is similar to House Bill 1865, which would cap the purchase price at 125% of the depreciated original cost of a system, and that that the Commission cannot rewrite statutes because it can only exercise the powers granted to it. PAWC further notes that that using the RRR to set a cap on the purchase price of a system would be bad public policy in that this approach could reduce competition for bidding and undermine the legislature's intent to encourage the sale of municipal systems. In addition, PAWC comments that the Commission has many other tools at its disposal, such as requiring that the increased revenue requirement be paid entirely by the existing customers of the selling system. PAWC states that focusing on the Commission's authority to decide who pays the cost of higher utility rates would be more consistent with Section 1329 than limiting the purchase price that the parties can negotiate. *Id.* at 13-14.

Moreover, PAWC states that the RRR cannot be a litmus test for approval of a Section 1329 application but can merely be one of many public interest factors that the Commission takes into consideration. PAWC notes that, although the Commission must consider rate impacts, there is a difference between the RRR and rate impacts. PAWC states that the Commission cannot disapprove a transaction based solely on the RRR and suggests that the Commission consider all of the facts of record in a particular case. In particular, PAWC asks the Commission to consider other factors, including: regionalization; consolidation; need for, and comparative ability of, the buyer and the seller to make improvements to the system; comparative ability of the buyer and seller to make environmental improvements; comparative technical fitness of the buyer and the seller; comparative financial fitness of the buyer and the seller; comparative legal fitness of the buyer and the seller; impact of the transaction on all stakeholders; comparative customer service; comparative low-income assistance programs; comparative procedures to resolve service and rate disputes; comparative abilities of the buyer and the seller to enhance conditions for economic development; comparative ability of the buyer and the seller to attract capital investment for infrastructure remediation and improvements; job retention and creation; comparative ability of the buyer and the seller to engage in research and development of industry technology; seller's desire to continue as owner or operator; financial and tax benefits to the community; comparative number of customers over whom costs can be spread; the limitation of unnecessary competition; the equitable shift of financial burdens, and other relevant public interest factors. PAWC also states that the RRR should not be given undue evidentiary weight, but that, if the ratemaking rate base does not exceed the rate base calculated using the RRR, the Commission should not consider the rate impact of the acquisition to be a detriment. *Id.* at 15-17, 22.

PAWC further comments that the Commission should clarify the RRR proposal to avoid legal challenges and revise the RRR formula to make it more equitable. *Id.* at 21. First, PAWC explains that Section 1329(g) defines the FMV of a utility system as “[t]he average of the two utility valuation expert appraisals conducted under Section [1329](a)(2)” and that the 2024 *TSIO* proposes to determine the FMV and that the Commission would utilize the EV of the IOUs as a relevant proxy, although the statutory definition cannot be changed. PAWC states that the Commission’s phrasing suggests that it is unlawfully re-defining the FMV and that the Commission should clarify that it is not trying to re-define this term. Second, PAWC asks the Commission to clarify that the controlling RRR is the one that applied at the time the APA was executed. With regard to the RRR being published annually, PAWC notes that it is common for an APA to be entered into and the resulting application to come before the Commission for a final decision more than 12 months later and that, as a result, the parties might enter into an APA that would satisfy the RRR when it was signed, but not satisfy the RRR when the matter comes before the Commission for a decision. *Id.* at 22.

Finally, PAWC asks the Commission to utilize a Rate Base Proxy in lieu of Net PP&E in its RRR formula. PAWC states that the problem with the Commission’s formula is that a focus on depreciated original cost (DOC), using Net PP&E as a proxy, ignores other material adjustments that are made to plant, property and equipment that a public utility is allowed to incorporate into its ratemaking rate base. PAWC also states that use of actual rate base, as opposed to Net PP&E, would be the truest and most equitable manner for the Commission to determine an RRR. PAWC further explains that it would establish a fair guidepost by which to assess whether the FMV, as determined by Section 1329 with the lower of purchase price or the average of two UVE appraisals, is a public benefit or detriment, which would then be weighed among other relevant factors in making an overall affirmative public benefit determination. While PAWC understands the Commission’s desire to keep the RRR formula as simple as possible for its staff to calculate, it notes that Commission staff could arrive at a fair Rate Base Proxy by making

a few material adjustments to Net PP&E using publicly available information. PAWC proposes the following basic formula for the determination of Rate Base Proxy, which would be used as the denominator in the RRR formula:

$$\begin{aligned} &+ \text{Gross PP\&E} \\ &- \text{Accumulated Depreciation} \\ &= \text{Net PP\&E} \\ &- \text{Deferred Taxes} \\ &+ \text{Regulatory Assets} \\ &- \text{Regulatory Liabilities} \\ &- \text{Contributions in Aid of Construction (CIAC)} \\ &- \text{Customer Advances} \\ &= \text{Rate Base Proxy} \end{aligned}$$

PAWC states that this is a simple formula that would not involve much additional effort by Commission staff to determine the RRR and that its use would result in a more appropriate RRR to be used by the Commission in assessing whether the FMV of the acquired system, as would be rate based by the acquiring public utility, is a public benefit or detriment. PAWC attached an Appendix A to its comments containing a spreadsheet showing how the RRR would be calculated using Rate Base Proxy as the denominator instead of Net PP&E. *Id.* at 23-24, Appendix A.

PAWC further explains that Use of the Rate Base Proxy in the RRR formula would be more consistent with the legislative intent of Section 1329, as such intent was expressly recognized by the Commission in its earlier Section 1329 implementation orders. PAWC notes that municipal entities would be allowed to realize an amount closer to the FMV of their assets in order to address financial challenges. PAWC also notes that the Commission's adoption of an RRR will inevitably impact the amounts bid for municipal systems and that investor-owned public utilities simply cannot overbid on systems and have their shareholders absorb a substantial premium between the allowed ratemaking rate base and the purchase price. Thus, regardless of which RRR formula the Commission finally adopts, PAWC asserts that municipalities will inevitably realize less

than what their assets are truly worth, a result that is contrary to legislative intent. PAWC recommends that the Commission err on the side of allowing municipal entities to realize an amount that is closer to FMV, as defined by statute, by using PAWC's proposed Rate Base Proxy instead of the Commission proposed Net PP&E. PAWC contends that it is the best way, under current circumstances, to balance the needs of consumers, utilities, and the general public. *Id.* at 24-25.

### **3. Advocate Comments**

#### **a. SPWSPG**

SPWSPG states that the RRR of 1.68 indicates that the Commission believes it is reasonable to buy a system marked up by 68 percent over the book value, but that this is counter to the public interest. SPWSPG suggests that the RRR be the actual depreciated book value of the system, less contributed assets. It states that other valuation methods lead to excessive rate hikes and that, by allowing inflated prices, Act 12 incentivizes the sale of healthy municipal utilities. SPWSPG notes that none of the 22 sales involved a distressed utility. SPWSPG Comments at 1.

#### **b. OCA**

The OCA supports the intent to provide guidepost to assist in determining the prudence of applications. The OCA asserts, however, that the RRR should not be a test of presumptive reasonableness or a determination that the application is in the public interest, but rather one factor among many. The OCA also asserts that the RRR should not override *McCloskey* and *Cicero*, which clearly require the Commission to consider the rate impact of the transaction as part of the overall consideration of whether there are substantial affirmative public benefits from the proposed transaction. Additionally, the OCA states that it prefers a fixed value guidepost of 1.25x because the use of the RRR raises variability and timing concerns. OCA Comments at 17-18.

The OCA explains that the acquisitions with final Commission orders have added \$1.09 billion of ratemaking rates base to the rate bases of Aqua, PAWC, and Veolia, and that the ratemaking rate bases are almost all multiples over the depreciated original cost. The OCA also explains that setting the ratemaking rate base at multiples over depreciated original cost plus the increased cost of ownership of an investor-owned utility caused a combined annual revenue shortfall of \$85,218,654 at the time of closing on these transactions due to differences between the revenues collected from the acquired customers and the revenue requirements for the acquired customers using the ratemaking rate base created by the FMV. The OCA states that consumers are paying \$85 million more each year for water and wastewater service due to the valuation under Section 1329 for these transactions, and that pending applications would add another \$18.8 million of annual revenue deficiencies. The OCA also states that the average rate base per customer for both Aqua and PAWC has grown significantly since 2016. The OCA provides tables depicting the ratemaking rate base, annual revenue requirement deficiency, and average rate base per customer. The OCA notes that the data paints an increasingly grim picture that Section 1329 has created an incentive for investor-owned water and wastewater utilities to purchase municipal utilities at significantly inflated prices to the detriment of consumers. Further, the OCA states that the issue is not the price a buyer can or should pay, but rather what amount can be put into rate base and paid by customers versus what amount should be paid for by the acquiring utility. *Id.* at 18-23.

The OCA suggests that the rate impact of future Section 1329 valuations can be lessened by using a fixed cap on what can be proposed to be collected from customers, particularly a fixed guidepost of 1.25x. The OCA explains that a variable could cause issues during the relatively long time that it might take from public hearings to the filing of an application with the Commission when the guidepost might change. The OCA states that the overall standard remains that an affirmative public benefit is required before the Commission can approve an acquisition, but that a fixed guidepost would permit a buyer to include 25% more than depreciated original cost in rate base, even if

the acquired system is not troubled. The OCA also notes that this approach maintains the higher calculation for depreciated original cost, as defined in Section 1329(d)(5), but would make a significant difference for consumers. The OCA states that, under this approach, a utility can pay anything it wants for another utility and shareholders would bear the costs associated with the acquisition above a certain threshold. The OCA also states that using a 1.25x cap would have resulted in 39% less being added to the ratemaking rate base under the current paradigm. The OCA provides a table as an example of what a maximum multiple would do to constrain FMV. *Id.* at 22-25.

Moreover, the OCA asserts that the RRR injects too much variability to serve as a guidepost, even if it is updated annually. The OCA also asserts that the use of a variable guidepost raises the issue of which calculation would be used to determine whether a particular transaction is under the RRR. For example, the OCA notes that, if an APA is signed on January 1, 2024, an application is filed on October 1, 2024, and a Commission vote is scheduled for May 1, 2025, the 2023 RRR would be available when the RRR is signed, the 2024 calculation would be available on the date the application is filed, and the 2025 calculation would be available at the time of the Commission vote. The OCA points out that there is uncertainty about which RRR calculation would be used, which creates complications for notice to customers as the metrics change, and that a fixed metric would create more certainty. *Id.* at 25-26.

### **c. CAUSE-PA**

CAUSE-PA states that it does not take a position on the Commission's proposed RRR. CAUSE-PA Comments at 15.

#### **d. OSBA**

The OSBA notes that it welcomes the Commission's proposal to provide a benchmark for evaluating the sale price of a municipal water system other than the appraisals submitted by utilities. The OSBA also notes that the RRR is a positive step and should be adopted as a metric to evaluating the reasonableness of acquisition cost subject to the caveat that the RRR should not be presumed to be the floor for acquisition cost, but rather a benchmark for evaluating it. In particular, the OSBA explains that the RRR captures on average what investors are willing to pay for utility shares and that it does not necessarily follow that it represents the premium that customers should reimburse utility shareholders for paying. The OSBA states that the RRR is a useful metric for evaluating how any premium above depreciated original cost should be apportioned between customers and shareholders in the ratemaking process. The OSBA suggests that it may be reasonable to consider that 50% of the RRR in excess of 1.0 could be borne by customers in rates and any premium in excess of that borne by shareholders. As an example, the OSBA provides that, if the RRR is 1.68, an acquisition premium of 34% above depreciated original cost could be deemed reasonable for inclusion in rate base. The OSBA asks the Commission to adopt the RRR as a starting point to determine the share of an acquisition to be paid by customers through rates and states that, if the RRR is used in the manner it describes, it can support normal economic incentives in the Section 1329 acquisition process. OSBA Comments at 4-5.

#### **4. Legislature Comments**

##### **a. Honorable Senator Comitta**

Again, Senator Comitta notes that she appreciates the Commission's consideration of guiderails to enhance uniformity in the process and better protect consumers. Senator Comitta states that she is interested in learning about the proposed RRR, but that without more context and information on how it will be used, it is difficult to gauge their potential impact and benefits. Comitta Comments at 2-3.

**b. Honorable Representative Cutler**

Representative Cutler comments that he appreciates the Commission's attempt to implement an RRR and notes that this measure plays to the strength of the Commission given its long-standing experience with quarterly earnings reports and calculating reasonable rates of return for public utilities. Cutler Comments at 1.

**5. Individual Comments**

**a. Mr. Mrozinski**

Mrozinski asks the Commission to focus the sale process on its true merits, the infrastructure needs, and the ability of the municipality to meet those needs. Mrozinski also states that the RRR should be set at one. Mrozinski comments at 3.

**b. Mr. Ferguson**

Ferguson states that the RRR proposal lacks context. Ferguson asks what a reasonable RRR is and how it would have been used in past acquisitions. Ferguson notes that the RRR could become a bureaucratic exercise. Ferguson Comments at 3-4.

**c. Mr. Sauer**

Sauer comments that the Commission should stop predatory pricing by mandating that the RRR cannot exceed 1.0 times the actual book value. Sauer Comments at 2.

**d. Yordan, *et al.***

Yordan, *et al.* note that an RRR of 1.7 implies that paying a market multiple to purchase a municipal system is reasonable and not harmful to ratepayers, although this isn't true. They point out that, in the case of Willistown Township, the 86% increase in sewer rates in Aqua's first rate case after the acquisition was almost entirely attributable

to the price paid by Aqua of \$17.5 million. They state that, if Aqua had paid 1.7 times book value for the system instead of 3.9 times book value, the net present value cost to ratepayers would have been \$23 million, which still constitutes a substantial amount. They also state that future capital investments made by investor-owned utilities are financed at higher costs than financially healthy municipalities can achieve in the tax-exempt bond market and that rate base additions for future investments will result in higher rate increases under the ownership of an investor-owned utility compared to a municipal system. Additionally, Yordan, *et al.* state that there is little value to nonbinding guidelines as proposed with respect to the RRR. They note that, historically, such guidelines are not meaningful vehicles for public protection and that, until the Commission denied PAWC's acquisition of Brentwood's wastewater assets, the Commission had overturned every ALJ decision recommending denial of an acquisition. Therefore, Yordan, *et al.* suggest that the RRR concept be eliminated entirely. They state that the only barometer for a transaction should be reasonableness under Section 1102 of the Public Utility Code. Yordan, *et al.* Comments at 2-5.

**e. Mr. Cawley**

Cawley states that the RRR proposal is an attempt to bring rationality and fairness to an irredeemably unconstitutional law designed to usurp the Commission's fundamental authority and end-run the Commission's statutory duty to ensure that every public utility rate is just and reasonable, and that the proposal suffers from needless complexity caused by the statute's unprecedented switch from depreciated original cost to FMV. In addition, he explains that, as is the case with determining a just and fair overall rate of return on the utility's rate base using comparable earnings by a barometer group of similar companies, the choice of barometer group members significantly influences the outcome. He notes that the same is true when a barometer group of similar municipal systems is chosen for comparison purposes to arrive at an individual system's FMV and that the result can vary significantly depending on the discretionary inputs. He states that

this drawback exists with the 2024 *TSIO*'s fourth proposal relying on comparable barometer groups. Cawley Comments at 1-3, 28.

**f. The Carls**

The Carls comment that the RRR proposal reads like it is written to intentionally confuse the layperson. They further state the proposals are nothing and that they are perfectly happy with their water and rates. Carls Comments at 2.

**g. Mr. Osei**

Osei suggests that the PUC bind itself to deny all Section 1329 applications with a RRR over 1.0 because premiums over depreciated cost being included in the rate base should be subject to more scrutiny than Section 1329 requires, and municipalities and utilities should be encouraged to use another acquisition procedure. Osei Comments at 1.

**h. Mr. Smeltzer**

Smeltzer states that the present approach using the lesser of the purchase price or the FMV is logical, particularly in the case of distressed utilities where IOUs assume additional risks. Smeltzer also states that IOUs are not exposed to the same level of risk with well-maintained and efficiently managed utilities and, consequently, the incentive received by IOUs should be moderated. Smeltzer suggests capping the benefit at original cost less depreciation for non-distressed systems to ensure a fair and proportionate approach to incentivizing IOUs while reflecting the varying levels of associated risk with different utility scenarios. Smeltzer Comments at 1.

## **B. Reply Comments On RRR**

### **1. Public Utility Reply Comments**

#### **a. Aqua**

Aqua agrees with the Commission's RRR proposal and does not agree with the recommendations to arbitrarily lower the RRR to a number not supported by readily observed public market valuations. Aqua asserts that the proposed RRR is a significant proposal that will guide the stakeholders in this process. Aqua believes that potential sellers and those that advise potential sellers will take into consideration the RRR in evaluating and negotiating a purchase price. Aqua does not support any other actions at this time to change the Commission's RRR proposal and believes it should be given time to take effect, drive conversation for those stakeholders involved in these processes, and evaluate the impact. Aqua Reply Comments at 5.

Additionally, Aqua states that it does not agree with the notion that public utility assets should be classified as distressed or non-distressed. Aqua explains that there are already municipal requirements for when bids are required, and bidding often only serves to increase the purchase price. *Id.*

#### **b. PAWC**

PAWC believes that OCA's proposal to use 1.25x of depreciated original cost as a fixed cap or the maximum that would be allowed for ratemaking rate base is an attempt to nullify the statute. PAWC explains that OCA's proposed cap is inconsistent with the statute, at an arbitrary threshold with no rational basis, and in stark deviation from FMV. PAWC elaborates that the intent of the statute is to encourage acquisitions in the interest of regionalization and consolidation through a FMV approach to valuing municipally owned assets, with FMV being defined in the statute. PAWC Reply Comments at 8-9.

PAWC again encourages the Commission to modify its proposed RRR formula to utilize a Rate Base Proxy in lieu of Net PP&E to create a fair guidepost to be weighed among other relevant factors in making an overall affirmative public benefit determination. PAWC explains that this would be more consistent with the legislative intent of Section 1329 in that municipal entities would be allowed to realize an amount closer to FMV to address financial challenges. *Id.* at 9.

PAWC disagrees with OSBA's proposal to consider requiring a premium above an arbitrary threshold of 50% of the RRR in excess of 1.0 to be borne by shareholders as this is not compatible with the statute. PAWC explains that encouraging shareholders to absorb a premium on the transaction price disincentives public utilities from moving forward with such necessary acquisitions. *Id.* at 12-14.

## **2. Advocate Reply Comments**

### **a. OCA**

The OCA raises concerns about the RRR including that it is not a fixed number and that it cannot be the determining factor as to whether a proposed transaction meets the affirmative public benefits standard and should be viewed as one factor among many in determining whether a proposed acquisition meets the legal standard set out in Section 1103 of the Public Utility Code. The OCA shares the concern that the ratemaking rate base allowed should have a limit if FMV continues. The OCA reiterates that the revenue requirement impact of the initial FMV for the twenty acquisitions that have closed to date is more than \$85 million per year. The rate impact of these acquisitions has resulted in substantial rate increases for existing and acquired customers while shareholders have received a return of and on that inflated rate base. OCA Reply Comments at 12-13; 15.

The OCA agrees with Aqua that the RRR should address ratemaking base but not the purchase price. The OCA takes no position on the price of a utility plant and notes that the issue is what amount can be put into rate base and paid for by customers versus what amount should be paid for by the acquiring utility. *Id.* at 13.

The OCA asserts that the guidepost should be a fixed multiple, not a calculation that can be modified to reach a specific result. The OCA further asserts that a fixed guidepost also addresses all the timing issues that have been raised regarding which RRR should be used and when that determination is made. *Id.* at 14.

The OCA does not agree with PAWC's proposed rate base proxy and maintains that Section 1329 is a valuation tool but did not amend the legal requirements contained in Sections 1102 and 1103 of the Public Utility Code. *Id.*

### **C. Conclusion On RRR**

A number of commentors agree that the Commission's annual publication of an RRR will be useful. Some commentors, however, note concerns regarding the method of calculating and comparing the RRR as well as the Commission's intended use of the RRR. Here we clarify the way in which the RRR is calculated. We also modify the proposal to use a ten-year, rather than seven-year, data set and explain to what the RRR will be compared. We remind commentors that, as we stated in the *2024 TSIO*, the RRR is not binding. With these clarifications and modifications, we adopt the proposal to annually publish an RRR to serve as an additional factor and point of reference that the Commission may consider in Section 1329 proceedings.

To evaluate the FMV, we will utilize the EV of the investor-owned utilities (IOUs) as a relevant proxy. As noted in the *2024 TSIO*, the EV is a comprehensive valuation of the IOUs and is readily available to the public for each of these IOUs given their publicly traded status.<sup>11</sup> To determine the DOC of these IOUs, we will utilize the Net PP&E included on each of the company's balance sheets. We reiterate that Net PP&E is an appropriate proxy for DOC since it represents the total value of the physical assets of the company less depreciation. The RRR is the ratio of these two numbers, with EV being the numerator and Net PP&E being the denominator, such that Reasonableness Review Ratio = Enterprise Value / Net Property, Plant & Equipment.

We will publish the RRR annually, comprised of the average of the RRR barometer group information set scraped four times a year. The EV and Net PP&E information will be comprised of values for each indicator at the end of all four quarters.<sup>12</sup> As proposed in the *2024 TSIO*, the data set will begin in quarter one of 2017. However, we modify the proposal to use a ten-year data set.

In the *2024 TSIO*, we proposed the calculation of a RRR based on a seven-year data set. The seven-year data set, made up of 28 quarterly periods, would be updated annually to include the most recent four quarters and to remove the most dated four quarters. Consequently, this would result in a seven-year rolling average data set for RRR. The seven-year data set was proposed as it covered the time period between the passage of Act 12 and the adoption of the *2024 TSIO*.

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<sup>11</sup> Enterprise Value is calculated via the following: Market Capitalization + Debt – Cash.

<sup>12</sup> The Net PP&E quarterly information will lag one quarter due to the timing of Securities and Exchange Commission reporting.

Upon review of the comments, we believe use of a larger data set is rational and prudent. However, we believe that the data set should not include information that precedes the passage of Act 12. Therefore, we submit that the RRR should commence with the initially proposed seven-year data set while adding an additional annual period, or four quarters, with every subsequent RRR publication until the total set reaches ten years. Once the ten-year data set is reached, the Commission should then utilize a rolling average of ten years. Such revision will work to capture more data for the calculation of the RRR, reducing the potential for volatility in the RRR calculation and instilling an increased level of gradualism.

Additionally, since the RRR is intended to be available as a reference for Section 1329 transactions, we clarify to what the RRR will be compared. As many commentors acknowledge, it is the addition to rate base, which is not necessarily the purchase price, that is critical to evaluating the costs and benefits of a transaction. Pursuant to Section 1329(c)(2), 66 Pa.C.S. § 1329(c)(2), the addition to the acquiring utility's rate base is the lesser of the purchase price and the average of the two UVE appraisals, or the FMV. The rate base addition will be divided by the DOC of the system to provide a resulting ratio for the transaction that can be compared to RRR. This number is referred to as the Market Value Ratio (MVR).

The DOC of the system is needed to calculate the MVR. Therefore, we are requiring UVEs to include the DOC of a system in their appraisals and we modify Appendix C, Additional Guidelines for UVEs, as follows:

2. Cost approach materials shall:
  - e. include the original cost of the system and the original cost less depreciation, even if original cost was not the chosen measure of value

We also modify Appendix D, UVE Direct Testimony Template, as follows:

**Q. If you did not use the original cost method, what is the system's original cost and original cost less depreciation?**

A. Those values are \_\_\_\_\_ and \_\_\_\_\_.

However, UVEs are not required to select DOC as the chosen method of cost valuation; they are only required to provide the DOC for comparison purposes. The Commission will use the average of the two UVEs DOCs, along with the proposed rate base addition, to calculate the MVR, which is compared to the RRR.

Regarding the nature of the RRR, we clarify, as PAWC suggests, that the RRR is not intended to redefine the FMV under Section 1329. Additionally, as Aqua suggests, we clarify that the RRR does not impact purchase price. Also, we agree with the OCA that the RRR is not a test of presumptive reasonableness or a determination that an acquisition is in the public interest, but rather one factor among many. Lastly, we agree with the OSBA that the RRR should not be presumed to be the floor for acquisition cost, but rather a benchmark for evaluating it. In sum, it should be understood that the RRR does not replace the Commission's current analysis in Section 1329 proceedings.

Likewise, the RRR is not binding, but is an additional factor and point of reference that the Commission may consider in Section 1329 proceedings. We reiterate that the *2024 FSIO* should not be construed to create binding norms. *See Chapter 14 Implementation* at 12-13. Moreover, in considering the RRR in a particular proceeding, we clarify that we will look to the RRR that was in place at the time the selling utility and acquiring utility executed an APA.

## **VI. Timing To Effectuate Proposed Changes**

In the *2024 TSIO*, we proposed that the public hearing, rate impact notice, and default appraisal weight modifications go into effect 30 days after issuance of a final implementation order. We stated that any applications filed pursuant to Section 1329 after that date would need to be submitted using the modified guidelines and processes in order to be considered. *2024 TSIO* at 8.

We also explained that the Commission would publish an initial RRR 30 days after the issuance of any final order in this proceeding and that, thereafter, the RRR would be published annually by the Commission in the month of April, or as soon as practical after the first quarter of the year recognizing the lag in Net PP&E reporting. We noted we would acknowledge that some transactions may be in the midst of negotiations, and as such, provide due consideration to the timing of the initial RRR release and any initial Section 1329 applications under this proposal. *2024 TSIO* at 8.

### **A. Comments On Timing To Effectuate Changes**

#### **1. Municipality Comments**

##### **a. EMBA**

EMBA notes that it entered into an APA with PAWC dated January 24, 2023, and that it expended a great deal of effort and associated costs in reaching this point of the transaction. EMBA explains that the APA was entered into based on the understanding of the current Section 1329 FMV process. EMBA also explains that an engineering assessment has already been completed and that EMBA's UVE is beginning its analysis. EMBA asks the Commission to consider how the proposed changes will impact transactions that have an APA in place. EMBA states that changing the Section 1329 analysis will be a great detriment to the EMBA because, under the proposed rules, it would need to restart the process, which would require additional costs and time. EMBA

requests that the Commission create an exception to the new rules for potential sales that are already subject to an APA. EMBA Comments at 1-2.

**b. PMAA**

PMAA questions whether the proposed standards will be applied retroactively without further comment on the timeframe for implementation. PMAA Comments at 4.

**c. Brentwood**

Brentwood comments that the 2024 *FSIO* can be applied prospectively only and, thus, cannot impact existing Section 1329 applications. Brentwood notes that it is a substantive rule, albeit an invalid one, because it creates a new controlling standard of conduct that is absent from the governing statute. Brentwood states that a substantive rule and regulation cannot be retroactively construed unless the regulation clearly permits as much. Brentwood Comments at 6-7.

**d. Beaver**

Beaver asks that the Commission find that pending acquisitions such as its sale to Aqua should not be subject to the as-yet finalized RRR. Beaver notes that it executed the APA for the sale of the Beaver Falls wastewater treatment plant and collection system to Aqua nearly two and a half years ago and has spent a year resolving litigation with contributing municipalities before reaching a settlement. Beaver also notes that it spent countless hours, resources, and money based on the existing law and that it would be incredibly unfair to change the rules now. Beaver Comments at 5-6.

Beaver also points out that changing the rules now may violate the Pennsylvania and United States Constitutions, which prohibit *ex post facto* laws impacting the obligations of existing contracts. Beaver states that applying an RRR calculated after the APA was executed would impair the obligations of both parties to the APA. Beaver

explains that, to survive a challenge under the Contracts Clause, if a state regulation constitutes a substantial impairment to a contract, the state may argue that it had a significant and legitimate public purpose behind the regulation, like remedying a broad and general social or economic problem, and a court would need to determine if the state's *ex post facto* prohibition on the sale of Beaver's system meets that public interest test. Beaver contends that a court would not make such a determination in its case since it is financially distressed, the system is troubled, and it needs the sale proceeds. *Id.* at 6.

Beaver further notes that the General Assembly has determined that acquisitions under Section 1329 further the public interest and the Commission has relied upon that determination. Beaver asks the Commission to effectuate the original significant and legitimate public purpose espoused by the General Assembly when it passed Section 1329 in support of the sale of water and wastewater systems from municipalities to investor-owned public utilities, especially with respect to municipalities that are far down the road in the process of selling their systems in reliance upon those laws. *Id.* at 7.

**e. Big Beaver**

Big Beaver's comments also concern the pending sale of the Beaver Falls' wastewater treatment plant and collection system to Aqua. Big Beaver explains that it is a municipality that transmits wastewater to Beaver Falls' wastewater treatment plant and that it entered into a Treatment Agreement with Aqua in December 2023 in connection with the sale of the system. Big Beaver notes that it spent a significant amount of time, effort, and resources negotiating and finalizing its Treatment Agreement and believes that the Treatment Agreement is beneficial to the municipality and its residents. Big Beaver requests that the Commission recognize and honor the Beaver Falls' APA as well as its Treatment Agreement with Aqua. Big Beaver Comments at 1.

**f. Patterson, West Mayfield, And Eastvale**

In their respective comments, Patterson, West Mayfield, and Eastvale echo the concerns of Big Beaver. They each explain that they are also municipalities that transmit wastewater to the Beaver Falls wastewater treatment plant and that they each entered into similar Treatment Agreements with Aqua in December 2023 in connection with the sale of the system. Patterson, West Mayfield, and Eastvale state that, like Big Beaver, they spent a considerable amount of time, effort, and resources negotiating and finalizing their Treatment Agreements. They join Big Beaver in asking that the Commission recognize and honor the Beaver Falls' APA as well as their Treatment Agreements with Aqua. Patterson Comments at 1; West Mayfield Comments at 1; Eastvale Comments at 1.

**g. Towamencin**

Moreover, like Beaver, Towamencin comments that, under Pennsylvania and United States constitutional law, the *2024 FSIO* cannot retroactively apply to contracts that were entered into prior to its passage, including the APA between Towamencin and PAWC. Towamencin reiterates that Pennsylvania and United States Constitutions prohibit *ex post facto* laws that impair the obligations of existing contracts. Towamencin states that a violation of the Contracts Clause is demonstrated where a change in state law would effect a substantial impairment of a contractual relationship and that the Contract Clause analysis requires three inquiries: (1) whether there is a contractual relationship; (2) whether a change in a law has impaired that contractual relationship; and (3) whether the impairment is substantial. Towamencin also states that, here, there is no doubt that a contract exists between the Township and PAWC, that the *2024 TSIO* represents a change in the law that would impair that contractual relationship since the *2024 TSIO* would add requirements to Section 1329 that did not exist when the APA was signed, and that that the impairment of the APA is substantial considering the RRR changes the existing law and valuation of water and wastewater systems under Section 1329 significantly limited the purchase price of the systems. Towamencin Comments at 7.

Again, like Beaver, Towamencin points out that, if a state regulation constitutes a substantial impairment, to survive a challenge under the Contracts Clause, the State, in justification, may argue that it had a significant and legitimate public purpose behind the regulation, for example, if the intent behind the governmental action was to remedy a broad and general social or economic problem. Towamencin notes that, in order to properly make a decision on such a proffered justification, a court would need to determine whether or not the *2024 TSIO*, and its *ex post facto* prohibition on a sewer system sale, meets that public interest-driven test. Citing the *2016 TIO*, Towamencin states that the sale of its system to PAWC will facilitate necessary infrastructure improvements and ensure the continued provision of safe, reliable service to customers at reasonable rates. Additionally, pointing to the *2018 TSIO*, Towamencin states that sale of the System to a larger, well-capitalized and well-run regulated public utility can be prudent because it can facilitate necessary infrastructure improvements and access to capital markets, and, ultimately, it can ensure the long-term provision of safe, reliable service to customers at reasonable rates. *Id.* at 7-8.

Further, Towamencin explains that, to approve the *2024 TSIO* as written and impair the APA between Towamencin and PAWC, a court must determine that there exists a significant and legitimate public purpose behind this change while recognizing the significant and public purpose behind Section 1329 supporting the sale of the System. Towamencin strongly encourages the Commission to effectuate the original significant and legitimate public purpose espoused by the General Assembly when it passed Section 1329 in support of the sale of water and wastewater systems from municipalities to investor-owned public utilities. In the alternative, Towamencin asks that, where purchase agreements have been executed by municipalities and regulated utilities prior to the *2024 FSIO*, and in particular where substantial time and money have been spent towards a Section 1329 application to the Commission, the Commission should establish

a non-retroactive rule based on such grandfather status. Towamencin states that doing otherwise is unfair to all parties that, in good faith, relied upon the law. *Id.*

## **2. Public Utility Comments**

### **a. Aqua**

Aqua suggests that any FMV application that comes before the Commission with an APA executed prior to the entry of a *2024 FSIO* should be grandfathered. Aqua explains that these transactions were entered into without the benefit of the most recent guidance and, therefore, should not be evaluated under these standards. Aqua also explains that significant time and effort has been put into these transactions and the *2024 FSIO* could disrupt the foundations of the transactions unless they are grandfathered. Thus, Aqua states that the changes should only apply to FMV applications where the APA was executed after a FSIO is issued. Aqua Comments at 8.

### **b. PAWC**

PAWC recommends that the Commission reconsider the effective dates in the *2024 TSIO* to avoid any potential *ex post facto* and impairment of contract issues with regard to acquisitions in progress, such as acquisitions for which an APA was signed prior to the adoption of the Motion on which the *2024 TSIO* is based. PAWC asserts that applying the *2024 TSIO* to pending transactions is fundamentally unfair to parties who have spent a great deal of time and money to structure deals based on the Commission's existing precedent. PAWC also points out that compliance with the new proposals may be impossible for transactions in progress. For example, PAWC explains that, if an APA has already been signed, compliance with the proposal requiring two public hearings to be held before the APA is not possible. PAWC asserts that an application should not be denied where compliance is impossible and asks that the Commission apply a flexible approach for acquisitions in progress for all proposals. PAWC Comments at 18.

### **3. Advocate Comments**

#### **a. OCA**

The OCA supports the prompt implementation of changes to the public hearing, rate impact notice, and default appraisal weight revisions. The OCA also does not object to the timing of the publication of the RRR with the consideration of its comments on the RRR. OCA Comments at 29-27.

### **B. Reply Comments On Timing To Effectuate Changes**

#### **1. Public Utility Reply Comments**

##### **a. PAWC**

With respect to the effective dates of the proposals in the *2024 TSIO*, PAWC recommends that the Commission consider the proposed effective dates to avoid any potential *ex post facto* and impairment of contract issues with regard to acquisitions in progress. Consistent with the comments of PSAB and other municipal entities, PAWC believes it would be fundamentally unfair to parties that have expended considerable time, money, and effort to structure transactions based on existing Commission precedent and instructions. PAWC Reply Comments at 19-20.

#### **2. Advocate Reply Comments**

##### **a. OCA**

The OCA generally agrees with the Commission's proposed timing contained in the *2024 TSIO*. OCA Reply Comments at 18.

### **C. Conclusion On Timing To Effectuate Proposed Changes**

Some parties raise concerns about retroactivity. The *2024 TSIO*, however, was not intended to propose retroactive requirements. In fact, we acknowledged that some transactions may be in the midst of negotiations, which may impact on the timing to effectuate the changes adopted in the *2024 FSIO*.

To be clear, the provisions of this Order are not retroactive. The public hearing, rate impact notice, and default appraisal weight provisions of the *2024 FSIO* will go into effect 30 days after the entry of this Order with respect to all acquisitions where an APA has not been executed. For acquisitions where an APA has been executed, including those for which a Section 1329 application has been filed, but not finally accepted, we will consider the unique facts and circumstances of each acquisition and take into account the dates on which the APAs were executed and applications were filed. Scheduling and conducting public hearings, revising the rate impact notices, and adjusting the appraisals to account for default weights may be to the benefit of the selling utility and acquiring utility given that we have determined that the public hearings, rate impact notice, and default appraisal weights discussed herein are in the public interest. We note, for example, that, even if an APA has already been executed, public hearings may be scheduled and conducted to better inform the public of the transaction between the acquiring utility and the selling utility.

As it pertains to the RRR, we will publish an initial RRR 30 days after entering this Order. We will then publish the RRR annually in the month of April or as soon as practical after the first quarter of the year recognizing the lag in Net PP&E reporting. As noted above, in considering the RRR in a particular proceeding, we will look at the RRR that was in place at the time the selling utility and acquiring utility executed an APA. If no RRR was in place at that time, we will give due consideration to that fact.

Again, the RRR does not replace the Commission’s current analysis in Section 1329 proceedings.

With regard to the rate impact notice practices that are encouraged but not required prior to executing an APA, if an APA has already been executed, we suggest that applicants carry out these practices as soon as practicable. For instance, if an APA has already been executed, the acquiring utility can still provide estimates and supporting working papers to the selling utility regarding rate impacts on the selling utility’s customers.

## **VII. Items Not Identified In The 2024 TSIO For Review**

As noted above, in the 2024 TSIO, we sought comments and reply comments regarding specific revisions to the Commission’s existing Section 1329 procedures and guidelines in four areas, including revisions for public hearings, the rate impact notice, the default weights for appraisals, and the RRR. A number of comments and reply comments were received, however, discuss items not identified in the 2024 TSIO for review and modification. We address these comments and reply comments below.

### **A. Comments On Items Not Identified In The 2024 TSIO For Review**

#### **1. Municipality Comments**

##### **a. Warwick**

Warwick suggests helping water and sewer authorities with reporting and testing requirements and providing grants for infrastructure improvements prior to allowing a municipality to consider selling a system. Warwick Comments at 1.

**b. PMAA**

PMAA suggests that return on equity be limited, even though it is not part of Section 1329. PMAA states that the OCA should be bolstered to include ratepayer advocates assigned to transactions to help guide customers through the Section 1329 process. Citing *Cicero*, PMAA further suggests that the Commission apply existing case law when evaluating Section 1329 applications. PMAA Comments at 1, 4.

**c. CWA**

CWA suggests that the Commission require selling utilities to issue a public bid notice and require respondents to provide a detailed analysis of the projected rates for 10 years after a proposed sale, which will become part of the agreement to purchase the utility and must be honored without change. CWA states that all bids should be made accessible to the public before any public hearings. CWA also suggests mandating the selling utility to conduct an independent assessment of all offers and rate projections and to share the analysis through public notices and hearings. Further, CWA recommends that the Commission require municipal utility sales to receive approval through a majority vote of the residents registered to vote in a local referendum held during a scheduled local election before it can be finalized. CWA also notes that the Commission should carefully evaluate each Section 1329 acquisition to determine whether there are substantial affirmative public benefits. CWA Comments at 3-4.

**2. Public Utility Comments**

**a. Aqua**

Aqua proposes that the Commission include examples of what public benefits should be included in a FMV application that would satisfy the substantial public benefits test that is being used to evaluate FMV applications in its current form. Aqua states that it is unclear and is leading to increased litigation and appeals. Aqua notes that each FMV

application will have a rate impact of some kind and that often the benefits that derive from these transactions are realized over many years and are not immediately quantifiable at the time of the application. Aqua Comments at 8.

### **3. Advocate Comments**

#### **a. SPWSPG**

SPWSPG claims that privatization deals are done in the dark behind closed doors and that local officials often sign non-disclosure agreements that keep the deal from the public until contract language is finalized. SPWSPG states that this has eroded the public's trust and that Section 1329 should explicitly require public bidding with prior public notice and prohibit non-disclosure agreements. SPWSPG Comments at 1.

#### **b. OCA**

The OCA notes that 27 applications have been filed pursuant to Sections 1329 of the Public Utility Code and that it has participated in each filing proceeding. The OCA states that these proceedings have provided valuable experience in understanding how applications filed under Sections 1329 and 1102 proceed and how to work within the short timeframe provided for the development of a record and litigation of a case. The OCA also notes that the Commission must consider including *McCloskey* and *Cicero*. The OCA points to a number of issues that arise in the course of application proceedings under Section 1329 that are part in the *2024 TSIO* and suggests modifications to procedures for adoption by the Commission. OCA Comments at 1-2, 27.

First, the OCA notes that the *2019 FSIO* provides that a docket will remain inactive until a Section 1329 application under that docket number has been formally accepted by the Commission and that filings in an active docket will not be considered until the time at which the docket becomes active. The OCA recommends changing this practice because, if a case is able to move forward while notices are being provided to customers, interested parties could file protests and petitions to intervene, pursue discovery, request public input hearings, and address procedural issues. The OCA notes that, when an application checklist is determined to be completed by TUS, a Secretarial Letter is issued to conditionally accept the application and notices are sent to customers. The OCA also notes that, during this 30-day period, the docket remains inactive, which prevents parties from submitting filings, and does not become active until notices are provided to all customers and the Secretary's Bureau issues a letter stating that the application is accepted followed by the application being published in the *Pennsylvania Bulletin* with a protest deadline. The OCA states that testimony for non-applicant parties is due within a few days of the prehearing conference and that it is not practical for a party that has not been involved since the filing of the application to appear at a prehearing conference and file testimony a few days later. The OCA asserts that permitting the docket to be active when an application is not finally accepted would be similar to what happens when a formal complaint is filed against a rate filing and the parties proceed with discovery even before suspension of the case for investigation. The OCA suggests an addition to this process by making the ALJ available to address procedural issues and public input hearings. *Id.* at 27-28.

Next, the OCA notes that, in the *2019 FSIO*, the Commission rejected requests for standard modified discovery periods, but encouraged applicants to propose discovery rule modification and parties to enter into mutually agreeable discovery schedules. The OCA states that working through these issues in each case should not be required after seven years and 27 applications and that it is reasonable to adopt modified discovery

timeframes as part of the filing of a Section 1329 application. The OCA proposes the following for all Section 1329 applications:

A. Answers to interrogatories and responses to requests for document production, entry for inspection, or other purposes shall be served within five (5) calendar days of service of the interrogatories or requests for production.

B. Objections to interrogatories and/or requests for production shall be communicated orally to the propounding party within two (2) calendar days of service; unresolved objections shall be served on the propounding party in writing within three (3) calendar days of service of the interrogatories and/or requests for production.

*Id.* at 29-30.

Further, the OCA notes that the Commission has recognized that the six-month suspension period is directory and not mandatory and that it has the discretion to extend the time period to permit appropriate due process to all parties. The OCA states that Section 1329 does not eliminate the Commission's adjudicatory discretion to provide appropriate due process to all parties. The OCA notes that there are still proceedings where the six-month suspension period does not line up well with a Commission public meeting. The OCA recommends that the Commission should, as part of the *2024 FSIO*, automatically extend the suspension period to a public meeting date that ensures there is at least a full six months for litigation. *Id.* at 30-31.

#### **4. Individual Comments**

##### **a. Mr. Mrozinski**

Mrozinski states that the Commission should focus its evaluation on the true costs and benefits to the community and to ensure that the public has adequate information and can provide meaningful input. Mrozinski also states that the public should be provided with a ratepayer advocate to represent their interests. In this regard, Mrozinski suggests that the OCA get involved in cases before the APA is submitted to the Commission for approval. Mrozinski also states that the Commission should deviate from the ALJ's recommendations only if there is quantifiable reasoning. Further, Mrozinski asks that public meetings be actively publicized and structured to allow open public discussion because the current process involves strict time limits. Mrozinski Comments at 1, 3-4.

##### **b. NGT Residents**

The NGT Residents state that sales should be based on the needs of the system and the community, not money. In addition, they suggest that the residents be involved in the sale. The NGT Residents also suggest that the claimed benefits be quantified with detailed supporting data, that sales be justified independent of the sale price, records may not be deemed confidential, that the requirement for a quantifiable net public benefit must be met, and that the Commission should have quantifiable reasoning to support any deviation from an ALJ's recommendation. NGT Residents Comments at 1-2.

##### **c. Cawley**

Cawley suggests that the Commission reduce the overall rate of return to reflect the inflated ratemaking rate base amounts adopted by an inappropriate and unconstitutional FMV method. In addition, he recommends that the Commission exercise more stringently its authority to deny Section 1102 applications if Section 1329 applications will produce excessive rates. Cawley further suggests that the six-month

timeframe in Section 1329(d)(2) must be removed or extended and, barring removal, the Commission should, for good cause, treat Section 1329(d)(2) as directory rather than mandatory because it provides no penalty for non-compliance that would render the proceeding a nullity. Cawley Comments at 38-40.

**d. PA Residents**

The PA Residents comment that the Commission should stop the predatory water system pricing and improve transparency in water and sewer privatizations. They request that the Commission not allow large corporations to increase water and sewer prices and set an enforceable limit, not just a guidepost, to prevent unreasonable rate hikes. They also request that the Commission require real transparency in privatization deals by banning non-disclosure agreements, requiring public bidding, and ensuring public input prior to bidding. They claim that local officials are forced to sign non-disclosure agreements to keep a privatization deal hidden from the public until contractual language is finalized. They state that this has eroded the public trust and suggest that the public be notified and engaged at every step of the process. PA Residents Comments at 1.

**e. Mr. Osei**

Osei suggests that the Commission deny or stay all Section 1329 applications until the lawsuits involving the East Whiteland Township and Butler Area Sewer Authority acquisitions are final. Osei also suggests that the Commission bind itself to accept an ALJ's recommendation to deny an application because residents shouldn't have to go through the extensive effort of getting a denial recommendation only for the Commission to ignore it. Further, Osei recommends that the Commission require open bidding under Section 1329 since, in the absence of open bidding, negotiations could take place before a sale is approved. Osei Comments at 1.

**B. Reply Comments On Items Not Identified In The 2024 TSIO For Review**

**1. Public Utility Reply Comments**

**a. Aqua**

Aqua recommends that the Commission adopt the 2024 TSIO with limited clarifications and does not support the majority of the additional requirements suggested by stakeholders. Aqua Reply Comments at 2-3.

In particular, Aqua does not agree with OCA's recommendation to permit the case to move forward prior to full acceptance being granted. Aqua explains that the application is either perfected or not and the case should move forward with protests, intervention, and discovery only after it has been accepted. *Id.* at 6.

Aqua also reiterates its request that the Commission provide greater clarity as to what it believes constitutes affirmative public benefit. Aqua enumerates the following considerations for the Commission to consider as guiderails: (1) a transaction's approved ratemaking rate base, if in line with the RRR, would be considered an affirmative public benefit, (2) the rate increases from the acquisition of a water or wastewater utility that result in rates that are less than the utility's weighted average base rates for the majority of its existing customers and are phased in using the concept of gradualism would constitute an affirmative public benefit, and (3) compliance with the Commission assessment of wastewater costs to water customers, including a maximum shift of \$5.00 per month on a water customer bill for a specific proposed transaction and all prior wastewater transactions on a combined basis. *Id.* at 6-7.

**b. PAWC**

Like Aqua, PAWC does not agree with OCA that conditional acceptance of an application should permit the case to move forward for protests, intervention, discovery, and other procedural issues. PAWC asserts that the extensive application checklist and the TUS deficiency reviews are intended to limit the need for discovery because of the statutory six-month timeline. PAWC further asserts that OCA's request for early discovery is unnecessary and would violate the Commission's Rules of Practice and Procedure because discovery rules do not apply until official acceptance of the application and OCA's proposal would make the acceptance process even more unwieldy and difficult. PAWC Reply Comments at 10-11.

PAWC explains that the TUS review process often goes far beyond assuring the application checklist items have been satisfied and asserts that applicants are now required to go through an unprotested application process before TUS and then a protested application process before an Administrative Law Judge which was never the intent of the Commission's earlier implementation orders and subverts the legislature's intent of a streamlined six-month process. Thus, if the Commission elects to upend its Rules of Practice and Procedure, PAWC believes the role of TUS should be scaled back to the role originally intended by the Commission which is to ensure that applicants have submitted all items required by the application checklist. *Id.* at 11.

PAWC does not agree with OCA's proposal to modify discovery schedules with shortened response periods as this is unnecessary since the discovery rules have already been routinely modified at the discretion of the presiding Administrative Law Judge to provide short five-day periods for discovery responses. *Id.*

PAWC also does not agree with OCA's proposal to extend the six-month suspension period to allow the Commission to hold a public meeting and act beyond the six-month window for a decision. PAWC explains that the statute requires the Commission to issue a final order within six months of the filing date of an application and OCA's proposal is inconsistent with the statute. *Id.* at 12.

## **2. Advocate Reply Comments**

### **a. OCA**

The OCA disagrees with Aqua's proposal to add a list of public benefits to the final order in this proceeding. The OCA notes that the list of benefits would be general in nature without regard to whether there is any specific evidence to support the claimed benefits. The OCA states that providing a long list does not equate to establishing benefits that outweigh the harms identified in an application. The OCA points out that record evidence in each proceeding must be developed based on the specific circumstances. OCA Reply Comments at 18.

## **3. Individual Reply Comments**

### **a. Yordan, *et al.***

Yordan, *et al.* believe that the six-month limitation to adjudicate acquisition cases presents significant due process considerations, especially consideration intervention by citizens, operating pro bono, without staff, without budget, and with no legal training. Yordan, *et al.* suggest that Commission proceedings should be separated into two cases, one for Section 1329 and one for Section 1102. Yordan, *et al.* Reply Comments at 3-4.

### **C. Conclusion On Items Not Identified In The 2024 TSIO For Review**

In the 2024 TSIO, we noted that only certain areas of the Commission's Section 1329 guidelines and processes were subject to review and modification. A number of commentors, however, discussed items not identified in the 2024 TSIO for review and modification. At this time, we decline to revise the Section 1329 guidelines and processes as to these items, which include, *inter alia*, creating a list of public benefits that should be included in a FMV application to satisfy the requisite affirmative public benefits test, requiring public bidding, prohibiting non-disclosure agreements, adopting modified discovery timeframes for all Section 1329 applications, and automatically extending the suspension period for certain Section 1329 applications. The majority of these items have been addressed in prior Section 1329 proceedings and orders.

Similarly, we decline to adopt the OCA's suggested changes regarding docketing Section 1329 applications. As we explained in the 2019 FSIO, a Section 1329 docket will remain inactive until an application under that docket has been formally accepted by the Commission, and filings in an inactive docket will not be considered until the time at which the docket becomes active. 2019 FSIO at 42. The Commission's procedures provide a structured process for evaluating application completeness that often involves substantial time and effort by Commission staff and acquiring utilities. The timeline of perfecting a Section 1329 application depends on a variety of factors over which acquiring utilities, selling utilities, and Commission staff have varying degrees of control. For example, while the OCA characterizes Section 1329 application conditional acceptance as a 30-day period, the length of the conditional acceptance period depends on the conditions imposed, the methods used by the acquiring utility to satisfy those conditions, review of whether conditions have been satisfied, and any delay of

application acceptance to provide a consideration period of at least 170 days. In addition, while the OCA asserts that permitting the docket to be active when an application is not finally accepted would be similar to what happens when a formal complaint is filed against a rate case, rate cases are deemed perfected for filing purposes unless the Commission notifies the filer that the tariff or tariff supplement is not perfected and rejects the filing. *See* 52 Pa. Code § 53.51(c)(2). Rate cases also involve consideration periods of approximately nine or eleven months, rather than the six-month consideration period provided for Section 1329 applications under Section 1329(d)(2).

## **CONCLUSION**

For the reasons set forth above, we believe that the revisions to the presently established Section 1329 implementation and administrative regimes adopted herein will improve the general public's awareness of applications, establish more consistent and expected weighing of valuation methods, and assist the Commission in its ultimate review and analysis of Section 1329 applications. The adoption of this *2024 FSIO*, which includes modifications for public hearings, rate impact notices, default weights for appraisals, and an RRR is in the public interest. As the Commission stated, Section 1329 applications have elicited a significant interest from the public and policy makers alike. These modifications to the Commission's administration of Act 12 are reasonable and necessary improvements based off our experience of the over eight years implementing the Act and the twenty-seven Section 1329 applications filed to date. **THEREFORE,**

### **IT IS ORDERED:**

1. That the Commission hereby adopts the procedures and guidelines set forth in this Final Supplemental Implementation Order.

2. That the Commission hereby adopts the Section 1329 Application Filing Checklist attached as Appendix A and as set forth herein.

3. That the Commission hereby adopts the Section 1329 Application Standard Data Requests attached as Appendix B and as set forth herein.

4. That in addition to others as may be appropriate, the Commission hereby adopts the Additional Guidelines for Utility Valuation Experts, including the jurisdictional exceptions to the Uniform Standards of Professional Appraisal Practice, attached as Appendix C and as set forth herein.

5. That the Commission concludes that Utility Valuation Experts registered pursuant to 66 Pa.C.S. § 1329(a)(1) shall submit written direct testimony substantially in the form of Appendix D, and at minimum, addressing the topics contained in Appendix D to accompany all applications for fair market valuation pursuant to Section 1329.

6. That a copy of this Final Supplemental Implementation Order and all Appendices shall be published in the *Pennsylvania Bulletin* and posted on the Commission's website.

7. That a copy of this Final Supplemental Implementation Order and all Appendices shall be served on all parties of record at the above-captioned docket.

8. That this docket shall be marked closed.

**BY THE COMMISSION**



Rosemary Chavetta  
Secretary

(SEAL)

ORDER ADOPTED: June 13, 2024

ORDER ENTERED: July 2, 2024