

COMMONWEALTH OF PENNSYLVANIA



PATRICK M. CICERO
Consumer Advocate

OFFICE OF CONSUMER ADVOCATE
555 Walnut Street, 5th Floor, Forum Place
Harrisburg, Pennsylvania 17101-1923
(717) 783-5048
(800) 684-6560

 @pa_oca
 /pennoca
FAX (717) 783-7152
consumer@paoca.org
www.oca.pa.gov

October 23, 2024

Via Electronic Filing

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

Re: Joint Application of Pennsylvania-American Water Company and Appalachian Utilities, Inc., Pursuant to Section 1102 of the Public Utility Code; Docket Nos. A-2024-3046084, A-2024-3046092, A-2024-3046068

Dear Judge Johnson:

Enclosed for e-filing please find a copy of the Office of Consumer Advocate's Main Brief in the above-referenced proceeding. Being submitted is a **CONFIDENTIAL** and redacted, Public version of the OCA's Main Brief. The **CONFIDENTIAL** version of the OCA's Main Brief will be e-filed using the Commission's SharePoint file process.

Copies have been served as indicated on the enclosed Certificate of Service.

Respectfully submitted,

/s/ Melanie Joy El Atieh
Melanie Joy El Atieh
Deputy Consumer Advocate
PA Attorney I.D. # 209323
MElAtieh@paoca.org

Enclosures:

cc: The Honorable Conrad A. Johnson (**email only**: cojohnson@pa.gov)
Certificate of Service

CERTIFICATE OF SERVICE

Application of Appalachian Utilities, Inc. for a Certificate of Public Convenience Evidencing the Pennsylvania Public Utility Commission's Approval of the Transfer of 40% of Outstanding and Issued Stock in Appalachian Utilities, Inc. : Docket No. A-2024-3046068

Joint Application of Pennsylvania-American Water Company and Appalachian Utilities, Inc., Pursuant to Section 1102 of the Public Utility Code, for approval of (1) the transfer to American Water Works Company, Inc., by merger, of all property of Appalachian Utilities, Inc. used and useful in the public service; (2) the transfer to Pennsylvania-American Water Company, by merger, of all property of Appalachian Utilities, Inc. used or useful in the public service, (3) the right of Pennsylvania American Water Company to begin to offer, render, furnish and supply water service to the public in the Borough of Avis and Townships of Pine Creek and Dunnstable, Clinton County, Pennsylvania, and (4) the abandonment by Appalachian Utilities, Inc. of all water service. : Docket Nos. A-2024-3046084 A-2024-3046092

I hereby certify that I have this day filed served a true copy of the following documents, the Office of Consumer Advocate’s Main Brief, CONFIDENTIAL and redacted, Public versions, upon parties of record in this proceeding in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant), in the manner and upon the persons listed below.

Dated this 23rd day of October 2024.

SERVICE BY E-MAIL ONLY

David P. Zambito
17 North Second Street
Suite 1410
Harrisburg, PA 17101
dzambito@cozen.com
Counsel for PAWC

Thomas J. Sniscak, Esquire
Todd S. Stewart, Esquire
Hawke McKeon & Sniscak LLP
100 North Tenth Street
Harrisburg, PA 17101
tjsniscak@hmslegal.com
tsstewart@hmslegal.com
Counsel for Appalachian Utilities, Inc.

Erin K. Fure, Esquire
Pennsylvania-American Water Company
852 Wesley Drive
Mechanicsburg, PA 17055
erin.fure@amwater.com
Counsel for PAWC

Sharon E. Webb, Esquire
Office of Small Business Advocate
555 Walnut Street
1st Floor, Forum Place
Harrisburg, PA 17101-1923
swebb@pa.gov
Counsel for OSBA

/s/ Melanie Joy El Atieh
Melanie J. El Atieh
Deputy Consumer Advocate
PA Attorney I.D. #209323
MElatieh@paoca.org

Counsel for:
Office of Consumer Advocate
555 Walnut Street
5th Floor, Forum Place
Harrisburg, PA 17101-1923
Phone: (717) 783-5048

Dated: October 23, 2024

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Application of Appalachian Utilities, Inc. for a : Docket No. A-2024-3046068
Certificate of Public Convenience Evidencing :
the Evidencing the Pennsylvania Public Utility :
Commission's Approval of the Transfer of 40% :
of Outstanding and Issued Stock in :
Appalachian Utilities, Inc. :

Joint Application of Pennsylvania-American : Docket Nos. A-2024-3046084
Water Company and Appalachian Utilities, : A-2024-3046092
Inc., Pursuant to Section 1102 of the Public :
Utility Code, for approval of (1) the transfer to :
American Water Works Company, Inc., by :
merger, of all property of Appalachian :
Utilities, Inc. used and useful in the public :
service; (2) the transfer to Pennsylvania- :
American Water Company, by merger, of all :
property of Appalachian Utilities, Inc. used or :
useful in the public service, (3) the right of :
Pennsylvania American Water Company to :
begin to offer, render, furnish and supply water :
service to the public in the Borough of Avis :
and Townships of Pine Creek and Dunnstable, :
Clinton County, Pennsylvania, and (4) the :
abandonment by Appalachian Utilities, Inc. of :
all water service.

MAIN BRIEF
OF THE
OFFICE OF CONSUMER ADVOCATE

Office of Consumer Advocate
555 Walnut Street
5th Floor, Forum Place
Harrisburg, PA 17101-1923
Phone: 717-783-5048
Fax: 717-783-7152

Date: October 23, 2024

Melanie Joy El Atieh
Deputy Consumer Advocate
PA Attorney I.D. #209323
MElAtieh@paoca.org

Counsel for:
Patrick M. Cicero
Consumer Advocate

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I. STATEMENT OF THE CASE

A. Description of the Office of Consumer Advocate

The Office of Consumer Advocate (OCA) is a statutory advocate with authority and duty to represent the interest of utility consumers as a party before the Pennsylvania Public Utility Commission (Commission). 71 P.S. § 309-4. The OCA's interest in this case is to protect utility consumers by ensuring that the Commission appropriately exercises its authority to ensure that only where there is a net, affirmative public benefit from approving an acquisition, with or without Commission imposed conditions, can a certificate of public convenience (CPC) be issued.

B. Procedural History

On February 2, 2024, Appalachian Utilities, Inc. (AUI) filed with the Pennsylvania Public Utility Commission (Commission) an application seeking approval to transfer a non-controlling 40% of Outstanding Stock from its stockholder to its employee Operations Manager (Application). On March 4, 2024, the Office of Consumer Advocate (OCA) filed a Notice of Appearance and the Office of Small Business Advocate (OSBA) filed a Notice of Intervention, Public Statement and Verification and Notice of Appearance.

Also on February 2, 2024, AUI and Pennsylvania-American Water Company (PAWC) filed a Joint Application seeking approval to merge PAWC and AUI (Joint Application). On March 4, 2024, the OCA filed a Protest and Public Statement and the OSBA filed a Notice of Intervention, Public Statement and Verification, Protest and Notice of Appearance.

On June 13, 2024, Administrative Law Judge (ALJ) Conrad A. Johnson issued a Prehearing Order setting forth a litigation schedule.

The OCA served the written direct, rebuttal, and surrebuttal testimony of its expert witness, Morgan N. DeAngelo, on August 16, August 30, and September 16, 2024, respectively.

On October 2, 2024, ALJ Johnson convened a telephonic evidentiary hearing and admitted the pre-served testimony of the OCA.

Pursuant to the litigation schedule set by ALJ Johnson, the OCA files this Main Brief in support of its litigation position.

C. Overview of the Proposed Transaction

PAWC is proposing to purchase AUI, a certificated water public utility, at a purchase price of **[BEGIN CONFIDENTIAL]** [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] **[END**

CONFIDENTIAL]. OCA St. 1R at 5, 12; OCA St. 1SR at 8. PAWC has not submitted this transaction using the valuation provisions of either Sections 1327 or 1329 of the Public Utility Code (Code).

Putting aside the purchase price premium and the resulting revenue deficiencies, AUI's customers – should they become PAWC's customers – will likely face sizeable and frequent rate increases in the future. Based on existing rates alone, current AUI customers using 4,000 gallons per month pay current AUI rates of \$41.68. OCA St. 1 at 6; OCA St. 1SR at 9. Using the rates that were effective on August 7, 2024, as a result of the most recent PAWC rate case order, PAWC's current Rate Zone 1 customers using 4,000 gallons would pay \$93.89 per month, or \$52.21 more each month. OCA St. 1 at 6, 12; OCA St. 1SR at 9. It would take years for AUI customers to move to PAWC's Rate Zone 1 rates and, in the meantime, other customers would be subsidizing this system. OCA St. 1 at 6; OCA St. 1SR at 9.

II. LEGAL STANDARDS

A. Burden of Proof, 66 Pa. C.S. § 332(a)

As the proponent of an order in this proceeding, PAWC has the burden of proof to establish that it is entitled to the relief it is seeking. 66 Pa. C.S. § 332(a). PAWC must demonstrate its case by a preponderance of evidence. *Lansberry v. Pa. PUC*, 578 A.2d 600, 602 (Pa. Cmwlth. Ct. 1990) (*Lansberry*), *alloc. denied*, 602 A.2d 863 (Pa. 1992). More precisely, PAWC’s evidence supporting the Applicant’s case must be more convincing than the evidence presented by any opposing party against it. *Se-Ling Hosiery, Inc. v. Margulies*, 70 A.2d 854, 856 (Pa. 1950). Additionally, a Commission decision must be supported by substantial evidence in the record. Indeed, “the elements of [a] cause of action [must be] proven with substantial evidence which enables the party asserting the cause of action to prevail, precluding all reasonable inferences to the contrary.” *Burleson v. Pa. PUC*, 461 A.2d 1234, 36 (Pa. 1983). Additionally, the evidence must be substantial and legally credible and cannot be mere “suspicion” or a “scintilla” of evidence. *Lansberry* at 602; *Norfolk & Western Ry. Co. v. Pa. PUC*, 413 A.2d 1037 (Pa. 1980).

B. Valuation of Utility Property, 66 Pa. C.S. § 1311(b)

Section 1311 of the Code specifies that the value of the rate base of a utility “shall be the original cost of the property when first devoted to the public service less the applicable accrued depreciation...” 66 Pa. C.S. 1311(b). The Code provides two alternatives to this valuation method found in Sections 1327 and 1329. 66 Pa. C.S. §§ 1327, 1329. The alternatives allow for higher-than-depreciated original cost value to be assigned to a utility’s rate base where a utility acquires qualifying water/wastewater systems. Of relevance, Section 1327 permits “the excess of the acquisition cost over the depreciated original cost” to “be added to the rate base to be amortized as an addition to expense over a reasonable period of time with corresponding reductions in the

rate base” for qualifying acquisitions of water/wastewater systems owned by a public utility, municipal corporation, or person that were “at the time of acquisition” meeting the criteria of Section 1327(a)(3) . 66 Pa. C.S. § 1327.¹

C. Substantial Public Benefits, 66 Pa. C.S. § 1103(a)

The Applicant has the burden of proving that the acquisition will “affirmatively promote the ‘service, accommodation, convenience, or safety of the public’ in some substantial way.” 66 Pa. C.S. § 1103(a); *City of York v. Pa. PUC*, 295 A.2d 825, 828 (Pa. Cmwlth. Ct. 1972) (*City of York*); 66 Pa. C.S. § 315(c). Under *City of York*, the Commission must conduct a “net benefits assessment,” whereby the proposed substantial benefits of a transaction must outweigh the harms caused by the transaction, should the Commission approve the Application. *Popowsky v. Pa. PUC*, 937 A.2d 1040, 1056 (Pa. 2007) (*Popowsky*). To satisfy Section 1103, the utility must demonstrate that the transaction has more than the mere absence of any adverse effect upon the public. *City of York* at 828. As the Commonwealth Court explained, “when the ‘public interest’ is considered, it is contemplated that the benefits and detriments of the acquisition be measured as they impact on all affected parties, and not merely on one particular group or geographic subdivision...” *Middletown Township v. Pa. PUC*, 482 A.2d 674, 682 (Pa. Cmwlth. Ct. 1984). The Court added that “the primary objective of the law in this area is to serve the interests of the public.” *Id.*; see also *Popowsky*, 937 A.2d at 1057.

As the Supreme Court explained in *City of York*, relevant to the Commission’s determination of affirmative public benefit is the transaction’s likely effect on service and rates:

¹ Although not applicable to this transaction, for sake of completeness in discussing the valuation provisions of the Code, Section 1329 of the Code permits a “fair market value” of the acquired property to be added to rate base where the system is acquired from a municipal corporation or municipal authority and the acquisition meets the criteria of Section 1329. 66 Pa. C.S. § 1329.

[A]t least in a general fashion, the effect that a proposed merger is likely to have on future rates to consumers. Along with the likely effect of a proposed merger upon the service that will be rendered to consumers, ***the probable general effect of the merger upon rates is certainly a relevant criteria of whether the merger will benefit the public.***

City of York, 295 A.2d at 829 (emphasis added). In applying the above language from *City of York*, the Commonwealth Court held that the Commission must perform “the balancing test required by Section 1102 of the Code to weigh all the factors for and against the transaction, *including the impact on rates*, to determine if there is a substantial public benefit.” *McCloskey v. Pa. PUC*, 195 A.3d 1055, 1066-67 (Pa. Cmwlth. Ct. 2018), *alloc. denied*, 207 A.3d 290 (Pa. 2019) (*McCloskey*) (emphasis added).

Additionally, the Commission may consider: “(1) the legal and technical fitness of the purchasing entity to provide service; (2) the public need for service; (3) the inadequacy of the existing service; and (4) any other relevant evidence.” *Application of North Heidelberg Water Co.*, 2010 PaPUC LEXIS 919 (June 7, 2010), R.D. at *20. However, to qualify as benefits of a transaction, the services, expertise, or fitness provided by the acquiring utility must differ substantially from the benefits already provided by the system operator, and must be specific to the transaction in question, not merely arising out of the fitness of the acquiring utility. *Cicero v. Pa. PUC*, 300 A.3d 1106, 1119-20 (Pa. Cmwlth. Ct. 2023) (*Cicero*), *alloc. granted*, Nos. 568 MAL 2023 (Commission), 569 MAL 2023 (East Whiteland Township), 570 MAL 2023 (Aqua Pennsylvania) (all filed Oct. 26, 2023). Furthermore, the Court clarified that:

Where...there are **no benefits that differ substantially** from the benefits already being provided by the existing system operator, those alleged benefits arise as a result of the acquiring utility’s fitness, rather than from the actual transaction, and where there are acknowledged or known harms that will result from the transaction, there are insufficient net benefits to support approving the transaction and granting the [Certificate] under Section 1103(a).

Id. at 1120 (emphasis in original). The Court explained that providing the same services as are already being provided, or providing for upgrades that the existing system operator is capable of providing, are not substantial affirmative benefits consistent with *City of York*, especially if the existing system is already operating safely and reliably. *Id.* at 1119. Moreover, the public benefits arising from aspirational statements or benefits that cannot be quantified at the time of the transaction may not always constitute affirmative public benefits that will be substantial enough to outweigh known harms. *Id.* at 1121.

Finally, the Commission can impose just and reasonable conditions in granting CPC authority. 66 Pa. C.S. § 1103(a). Section 1103(a) states: “The commission, in granting such certificate, may impose such conditions as it may deem to be just and reasonable.” *Id.*

III. SUMMARY OF ARGUMENT

PAWC’s request for approval of its proposed purchase of the AUI’s water system should be denied, or alternatively conditioned, because PAWC failed to establish that the proposed transaction would result in substantial affirmative public benefit. PAWC’s averred benefits are either not benefits at all – because they do not differ in any substantial way from the technical, legal, or financial capability of AUI – or they do not outweigh the adverse rate impact on existing PAWC customers and to-be-acquired AUI customers. The rate harm of the purchase price must be considered by the Commission in its weighing of harms and benefits in determining whether the transaction as proposed would produce affirmative public benefit. Based on this record, the general probable rate harm of the proposed transaction is known and not speculative, and the timing of the rate harm is tied directly to PAWC’s next base rate case filing where it can seek to include in ratemaking rate base the acquisition premium above depreciated original cost.

While the existing shareholder of AUI wants to exit the business, AUI is a jurisdictional public utility with a statutory obligation to serve its customers pursuant to the requirements of the Public Utility Code. While undoubtedly the shareholder of AUI will benefit from being paid the proposed acquisition premium, both existing PAWC consumers and to-be-acquired AUI consumers will be harmed in the future rate case absent the Commission imposing a just and reasonable condition that no acquisition premium or goodwill amount (*i.e.*, amounts higher than depreciated original costs) may be included in PAWC's ratemaking rate base or capital structure in a future rate case.

The Commission can impose a just and reasonable condition on the certificate to enable a finding of affirmative public benefit. Given that the Public Utility Code mandates that valuation of utility property be at depreciated original cost, to protect consumer interests, any purchase price premium that exceeds depreciated original cost for the sole benefit of the AUI shareholder should be paid for by PAWC's shareholders and not ratepayers. Thus, the OCA recommends that the Commission condition approval on no acquisition premium or goodwill amount (*i.e.*, amounts higher than depreciated original costs) to be included in PAWC's ratemaking rate base or capital structure. This condition is just and reasonable and the Commission can and should impose it should it decide to approve the transaction. Absent this condition, the Commission should reject the application.

IV. ARGUMENT

A. Substantial Public Benefits Test

1. PAWC Failed to Establish That There Will Be Substantial Affirmative Public Benefits Resulting from This Application.

The proposed transaction does not create affirmative public benefit and should be denied. 66 Pa. C.S. §§ 1102, 1103; *City of York*, 295 A.2d at 828; *Popowsky*, 937 A.2d at 1057; *McCloskey*,

195 A. 3d at 1067. The known and foreseeable harms to consumers of the proposed transaction outweigh the benefits that PAWC and AUI aver will result from approval. The Commission must consider the general probable rate impact of this transaction, and in this case, there are no net benefits to the transaction given the excessive purchase price and general probable rate impact resulting therefrom. *City of York*, 295 A.2d at 829; *McCloskey*, 195 A.3d at 1066-67.

Additionally, the benefits PAWC asserts will result from the transaction are almost exclusively based on the existing shareholder of AUI wanting to exit the business and PAWC's fitness (especially as derived from its size) to run the system and not specific to the proposed transaction and are not marked improvements over the safe and reliable service already being provided by AUI. *See* OCA St. 1 at 7-13; OCA St. 1SR at 4-6, 8. The general benefits claimed by PAWC in this Application would apply to any system acquisition by PAWC and this, standing alone, is not sufficient to meet the substantial public benefit standard. *Cicero*, 300 A.3d at 1119. On the other hand, all existing PAWC and AUI customers will pay higher rates because of this transaction, and such future rate harm outweighs the few, if any, benefits of the transaction. OCA St. 1SR at 8-9. Accordingly, PAWC has failed to meet its burden of demonstrating that substantial public benefits will result from the Application's approval, that those benefits arise out of the instant transaction, and that those benefits outweigh the known or foreseeable harms which will result from approval. 66 Pa. C.S. §§ 1102, 1103; *City of York*, 295 A.2d at 828; *Popowsky*, 937 A.2d at 1057; *McCloskey*, 195 A. 3d at 1067; *Cicero*, 300 A.3d at 1119-21. Because PAWC has not demonstrated that the proposed transaction will meet the substantial public benefit standard under Sections 1102 and 1103, the instant Application must be denied. 66 Pa. C.S. §§ 1102, 1103; *City of York*, 295 A.2d at 828; *Popowsky*, 937 A.2d at 1057; *McCloskey*, 195 A. 3d at 1067.

a. **AUI's Shareholder's Desire to Exit the Business and Avoid Filing a Rate Case is Not a Public Benefit.**

PAWC and AUI assert that the Seller would benefit from the transaction because it would receive the proceeds of the transaction and be able to exist the water industry and avoid handling the pressures and challenges that the industry presents in the future. PAWC St. 1 at 18; PAWC St. 1R at 4. AUI asserts it wants to sell the system to another utility that can continue providing “the excellent service that [AUI has] managed all these years” and “manage the challenges that lie ahead”. AUI St. 1 at 2. However, an owner of a certificated public utility seeking to exit the water utility business does not equate to a troubled system or a public benefit. OCA St. 1 at 8-9; OCA 1SR at 6.

Additionally, AUI has admitted that it “is long overdue for a rate case” and claimed that a rate increase will benefit AUI’s sole shareholder, and that avoiding a rate case benefits AUI’s customers. AUI St. 1 at 4. PAWC asserts that AUI’s customers will benefit financially by becoming a part of the PAWC large customer base, allowing shared costs across a greater customer base and avoid being exposed to rate spikes due to new regulatory requirements that could result in a significant expense. PAWC St. 1 at 19, 25. However, there is no record evidence to indicate the scope or magnitude of any rate increase to AUI’s existing customers if the transaction is not approved. OCA St. 1 at 11. Furthermore, the timing and scope of any AUI rate case is within its control. *Id.* To be sure, the timing of PAWC’s next rate case is also entirely within its control, but it is also unclear based on this record when PAWC will come in for another base rate case that includes AUI customers. *Id.* When that happens, it would likely result in a rate increase to those customers but there is no record evidence to indicate the scope or magnitude of this inevitable rate increase. *Id.* The rates that AUI’s customers pay are directly tied to the rate base that was established in its last rate case that was tied to value of the system at depreciated original costs

plus AUI's prudent and reasonable expenses at that time. *Id.* However, based on PAWC's recent base rate case and acquisition activity, PAWC has made frequent and sizeable requests for general rate increases to include its investments in its systems and also its aggressive acquisition activity, and PAWC's rates also include more sizeable expenses due its large size, and PAWC's rates include application of DSIC, which AUI does not currently use or charge customers. *Id.* at 11-12.

Based on these differences between the two utilities, AUI's customers – should they become PAWC's customers – will likely face sizeable and frequent rate increases in the future. Current AUI customers using 4,000 gallons per month pay current AUI rates of \$41.68. OCA St. 1 at 6; OCA St. 1SR at 9. Using the rates that were effective on August 7, 2024, as a result of the most recent PAWC rate case order, PAWC's current Rate Zone 1 customers using 4,000 gallons would pay \$93.89 per month, or \$52.21 more each month. OCA St. 1 at 6, 12; OCA St. 1SR at 9. It would take years for AUI customers to move to Rate Zone 1 rates and, in the meantime, other customers would be subsidizing this system as noted above. OCA St. 1 at 6; OCA St. 1SR at 9. While PAWC downplays the impact of this subsidy, in the absence of real, tangible benefits to this transaction there is no apparent reason why PAWC's customers should be required to pay any revenue deficiency. OCA St. 1SR at 9.

b. PAWC's Fitness To Run the System and the Benefits Flowing From Its Fitness Are Not Substantial Affirmative Public Benefits.

Under *Cicero*, a utility applying for CPC authority for a proposed merger must demonstrate that benefits will result from the transaction which are specific to the proposed transaction and do not merely flow from the acquiring utility's fitness. *Cicero*, 300 A.3d at 1120. In that case, the utility sought Commission approval of acquisition of the seller's wastewater system, averring that the acquired customers would benefit from Aqua's managerial and technical expertise, access to capital, and other, aspirational, proposed benefits. *Id.* at 1117. The Commonwealth Court reversed

the Commission's approval, finding that the utility's reliance on general, aspirational benefits flowing from its fitness were not substantial enough to outweigh the known harms of the proposed transaction. *Id.* at 1120. Instead, the Commonwealth Court applied the *City of York* standard, holding that affirmative public benefits must arise from and be specific to a transaction, and outweigh the harms of the transaction in order to establish a substantial affirmative public benefit. *Id.*

Here, under *Cicero*, PAWC is required to present evidence that any benefits which derive from its technical, managerial, or financial fitness provide a substantial benefit over the fitness of the acquired utility. *Cicero*, 300 A.3d at 1119. PAWC has not provided evidence sufficient to prove that the approval of the instant Application would create a substantial improvement for AUI customers over the status quo.

The Joint Applicants aver several benefits; however, each of which flow from the technical, managerial, and financial fitness of the Company and are not specific to the transaction at hand. The OCA does not contest that PAWC is fit. *See McCloskey*, 195 A.3d at 1058 (certificated public utilities are presumed to be fit). However, PAWC's proposition that AUI customers would benefit from, among other things, additional capital investment by PAWC and better customer service relates more to PAWC's fitness than to the proposed transaction, specifically. Therefore, the OCA submits that these purported benefits when weighed against the rate harm and the ability of AUI to perform similarly simply perpetuate the status quo.

Along these lines, both AUI and PAWC assert that PAWC is better resourced to ensure compliance with the recent revision of the Lead and Cooper Rule, including the required lead service line inventory. PAWC St. 1 at 23; PAWC St. 1-R at 5. It may be easier for PAWC to ensure compliance, but there is no evidence that AUI cannot or will not comply and as a public

Simply put, there is nothing in the record that justifies the proposed acquisition price. Most critically to the OCA on this point, PAWC has made no commitments here to ensure that if the transaction is approved, that customers are not on the hook for paying rates for an unreasonable purchase price. Paying [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] over the depreciated original cost value of the AUI system is not a reasonable purchase price, even if it was negotiated at arms-length. As such, OCA witness DeAngelo testified that she does not believe it would be reasonable to include the amount in excess of net book value in rate base in a future proceeding. OCA St. 1 at 16-17. The Commission has held that an arms-length transaction does not in itself determine the reasonableness of the purchase price. *Pa. PUC v. Citizens Utilities Water Co. of Pa.*, 1996 PaPUC LEXIS 164 (Mar. 29, 1996), Order at *19-26 (*Citizens*). In its rejection of the utility's claim that the reasonableness of the purchase price could be inferred from the fact that it was an arms-length transaction, the Commission stated that the requirement of an arms-length negotiation is a separate requirement of Section 1327 of the Code, 66 Pa. C.S. Section 1327, and that "the fairness of the statute recognized that an arms-length transaction, even between non-affiliated entities, could produce an unreasonable price." *Citizens* at *19-20.

PAWC witness Kohl provides a comparison of purchase price per customer for PAWC's acquisitions since 2019. PAWC St. 1 at 24-25. However, while purchase price per customer is simply a comparative tool and not a test for reasonableness, the purchase price per customer for AUI is higher than three out of the four Section 1102 acquisitions in the last six years. OCA St. 1 at 14. The AUI purchase price per customer is the highest of the water utility Section 1102 (only) acquisitions, ranging between 9% and 26% higher. *Id.*

d. AUI Customers Do Not Substantially Benefit from the Additional Capital Investment Proposed by PAWC.

The AUI system is not distressed or troubled and does not need an immediate influx of capital investment to provide safe and reliable service. While PAWC has argued that the transaction would provide significant environmental benefits, PAWC relies on generalizations about its ability, as PAWC, to fix and comply with the systems' current constraints. OCA St. 1 at 7. As the largest water and wastewater utility in Pennsylvania, it is clear that PAWC has relatively more sophistication and financial and technical ability to ensure that AUI comes into and remains in compliance with all of DEP reporting requirements more quickly than AUI could on its own. However, it is not at all certain that any of the planned improvements that PAWC asserts that it will make are meant to address those issues that PAWC considers to be areas of failure for AUI.

PAWC witness Everette testified that AUI's financial position does not indicate it is capable of financing significant capital improvements and that, "PAWC makes substantial investment into its systems each year and is fully capable of making needed investment into the Appalachian system." PAWC St. 3-R at 7-8. However, there are resources available such as low-interest loans and grants from PENNVEST that AUI could apply for, which could help mitigate some of the costs for design, engineering, and construction. OCA St. 1SR at 8-9. Furthermore, as a jurisdictional public utility, AUI could file a rate case to seek rate relief if its revenues are insufficient. OCA St. 1 at 11.

e. PAWC Will Not Be Able to Provide Substantially Better Customer Service to AUI Customers.

PAWC witness Kohl claims the System's customers will benefit from the enhanced and proven customer service that PAWC provides. PAWC S. 1 at 23. PAWC witness Guntrum also testified that PAWC's call center is available from 7:00 a.m. to 7:00 p.m., Monday through Friday

the acquisition of the AUI system by PAWC is not occurring in a vacuum. PAWC's current customers will also be affected by the increase in rates which will arise out of PAWC's pending Section 1329 acquisitions. While this transaction is not a Section 1329 acquisition, existing PAWC customers will see substantial rate harms, should this Application, and other applications under Section 1329, be approved. PAWC and AUI have failed to produce any evidence as to potential substantial benefits which existing PAWC customers will see as a result of this transaction. Simply put, the record is replete with harm and devoid of benefit. PAWC's existing customers should not be responsible for covering the AUI revenue deficiency that results from an unreasonable purchase price.

Likewise, as noted above, AUI's customers – should they become PAWC's customers – will likely face sizeable and frequent rate increases in the future. Current AUI customers using 4,000 gallons per month pay current AUI rates of \$41.68. OCA St. 1 at 6; OCA St. 1SR at 9. Using the rates that were effective on August 7, 2024, as a result of the most recent PAWC rate case order, PAWC's current Rate Zone 1 customers using 4,000 gallons would pay \$93.89 per month, or \$52.21 more each month. OCA St. 1 at 6, 12; OCA St. 1SR at 9. It would take years for AUI customers to move to Rate Zone 1 rates and, in the meantime, other customers would be subsidizing this system as noted above. OCA St. 1 at 6; OCA St. 1SR at 9. While PAWC downplays the impact of this subsidy, in the absence of real, tangible benefits to this transaction there is no apparent reason why PAWC's customers should be required to pay any revenue deficiency. OCA St. 1SR at 9.

Finally, the rate impact to customers – whether they are current PAWC customers or the to-be-acquired AUI customers – will not occur until the first rate case post-acquisition. This, of

course, is merely a delay of a known harm not a neutralization of that known harm. It is also does not make the known rate harm less probable or speculative. OCA St. 1SR at 7.

g. There Is No Net Benefit to the Proposed Transaction Arising Out of PAWC's Claim of Environmental Benefits, Regionalization, and Consolidation.

PAWC's claims regarding economic, environmental, and regionalization benefits appear more in line with PAWC's fitness as a large, investor-owned utility. Where an Application under Sections 1102 and 1103 of the Public Utility Code relies on benefits which flow from the acquiring utility's fitness, as opposed to benefits which arise specifically from the transaction, those benefits cannot be considered substantial. *Cicero*, 300 A.3d at 1119. Instead, purported benefits must be specific to the transaction, even if aspirational, to be able to outweigh any known or foreseeable harms which would result from the transaction. *Id.*

In *CMV*, the Commission concluded that the adverse impacts of the proposed transaction for the existing customers outweighed the benefits. *CMV v. Pa. PUC*, 2008 PaPUC LEXIS 950 (Dec. 23, 2008), Order at *30. While the CMV system might have required upgrades to comply with stricter environmental requirements at an unknown future date, the Commission emphasized the acquired system's compliance with applicable environmental regulations at the time of the application. *Id.* The Commission could not rely on the presented evidence to determine the cost of any required, future upgrades to the target system. *Id.*

Here, the AUI system is in a similar position to that of the target system in *CMV*. While PAWC has made aspirational assurances that the Company would be able to make such upgrades at a lower cost than AUI due to its size and technical fitness, PAWC has failed to quantify any potential savings. There is not sufficient evidence for the Commission to rely on PAWC's aspirations that long-term ownership under PAWC will actually be a substantial benefit to consumers.

There are no benefits relating to regionalization and consolidation in this Application. PAWC indicated that the system will be a standalone system, and it does not plan any physical interconnection of the AUI system with any other PAWC water systems. OCA St. 1 at 7. While regionalization and consolidation could constitute a public benefit even if a system is not interconnected, PAWC has not demonstrated here that consumer benefits will be enhanced and outweigh the harms. OCA St. 1SR at 5. All transactions with PAWC allow PAWC to bring its expertise, access to capital, and employees to the table; however, such is really about PAWC's size and technical and legal fitness, which the OCA does not dispute. *Id.* Moreover, if every acquisition PAWC makes is at a premium, the harm of the cumulative rate impact of increased rates on consumers would be substantial. *Id.* It is not clear how consolidation of water companies at cumulative inflated rate base values will sincerely create an affirmative public benefit. *Id.* There is no legislation, statute, or Commission regulation, order or policy that says regionalization and consolidation must be achieved by PAWC or that it should be achieved by PAWC by its ad hoc acquisitions of systems at premiums that get recovered through utility rates at rate base values exceeding depreciated original cost. *Id.* Additionally, as PAWC continues to grow at a rapid pace through frequent acquisition activity, its business risks grow with it, including service quality issues, labor shortages, increased operational costs, customer complaints, potential under-earning, and potential security risks, and these risks need to be considered as part of regionalization and consolidation. *Id.*

Relatedly, aside from a general claim of economies of scale (of spreading costs over larger customer bases, PAWC St. 1 at 25), PAWC has claimed that laboratory costs will be reduced due to PAWC's handling of laboratory analysis in-house. PAWC St. 1 at 17. PAWC also claims the acquisition "would conserve resources of the Commission, which will no longer need to review

filings from two separate public utilities.” PAWC St. 1 at 17. PAWC has not demonstrated with substantial evidence that any costs will decrease with the acquisition of the AUI ratepayers. PAWC has not identified, with any reliable degree of specificity, any quantification of Operation and Maintenance (O&M) synergies, especially given that the system will be operated on a standalone basis. *See* OCA St. 1 at 7-8. As there are no known synergies that will occur as the result of the proposed transaction, the cost of the AUI system will very likely be higher under PAWC’s ownership.

PAWC has not provided any projections of its anticipated costs of owning and operating the AUI system. While merely claiming consolidation, PAWC has failed to quantify any cost savings or other synergies. Rather than demonstrating any affirmative benefit resulting from consolidation, PAWC provided vague and illusory generalizations that are unsupported by the record.

h. There Are No Net Affirmative Public Benefits to This Transaction.

When considering the long-term rate impact of the proposed transaction to both PAWC and AUI customers, the Joint Applicants have not provided evidentiary support to establish that net benefits will result. To the extent that PAWC has alleged any benefits exist, with the exception of PAWC’s ability to provide a low-income discount program, those benefits result entirely from PAWC’s fitness, are not specific to this transaction, and do not differ substantially from the service currently provided by AUI. As a result, PAWC has failed to meet its burden of its proof under Section 1103 of the Public Utility Code, as interpreted by the Commonwealth and Supreme Courts, to establish that net benefits would result from the proposed transaction. Where a utility is unable to establish a net benefit would result from an Application under Section 1102, the Commission

should reject that Application. *City of York*, 295 A.2d at 141. Therefore, the OCA respectfully requests that PAWC's Application be denied.

2. Delaying the Consideration of Rate Impact Is Against Commonwealth Precedent

a. The Rate Harm of the Purchase Price Must Be Properly Considered in the Weighing of Harms and Benefits under Sections 1102/1103.

To determine the general probable rate impact of the transaction, the Commission must consider the depreciated original book value of the system assets and the purchase price and the probable acquisition premium that PAWC could claim in rate base in a future rate case. PAWC asserts that it is unnecessary to examine this information because if the transaction is approved as proposed, shareholders will bear the risk of future recovery of the difference between the depreciated original cost of the systems and the purchase price, and that approving the transaction as filed does not provide any certainty for future recovery. PAWC St. 3-R at 3-7; PAWC St. 3-RJ at 3. PAWC argues that the Commission should disregard the OCA's position about the rate harm resulting from this transaction because PAWC can elect to defer a Commission ratemaking rate base determination until its next filed rate case by not making a ratemaking claim under Section 1327 in this Section 1102/1103 Application proceeding. PAWC St. 3-R at 5-7.

PAWC is wrong and its position is contrary to Commonwealth precedent. The Commission need not (and is not being requested to) make a ratemaking rate base determination in this proceeding. Rather, in accordance with the law, the Commission must consider evidence of the record that shows the general probable effect upon rates and then it must determine if the benefits of the transaction outweigh the adverse rate impact. *See City of York*, 295 A.2d at 829; *McCloskey*, 195 A.3d at 1066-67. The law on this point is clear. To determine if the transaction will result in affirmative public benefit, the Supreme Court stated in *City of York* that the transaction's likely effect on service and rates is relevant criteria that the Commission must consider:

[A]t least in a general fashion, the effect that a proposed merger is likely to have on future rates to consumers. Along with the likely effect of a proposed merger upon the service that will be rendered to consumers, ***the probable general effect of the merger upon rates is certainly a relevant criteria of whether the merger will benefit the public.***

City of York, 295 A.2d at 829 (emphasis added). In applying the above language from *City of York*, the Commonwealth Court held that the Commission must perform “the balancing test required by Section 1102 of the Code to weigh all the factors for and against the transaction, *including the impact on rates*, to determine if there is a substantial public benefit.” *McCloskey*, 195 A.3d at 1066-67 (emphasis added). Therefore, the Commission must consider the probable rate impact based on the substantial evidence in this proceeding. This consideration must consider what would occur if the full cost of the acquisition is allowed to be collected from customers in a future proceeding.

Based on this record, if this transaction is approved as proposed, existing and acquired customers will likely have to pay for at least a [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] acquisition premium over net book value for the existing assets and additional amounts for the planned capital improvements to the AUI system in addition to the operations and management of the system. PAWC estimates that under PAWC ownership, and including capital investment projected by PAWC, the system will have revenue deficiencies of at least [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] per year. OCA St. 1R at 5, 12; OCA St. 1SR at 8. PAWC has not provided any analysis or financial modeling that shows how an acquisition that results in paying [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] over book value while under recovering its revenue requirement is financially rational. The only justification PAWC provides is that it has the financial resources. However, the use of PAWC’s financial resources comes with a cost that has to be repaid by someone. Given that there are no

benefits that outweigh this harm to consumers, there can be no finding of an affirmative net public benefit if PAWC will seek to have its customers pay for this excessive price. Where there is no benefit, and instead there will be harm to PAWC's existing and acquired customers, the Commission should either deny the acquisition or condition its approval on a limitation of the amount that PAWC can include in rate cases.

b. The General Probable Rate Harm of the Proposed Transaction is Known and Not Speculative Based on this Record.

The general probable rate harm of the proposed transaction is known and not speculative based on this record. PAWC argues that the acquisition adjustment for amounts above original cost less depreciation is speculative because “the [depreciated original cost] amount for the [AUI] System will be dependent on the date of closing and so the exact amount is not currently known. It is not a static number as [OCA witness] Ms. DeAngelo’s testimony indicates.” ” PAWC St. 3-RJ at 2. PAWC’s argument is correct in that depreciated original cost (i.e., net book value always changes, but it is sophistic in that it is meant to mislead and distract from the fact that there is a significant gap between the value of the system that it seeks to acquire and the purchase price that it agreed to pay. Based on the record, the purchase price and the net book value of the assets are known at a point in time, and any further depreciation of the assets will not create dynamic changes in book value as PAWC asserts, but rather there will be measured and known reductions in the book value between the close of the record and the closing date of the acquisition. Such depreciation of the assets will only serve to widen the gap between the purchase price and net book value of the assets, which will effectively increase the purchase price premium over and above the [BEGIN CONFIDENTIAL] █████ [END CONFIDENTIAL]. Moreover, any additional improvements to the system assets will only serve to further increase the revenue deficiency from

the amount known in this record. In other words, the rate harm can only get worse not better between the close of the record and the closing date of the acquisition.

Furthermore, despite PAWC's assertion to the contrary, there need not be precision to consider the general probable effect of the transaction on rates. On this point, the Commonwealth Court explained:

Because *City of York* requires the impact on rates to be considered, the Commission must address that impact when deciding whether there is substantial public benefit. ***Contrary to its contention that impact on rates can only be addressed in a rate base case, the impact on rates can be addressed without all the cost-of-service studies, rate base valuations or rate-of-return calculations.***

McCloskey, 195 A.3d at 1066 (emphasis added). Hence, the general probable effect on rates must be addressed in determining whether the transaction will result in affirmative public benefit; however, it can be without all the formality of cost-of-service studies, rate base valuations or rate-of-return calculations that would typically be found in the record of a rate case. *Id.* Thus, the Commission has all the information it needs based on this record to consider the rate impact and therefore should reject PAWC's argument that the potential for rate harm is speculative.

PAWC further asserts that the rate harm is speculative because PAWC's management can decide to not make a Section 1327 ratemaking rate base claim for the purchase price premium in its next rate case. PAWC St. 3-R at 5-6; PAWC St. 3-RJ at 2. This argument is meritless. PAWC is in complete control of the claims it makes in its rate cases, and therefore it should be known already to PAWC's management at the time of this Section 1102 Application proceeding whether it plans to make a ratemaking claim in its next filing or not make a claim at shareholder expense. The idea that PAWC's management is not certain now whether it will or will not make a ratemaking claim in its next rate case for the purchase price premium is not credible. More importantly, to the extent PAWC's argument is that the Commission could deny such a claim,

PAWC has made no showing in this record that nonrecovery of the purchase price premium is a highly likely risk facing its shareholders because it has failed to show the frequency and magnitude of the Commission denying utility claims to recover purchase price premiums in rate cases following Section 1102 approval (as opposed to the Company's management deciding within its control as part of resolution of a case to not make claim or to reduce its claim). Thus, both AUI and PAWC customers will likely be required to bear the burden of this transaction instead of PAWC's shareholders.

c. The Commission's Foundational Gatekeeping Authority under Section 1102/1103 Is Not Tied By the Section 1327 Valuation Provision of the Statute.

While the OCA recommends that the acquisition be denied due to the rate harm, alternatively the OCA recommends that the Commission impose a just and reasonable condition on the CPC authority in accordance with its authority under Section 1103(a). 66 Pa. C.S. § 1103(a). While all the conditions are discussed further below in Section IV.B., relevant here is the OCA's recommended condition that the Commission disallow any amount of the purchase price to be placed in rate base above the depreciated original cost (*i.e.*, net book value) of utility plant in service. OCA St. 1 at 16. The depreciated original cost of the system is at least \$1,396,252 as of December 31, 2023. OCA St. 1R at 5.

Every statute shall be construed, if possible, to give effect to all its provisions, governing presumptions are that the General Assembly intended the entire statute at issue to be effective and certain, and that the General Assembly does not intend an absurd result or one that is impossible of execution. *See* 1 Pa. C.S. §§ 1921(a), 1922(1)-(2); *see also* *Wayne M. Chiurazzi Law Inc. v. MRO Corp.*, 97 A.3d 275, 292 (Pa. 2014). Here, reading Section 1327 and 1102/1103 together, the election right provided to the utility under Section 1327 merely affects the notice obligations that the utility must meet at the time of its Section 1102 application. Indeed, if the utility elects to

seek a Section 1327 determination outside of a base rate case, the utility must provide notice to customers as part of its Section 1102 application proceeding. 66 Pa. C.S. § 1327(b). Here, PAWC chose not to provide the required notice to customers in this proceeding. However, PAWC's election to avoid more burdensome notice obligations does not limit or relieve the Commission from its statutory obligation to conduct the weighing of benefits and harms based on the risk that customers will potentially have to pay an excessive purchase price in rate base and cover the excessive annual revenue deficiencies of the AUI system given the unreasonable purchase premium. While this may not be a rate proceeding under Section 1327, it remains that the Commission has express authority to condition its approval of the transaction on certain conditions being met. *See* 66 Pa. C.S. § 1103(a) ("The commission, in granting such certificate, may impose such conditions as it may deem to be just and reasonable."). The Commission can exercise its broad discretion under Section 1103(a) based on this record to impose the just and reasonable condition to limit the future recovery associated with this purchase price given the known rate harms.

d. PAWC's Erroneous Reliance on Scranton Should Be Rejected.

PAWC erroneously relies on the Commission's decision in *Scranton*² for the proposition that an application proceeding is not the appropriate place to consider the potential rate impact of this acquisition in determining whether there is an affirmative public benefit. PAWC St. 3-R at 9-10. *Scranton* is not applicable here as a matter of law because the Commission's decision in *Scranton* was decided before *McCloskey*, where the Commonwealth Court reaffirmed and clarified the *City of York* holding – a holding that is applicable to all applications brought under Section

² *Joint Application of Pennsylvania-American Water Co. and the Sewer Authority of the City of Scranton*, A-2016-2537209 (Oct. 19, 2016), Order.

1102 and adjudicated under Section 1103, including but not limited to Section 1329 applications – that all factors must be considered, including rate impact, to determine if a transaction will result in net benefit. *McCloskey*, 195 A.3d at 1067.

In *McCloskey*, the Court rejected the argument that, because at the time of the application proceeding, the buyer had not yet proposed any changes in the rates to existing or acquired ratepayers, “and without cost studies, potential cost allocation or possible rate designs, the Commission would be asked to determine the impact on rates without sufficient or substantial evidence” *McCloskey*, 195 A.3d at 1066-67. Where the record provides substantial evidence regarding the impact on rates of adding the purchase price to rate base – here, under Section 1327(a) versus Section 1329 – the impact on rates must be addressed in the Commission’s weighing of whether substantial affirmative benefits will result from the proposed transaction. *Id.*

Simply, by approving the sale and then putting off the consideration of the impact on rates to a later rate base proceeding, the Commission cannot do the balancing test required by Section 1102 of the Code to weigh all the factors for and against the transaction, including the impact on rates, to determine if there is a substantial public benefit. It is in this proceeding that the Commission is charged with deciding whether the impact on rates based on the OCA's undisputed evidence was outweighed by the other positive factors that the acquisition served a substantial public benefit. Because it did not do so, this matter is remanded to the Commission to make that determination, including the propriety of the rate restriction on New Garden ratepayers set forth in the APA.

McCloskey, 195 A.3d at 1067.

While *McCloskey* dealt with an application brought under Section 1329, where the ratemaking rate base is determined as a part of the application proceeding, the Commonwealth Court’s analysis is equally applicable here because the rate impact is a clear and quantifiable harm that the Commission must consider in its overall balancing and determination of whether there is an affirmative public benefit. As such, the Commission cannot rely on *Scranton* for the proposition that it can turn a blind eye to the rate impact associated with the transaction and leave for another

day a determination of rates, which is exactly what PAWC wants the Commission to do. It defies logic, common sense and, most significantly, the Commonwealth Court's precedent for the PAWC to argue that the Commission could not or should not consider that fact in determining whether there is an affirmative public benefit.

e. **OSBA's Proposal to Use the Reasonableness Review Ratio Outside of the Context of a Section 1329 Proceeding is Unreasonable.**

OSBA witness Higgins states that he does not oppose the merger between PAWC and AUI. OSBA St. 1 at 3-4. However, OSBA witness Higgins identifies an acquisition premium resulting from the difference between the purchase price and the net book value of the purchased assets. *Id.* Mr. Higgins recommended that, if the merger is approved, and PAWC seeks to include the acquisition premium in rate base, the Commission should allow only 34% of the acquisition premium in rate base. *Id.*

OSBA witness Higgins bases his recommended acquisition premium limit by using the Reasonableness Review Ratio (RRR), a new valuation metric that the Commission has adopted in evaluating Section 1329 applications. OSBA St. 1 at 9. The RRR would be equal to the ratio of fair market value to depreciated original cost of a barometer group of similarly situated investor-owned water utility companies. *Id.* According to OSBA, "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." OSBA St. 1 at 9. OSBA further states that the Commission calculates that the RRR is 1.68 and that an acquisition premium of 34% above depreciated original cost would be reasonable for inclusion in rate base. *Id.* at 9-10.

The OCA disagrees that applying the RRR to the proposed transaction in this proceeding is reasonable. Fair market value was never established in this proceeding as the Application was not filed under Section 1329 of the Public Utility Code – nor could it be as that provision of the

Code is not applicable to transactions between public utilities – and the RRR is intended to be a check on reasonableness for fair market value. *Implementation of Section 1329*, M-2016-2543193 (Feb. 1, 2024), Final Supplemental Implementation Order (Order entered July 2, 2024). While used a point of reference for Section 1329 cases, the RRR is not a binding norm and establishes no legal obligation on the parties or the Commission.

As discussed in the OCA’s comments to the TSIO, the Reasonableness Review Ratio should not be considered a test of presumptive reasonableness or a determination that the application is in the public interest if the transaction meets this guidepost. In the OCA’s view, if used at all, it is a check on reasonableness that should be used as one factor, among many others, for determining whether an acquisition under Section 1329 is in the public interest. The proposed transaction, however, is not a Section 1329 acquisition. As such, the use of the Reasonableness Review Ratio is inappropriate for the instant transaction. OCA St. 1R at 4.

B. Recommended Conditions for Approval

PAWC has failed to demonstrate the necessary affirmative public benefits required for approval of this Application given the probable rate harm at the price negotiated by the PAWC and AUI. The purchase price of the system to be acquired is excessive with respect to the net book value of the AUI system, and both AUI and PAWC customers will likely be required to bear the burden of this transaction instead of PAWC’s shareholders. Where a utility is unable to establish that, based on the facts of the specific Application, an affirmative public benefit would result from an Application under Section 1102, the Commission must reject that Application. *City of York* at 828. Therefore, the OCA respectfully requests that PAWC’s Application be rejected.

Alternatively, to meet the affirmative public benefits standard, the Commission can exercise its express authority under Section 1103(a) to impose conditions that it deems just and

reasonable when granting certificate of public convenience (CPC) authority. 66 Pa. C.S. § 1103(a). The OCA recommends that following conditions be imposed in granting CPC authority as follows:

- No acquisition premium or goodwill amount, *i.e.*, amounts higher than depreciated original costs, may be included in PAWC’s ratemaking rate base or capital structure in a future rate case.
- At the time of filing its next base rate case, PAWC will submit a cost of service study that removes all costs and revenues associated with the operation of the AUI system and will also provide a separate cost of service study for the AUI system.

OCA St. 1 at 17-18. The above conditions are just and reasonable and supported by the substantial evidence of record.

Section 1103(a) states: “The commission, in granting such certificate, may impose such conditions as it may deem to be just and reasonable” and “[a]ny holder of a certificate of public convenience . . . shall be deemed to have waived any and all objections to the terms and conditions of such certificate.” *Id.* The Commission has broad authority and discretion to impose conditions that it may deem to be just and reasonable when granting CPC authority. 66 Pa. C.S. § 1103(a). As a matter of law, a Commission grant of CPC authority pursuant to 66 Pa. C.S. §§ 1102-1103, is a revocable privilege and not a property right. *Western Pa. Water Co. v. Pa. PUC*, 311 A.2d 370 (Pa. Cmwlth. 1973) (“[A] certificate of public convenience is neither a contract nor a property interest under which its holder acquires vested rights. The certificate is a privilege granted by the Commonwealth.”). Because Pennsylvania jurisdictional utilities have no property right in the certificates they hold, the Commission has the authority to grant, deny, or even condition a utility’s request to begin, transfer, or abandon service or acquire utility property. *Borough of Duncannon v. Pa. PUC*, 213 A.2d 139 (Pa. Super. 1965); *Modern Transfer v. Pa. PUC*, 125 A.2d

463 (Pa. Super. 1956). Indeed, as the Commonwealth Court stated in upholding the Commission’s exercise of its authority to impose conditions when granting CPC authority:

Notably, Chapter 11 has endowed the PUC with the authority to impose conditions upon a certificate of public convenience “as it may deem to be just and reasonable,” and “[a]ny holder of a certificate of public convenience . . . shall be deemed to have waived any and all objections to the terms and conditions of such certificate.”

Twin Lakes Utils. v. Pa. PUC, 281 A.3d 384, 390 (Pa. Cmwlth. 2022) (*Twin Lakes*) (citing 66 Pa. C.S. § 1103(a)) (upholding the Commission’s imposition of a \$1.675 million escrow condition on the granting of CPC authority under the unique factual circumstances of the case).

To protect consumer interests, any purchase price premium that exceeds depreciated original cost for the sole benefit of the AUI shareholder should be paid for by PAWC’s shareholders and not ratepayers. Section 1311(b) of the Public Utility Code mandates that valuation of utility property be at depreciated original cost, and this record demonstrates the rate harm to consumers if the transaction is approved as proposed. Thus, the OCA recommends that the Commission condition approval on no acquisition premium or goodwill amount (i.e., amounts higher than depreciated original costs) to be included in PAWC’s ratemaking rate base or capital structure. This condition is just and reasonable and the Commission can and should impose it in the event it decides to approve the transaction. Absent this condition, the Commission should reject the Application.

The Commission should reject any argument by PAWC that the OCA’s recommended condition to exclude the acquisition premium from ratemaking rate base would violate the rules of statutory construction or violate the constitutional non-delegation doctrine by effectively repealing Section 1327. Such arguments are meritless. First, there is no ambiguity in Section 1103 as to the Commission’s authority and discretion to impose just and reasonable conditions that would necessitate statutory interpretation to determine legislative intent. “When words of a statute are

clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.” 1 Pa. C.S. § 1921(b). When the General Assembly selects the words to use in a statute, it has chosen them purposefully. *See also Commonwealth v. Scolieri*, 813 A.2d 672, 673-74 (Pa. 2002).

Next, every statute shall be construed, if possible, to give effect to all its provisions; however, the governing presumptions are that the General Assembly intended the entire statute at issue to be effective and certain, and that the General Assembly does not intend an absurd result or one that is impossible of execution. *See* 1 Pa. C.S. §§ 1921(a), 1922(1)-(2); *see also Wayne M. Chiurazzi Law Inc. v. MRO Corp.*, 97 A.3d 275, 292 (Pa. 2014). As discussed above, reading Section 1327 and 1102/1103 together, the election right provided to the utility under Section 1327 merely affects the notice obligations that the utility must meet at the time of its Section 1102 application. Indeed, if the utility elects to seek a Section 1327 determination outside of a base rate case, the utility must provide notice to customers as part of its Section 1102 application proceeding. 66 Pa. C.S. § 1327(b). Here, PAWC chose not to provide the required notice to customers in this proceeding. However, PAWC’s election to avoid more burdensome notice obligations does not limit or relieve the Commission from its statutory obligation to conduct the weighing of benefits and harms or its authority to condition the grant of CPC authority.

Such argument, if adopted, would artificially constrain the Commission’s foundational, gatekeeping statutory authority and responsibility to do the necessary weighing of harms against benefits under Section 1103(a). The Commission does not need to wait until PAWC files its next rate case and elects to provide the Section 1327-mandated notice to customers in seeking a positive acquisition adjustment under Section 1327(a) to address the rate harm demonstrated in this record. Indeed, adoption of such argument would produce an absurd result or one that is impossible of

execution where the utility and only the utility can control and determine the type and level of record evidence that the Commission can review and weigh when considering the general probable rate impact of the acquisition in an 1102 Application, a result that is contrary to the standards articulated under Section 1103(a), *City of York*, and *McCloskey*.

Further, no party – including the OCA – is asking the Commission to make or repeal laws. Instead, what the OCA requests is that the Commission exercise its authority under Section 1103(a) to impose just and reasonable conditions on its grant of CPC authority. The Commission should reject any attempt to twist the OCA’s request into an argument that the OCA is trying to render Section 1327 as a nullity, which is a disingenuous reading of the OCA’s position.

Finally, if PAWC or AUI are dissatisfied with the condition, they could simply choose to not close the transaction given that the Commission’s grant of CPC authority merely serves as permission to proceed with the transaction, and not as a mandate requiring the parties to close the transaction. This reality is recognized by function of Commission orders which typically require first the utility to notify the Commission when the closing takes place and second the Secretary to then issue the CPC evidencing the utility’s authority to acquire the assets and serve the customers of the acquired system. 66 Pa. C.S. §§ 1102, 1103.³

³ See *Application of Aqua Pa. Wastewater, Inc.*, A-2021-3027268 (Letter re: Termination of APA May 12, 2023) (“Based on this correspondence terminating the APA, the Transaction will not be proceeding to closing and Aqua will not be providing the Commission notice that the Transaction has closed”), available at <https://www.puc.pa.gov/pcdocs/1785100.pdf>.

V. CONCLUSION

For the reasons stated above, the Application should be denied or, if not denied should be granted only upon the conditions outlined herein. PAWC and AUI have failed to meet their burden of proof under Section 1102 and 1103.

Office of Consumer Advocate
555 Walnut Street
5th Floor, Forum Place
Harrisburg, PA 17101-1923
Phone: 717-783-5048
Fax: 717-783-7152

Dated: October 23, 2024

Respectfully submitted,
/s/ Melanie Joy El Atieh
Melanie Joy El Atieh
Deputy Consumer Advocate
PA Attorney I.D. # 209323
MElAtieh@paoca.org

Counsel for:
Patrick M. Cicero
Consumer Advocate

12. AUI witness Frank Sargent Jr. indicated there are several reasons he wants to sell the Company, concluding that he wants to retire, “ensuring that the Company we have shepherded for almost 30 years, is in good hands and will continue to provide excellent service that we have managed all these years.” AUI Statement No 1 at 2.
13. Mr. Sargent, Jr. also stated, “My other goal is to reward the loyalty and dedication of a key and outstanding employee of Appalachian, Mr. Kyle Gallagher, who is the Co-Director and Operations Manager of Appalachian, by transferring him, 40% of the shares of Appalachian stock prior to the sale of the Company.” AUI Statement No 1 at 2.
14. Mr. Sargent indicated he “wanted to make sure that the system and operations were in a position to continue to improve and manage the challenges that lie ahead so as to promote great service to customers.” AUI Statement No 1 at 2.
15. Aside from the purchase price premium and the resulting revenue deficiencies, AUI’s customers – should they become PAWC’s customers – will likely face sizeable and frequent rate increases in the future. OCA St. 1 at 6; OCA St. 1SR at 9.
16. Based on existing rates alone, current AUI customers using 4,000 gallons per month pay current AUI rates of \$41.68. OCA St. 1 at 6; OCA St. 1SR at 9.
17. Using the rates that were effective on August 7, 2024, as a result of the most recent PAWC rate case order, PAWC’s current Rate Zone 1 customers using 4,000 gallons would pay \$93.89 per month, or \$52.21 more each month. OCA St. 1 at 6, 12; OCA St. 1SR at 9.
18. It would take years for AUI customers to move to PAWC’s Rate Zone 1 rates and, in the meantime, other customers would be subsidizing this system. OCA St. 1 at 6; OCA St. 1SR at 9.
19. There are no plans to physically interconnect this system and PAWC plans to run it as a standalone system. PAWC Statement No. 2 at 5.
20. AUI is currently an operating water utility that does not have any known Department of Environmental Protection (DEP) violations or Corrective Action Plans. OCA St. 1 at 9; Exh. MND-1.
21. Public utility corporations have an existence that is separate from its owners/shareholders. This means they can continue operating even after an owner’s/shareholder’s retirement and they must continue operating where a Commission certificate is granted. OCA St. 1 at 9.
22. There is no record evidence to indicate the scope or magnitude of any rate increase to AUI’s existing customers if the transaction is not approved. OCA St. 1 at 11.
23. The timing and scope of any AUI rate case is within its control. OCA St. 1 at 11.
24. The timing of PAWC’s next rate case is entirely within PAWC’s control, and it is also unclear based on this record when PAWC will come in for another base rate case that includes AUI customers. OCA St. 1 at 11.

25. Based on PAWC's recent base rate case and acquisition activity, PAWC has made frequent and sizeable requests for general rate increases to include its investments in its systems and also its aggressive acquisition activity, and PAWC's rates also include more sizeable expenses due its large size, and PAWC's rates include application of DSIC, which AUI does not currently use or charge customers. OCA St. 1 at 11-12.
26. PAWC has not identified the existence of either company-owned (from main to curb stop) or customer-owned lead service lines in the AUI system at this time. OCA St. 1 at 12; Exh. MND-3.
27. PAWC's call center is available from 7:00 a.m. to 7:00 p.m., Monday through Friday for routine business and 24/7/365 for emergency situations. PAWC Statement No. 2 at 14.
28. PAWC offers its customers the ability pay their bills by mail, online, over the phone, by e-check or in-person at an authorized payment location. PAWC Statement No. 2 at 15.
29. There are resources available to AUI such as low-interest loans and grants from PENNVEST that AUI could apply for, which could help mitigate some of the costs for design, engineering, and construction. OCA St. 1SR at 8-9.
30. As a jurisdictional public utility, AUI could file a rate case to seek rate relief if its revenues are insufficient. OCA St. 1SR at 9.
31. If every acquisition PAWC makes is at a premium, the harm of the cumulative rate impact of increased rates on consumers would be substantial. OCA St. 1SR at 5.
32. It is not clear how consolidation of water companies at cumulative inflated rate base values will sincerely create an affirmative public benefit. OCA St. 1SR at 5.
33. There is no legislation, statute, or Commission regulation, order or policy that says regionalization and consolidation must be achieved by PAWC or that it should be achieved by PAWC by its ad hoc acquisitions of systems at premiums that get recovered through utility rates at rate base values exceeding depreciated original cost. OCA St. 1SR at 5.
34. As PAWC continues to grow at a rapid pace through frequent acquisition activity, its business risks grows with it, including quality issues, labor shortages, increased operational costs, customer complaints, potential under-earning, and potential security risks, and these risks need to be considered as part of regionalization and consolidation. OCA St. 1SR at 5.
35. The Application was not filed under Section 1329 of the Public Utility Code. *See generally* Application.

OCA Proposed Conclusions of Law

1. As the proponent of an order in this proceeding, PAWC has the burden of proof to establish that it is entitled to the relief it is seeking. 66 Pa. C.S. § 332(a).
2. PAWC must demonstrate its case by a preponderance of evidence. *Lansberry v. Pa. PUC*, 578 A.2d 600, 602 (Pa. Cmwlth. Ct. 1990).
3. PAWC's evidence supporting the Applicant's case must be more convincing than the evidence presented by any opposing party against it. *Se-Ling Hosiery, Inc. v. Margulies*, 70 A.2d 854, 856 (1950).
4. A Commission decision must be supported by substantial evidence in the record. *Burleson v. Pa. PUC*, 461 A.2d 1234, 36 (1983).
5. The evidence must be substantial and legally credible, and cannot be mere "suspicion" or a "scintilla" of evidence. *Norfolk & Western Ry. Co. v. Pa. PUC*, 413 A.2d 1037 (Pa. 1980).
6. The Applicant has the burden of proving that the acquisition will "affirmatively promote the 'service, accommodation, convenience, or safety of the public' in some substantial way." *City of York v. Pa. PUC*, 295 A.2d 825, 828 (Pa. Cmwlth. Ct. 1972).
7. The Commission must conduct a "net benefits assessment," whereby the proposed substantial benefits of a transaction must outweigh the harms caused by the transaction, should the Commission approve the Application. *Popowsky v. Pa. PUC*, 937 A.2d 1040, 1056 (Pa. 2007).
8. The Commission's determination of affirmative public benefit is the transaction's likely effect on service and rates: "[A]t least in a general fashion, the effect that a proposed merger is likely to have on future rates to consumers. Along with the likely effect of a proposed merger upon the service that will be rendered to consumers, *the probable general effect of the merger upon rates is certainly a relevant criteria* of whether the merger will benefit the public." *City of York*, 295 A.2d at 829 (emphasis added).
9. In applying the above language from *City of York*, the Pennsylvania Commonwealth Court recently held that the Commission must perform "the balancing test required by Section 1102 of the Code to weigh all the factors for and against the transaction, *including the impact on rates*, to determine if there is a substantial public benefit." *McCloskey v. Pa. PUC*, 195 A.3d 1055, 1066-67 (Pa. Cmwlth. 2018), *alloc. denied*, 207 A.3d 290 (Pa. 2019) (*McCloskey*) (emphasis added).
10. The Commission must consider evidence of the record that shows the general probable effect upon rates and then it must determine if the benefits of the transaction outweigh the adverse rate impact. *See City of York*, 295 A.2d at 829; *McCloskey*, 195 A.3d at 1066-67.

11. The Commission is charged with deciding whether the impact of rates is outweighed by other positive factors that served as a substantial public benefit. *McCloskey v. Pa. PUC*, 195 A.3d 1055, 1067 (Pa. Cmwlth. 2018).
12. To qualify as benefits of a transactions, the services, expertise, or fitness provided by the acquiring utility must differ substantially from the benefits already provided by the system operator, and must be specific to the transaction in question, not merely arising out of the fitness of the acquiring utility. *Cicero v. Pa. PUC*, 300 A.3d 1106, 1119-1120 (Pa. Cmwlth. Ct. 2023).
13. There are no benefits that differ substantially from the benefits already being provided by the existing system operator, those alleged benefits arise as a result of the acquiring utility's fitness, rather than from the actual transaction, and where there are acknowledged or known harms that will result from the transaction, there are insufficient net benefits to support approving the transaction and granting the Certificate under Section 1103(a). *Cicero v. Pa. PUC*, 300 A.3d 1106, 1120 (Pa. Cmwlth. Ct. 2023).
14. The Commission, in granting such certificate, may impose such conditions as it may deem to be just and reasonable. 66 Pa. C.S. § 1103(a).
15. The Commission must weigh the impact of the proposed merger on all affected parties, not just certain groups. *Middletown Township v. Pa. PUC*, 482 A.2d 674 (Pa. Cmwlth. Ct. 1984).
16. Sections 1102 and 1103 require an Applicant to demonstrate that a proposed acquisition provides an affirmative public benefit, meaning that the benefits of the transaction outweigh the adverse impacts of that transaction, when all affected parties are considered. *Application of CMV Sewage Co., Inc.*, 2008 PaPUC LEXIS 950, *30 (Dec. 18, 2008).
17. To determine whether benefits meet this standard, the Commission may consider: "(1) the legal and technical fitness of the purchasing entity to provide service; (2) the public need for service; (3) the inadequacy of the existing service; and (4) any other relevant evidence." *Application of North Heidelberg Water Co.*, 2010 PaPUC LEXIS 919, *20 (June 7, 2010).
18. Benefits which derive from the acquiring utility's technical, managerial, and financial fitness are not sufficient to satisfy the utility's burden under *City of York* to find substantial affirmative benefits, where the system being acquired provides similar benefits. *Cicero v. Pa. PUC*, 300 A.3d 1106, 1119 (Pa. Cmwlth. Ct. 2023).
19. Only those benefits which are specific to the transaction before the Commission are considered substantial; and only those benefits may be weighed against the harm which would result from the proposed transaction. *Cicero v. Pa. PUC*, 300 A.3d 1106, 1120 (Pa. Cmwlth. Ct. 2023).
20. An arms-length transaction does not in itself determine the reasonableness of the purchase price. *Pa. PUC v. Citizens Utilities Water Co. of Pa.*, 1996 PaPUC LEXIS 164 (Mar. 29, 1996), Order at *19-26.

21. The Commission can impose just and reasonable conditions in granting CPC authority. 66 Pa. C.S. § 1103(a). Section 1103(a) states: “The commission, in granting such certificate, may impose such conditions as it may deem to be just and reasonable.” *Id.*
22. Every statute shall be construed, if possible, to give effect to all its provisions, governing presumptions are that the General Assembly intended the entire statute at issue to be effective and certain, and that the General Assembly does not intend an absurd result or one that is impossible of execution. *See* 1 Pa. C.S. §§ 1921(a), 1922(1)-(2); *see also Wayne M. Chiurazzi Law Inc. v. MRO Corp.*, 97 A.3d 275, 292 (Pa. 2014).
23. When words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.” 1 Pa. C.S. § 1921(b). When the General Assembly selects the words to use in a statute, it has chosen them purposefully. *See also Commonwealth v. Scolieri*, 813 A.2d 672, 673-74 (Pa. 2002).
24. Construing Section 1327 and 1102/1103 together, the election right provided to the utility under Section 1327 merely affects the notice obligations that the utility must meet at the time of its Section 1102 application. If the utility elects to seek a Section 1327 determination outside of a base rate case, the utility must provide notice to customers as part of its Section 1102 application proceeding. 66 Pa. C.S. § 1327(b).
25. A utility’s election to avoid more burdensome notice obligations under Section 1327 in an application proceeding does not limit or relieve the Commission from its statutory obligation to conduct the weighing of benefits and harms of the proposed transaction under Section 1103, including the general probable rate impact of the transaction.
26. While an application proceeding is not a rate proceeding, it remains that the Commission has express authority to impose just and reasonable conditions as part of its approval of the transaction. *See* 66 Pa. C.S. § 1103(a) (“The commission, in granting such certificate, may impose such conditions as it may deem to be just and reasonable.”).
27. The Commission can exercise its broad discretion under Section 1103(a) based on this record to impose the just and reasonable condition to limit the future recovery associated with this purchase price given the known rate harms.
28. Fair market value was never established in this proceeding as the Application was not filed under Section 1329 of the Public Utility Code and the Reasonableness Review Ration (RRR) is intended by the Commission to be a check on reasonableness for fair market value. *Implementation of Section 1329*, M-2016-2543193 (Feb. 1, 2024), Final Supplemental Implementation Order (Order entered July 2, 2024).
29. While used a point of reference for Section 1329 cases, the RRR is not a binding norm and establishes no legal obligation on the parties or the Commission.
30. Section 1103(a) states: “The commission, in granting such certificate, may impose such conditions as it may deem to be just and reasonable” and “[a]ny holder of a certificate of public convenience . . . shall be deemed to have waived any and all objections to the terms and conditions of such certificate.” *Id.*

31. The Commission has broad authority and discretion to impose conditions that it may deem to be just and reasonable when granting CPC authority. 66 Pa.C.S. § 1103(a).
32. As a matter of law, a Commission grant of CPC authority pursuant to 66 Pa. C.S. §§ 1102-1103, is a revocable privilege and not a property right. *Western Pa. Water Co. v. Pa. PUC*, 311 A.2d 370 (Pa. Cmwlth. 1973) (“[A] certificate of public convenience is neither a contract nor a property interest under which its holder acquires vested rights. The certificate is a privilege granted by the Commonwealth.”).
33. Because Pennsylvania jurisdictional utilities have no property right in the certificates they hold, the Commission has the authority to grant, deny, or even condition a utility’s request to begin, transfer, or abandon service or acquire utility property. *Borough of Duncannon v. Pa. PUC*, 213 A.2d 139 (Pa. Super. 1965); *Modern Transfer v. Pa. PUC*, 125 A.2d 463 (Pa. Super. 1956).
34. The Commonwealth Court stated recently upheld the Commission’s exercise of its authority to impose conditions when granting CPC authority, stating:

Notably, Chapter 11 has endowed the PUC with the authority to impose conditions upon a certificate of public convenience “as it may deem to be just and reasonable,” and “[a]ny holder of a certificate of public convenience . . . shall be deemed to have waived any and all objections to the terms and conditions of such certificate.”

Twin Lakes Utils. v. Pa. PUC, 281 A.3d 384, 390 (Pa. Cmwlth. 2022) (*Twin Lakes*) (citing 66 Pa. C.S. § 1103(a)) (upholding the Commission’s imposition of a \$1.675 million escrow condition

Proposed Ordering Paragraphs

It is hereby ORDERED THAT:

1. The Application of Pennsylvania-American Water Company pursuant to Section 1102 of the Public Utility Code for Approval of Acquisition by Pennsylvania-American Water Company, by sale and merger, of the Appalachian Utilities, Inc. is denied.

Alternatively, It is hereby ORDERED THAT:

1. The Application of Pennsylvania-American Water Company pursuant to Section 1102 of the Public Utility Code for Approval of Acquisition by Pennsylvania-American Water Company, by sale and merger, of the Appalachian Utilities, Inc. is accepted, subject to the following conditions:
 - a. No acquisition premium or goodwill amount, *i.e.*, amounts higher than depreciated original costs, may be included in PAWC's ratemaking rate base or capital structure in a future rate case.
 - b. At the time of filing its next base rate case, PAWC will submit a cost of service study that removes all costs and revenues associated with the operation of the AUI system and will also provide a separate cost of service study for the AUI system.