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November 6, 2024

VIA E-Filing

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

RE: 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

APPALACHIAN UTILITIES, INC.'S REPLY BRIEF (PUBLIC VERSION)

Dear Secretary Chiavetta:

Enclosed you will find Appalachian Utilities, Inc.'s Reply Brief (Public Version) in connection with the above-captioned proceeding. The confidential version of Appalachian Utilities, Inc.'s Reply Brief will be filed by overnight delivery.

If you should have any questions, please feel free to contact me.

Very truly yours,

/s/ Thomas J. Sniscak

Thomas J. Sniscak
Todd S. Stewart

Counsel for Appalachian Utilities, Inc.

TSS/jld
Enclosures
cc: Administrative Law Judge Conrad A. Johnson cojohnson@pa.gov)
Per Certificate of Service

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

In re: 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
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	(CONSOLIDATED)	

REPLY BRIEF OF APPALACHIAN UTILITIES, INC.

Public Version

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Dated: November 6, 2024

Attorneys for Appalachian Utilities, Inc.

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I. SUMMARY OF THE REPLY ARGUMENT

Having requested approval of the proposed merger transaction ("Transaction"), as described in the Joint Merger Application and stated pursuant to Verifications, Pennsylvania-American Water Company ("PAWC") and Appalachian Utilities, Inc. ("AUI") ("PAWC" and "AUI" collectively the "Joint Applicants") and as more fully described in the PAWC's and AUI's Testimony, Exhibits and Main Briefs, have more than adequately satisfied their collective burden of proof.[1]

Contrary to OCA's myopic view of this matter, there are multiple substantial benefits that will be produced by the Transaction that far exceed OCA's attempt to attribute or minimize this matter being solely about Mr. Sargent's (AUI's President and sole shareholder) desire to retire after 30 plus years of being a hands-on President who ran the company and wore many hats both financially and operationally. There are multiple concerns documented on this record that demonstrate that AUI, despite its best efforts, is barely hanging on to avoid failure and that the situation under AUI *status quo* is not improving. In fact, it has been losing money for the past two years (AUI St. 1-RJ, 3:1-5), has had several notices of violation issued by DEP between 2020 and 2024, (AUI St. 1-R, 6:5-12) and is in dire need of a "massive" rate increase to allow it to address existing problems and projects including compliance with new and existing regulatory mandates such as the lead and copper pipe inventory. (AUI St, 1-R, 6:20-23). AUI has not been able to surmount these issues on its own and there is no evidence on this record to suggest that it will be

[1] 66 Pa. C.S.§ 332(a). The Joint Applicants must establish their case by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 578 A.2d 600 (Pa. Cmwlth. 1990). In other words, the Joint Applicants' evidence must be more convincing, even by the smallest amount, than the evidence presented by the other parties. *Se-Ling Hosiery, Inc. v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950). Any finding of fact necessary to support the Commission's decision must be supported by substantial evidence, which is such evidence that a reasonable mind might accept as adequate to support a conclusion. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & Western Ry. Co. v. Pa. Pub. Util. Comm'n*, 489 Pa. 109, 413 A.2d 1037 (1980).

able to do so in the future without the financial, technical, and operational assets that PAWC has and will provide to the system and its customers through the merger acquisition.

PAWC brings not just money and size to these problems, but rather the particular expertise to address each of these issues. There is a significant number of substantial benefits, including regionalization, not just in concept, but in fact. PAWC has several operation districts within a short distance that will be able to assist when needed for emergency and day to day operations, depending on the task. (PAWC St. No. 2, 4-5). Likewise, as Mr. Sargent pointed out in his testimony, he does not have the availability of in this rural area, nor the ability to hire competent contractors on short order. (AUI St. No. 1-R, 8:12-23). The record has multiple examples of how regionalization will benefit both AUI and PAWC. AUI will benefit because of the proximity of the other PAWC affiliates and because of the increased ability to leverage assets, both human and physical, within the proximity of AUI. PAWC will benefit from the ability to optimize the use of those same assets across a broader footprint so that those same assets are not left idle for stretches of time. These interlocking benefits are tangible and would not be realized, absent the merger. These are the benefits that will accrue from regionalization as discussed and promoted in the Commission's Regulations.[2]

Also, on the positive side of the ledger, contrary to the OCA's Main Brief, there is no chance of immediate rate impact due to the Transaction. Also, the estimated future impact is miniscule, about a [**BEGIN CONFIDENTIAL**] [redacted] [**END CONFIDENTIAL**] customer per year. (PAWC St. No. 3-RJ, 4:6-11). However, the issue of future rate increases is not legally ripe in this proceeding. If there is to be any future rate impact, which is not a foregone conclusion, such proposed change must be approved by the Commission *when and if a rate increase is requested*.

[2] 52 Pa. Code § 69.701, *et seq*.

At this juncture there is neither any request for a rate increase, Section 1327 rate relief, nor any substantial or credible evidence on the record by OCA to substantiate its speculation. Even OCA cannot disagree that no rate increase has been requested nor any Section 1327 relief. Nor can OCA presume that any future rate increase or Section 1327 adjustment made by the Commission in a future rate case is, as OCA intones, presumptively "rate harm" when the Commission's statutory charge under Section 1301 of the Public Utility Code is to establish just and reasonable rates.

OCA has taken the position that one can conclusively consider the "probable general impacts" of the merger on rates, by speculation instead of substantial evidence. OCA's exaggerations and speculation should be rejected. What we do know by actual substantial evidence is that the annual revenue requirement impact occasioned by the merger would be [**BEGIN CONFIDENTIAL**] [redacted] [**END CONFIDENTIAL**] per year per customer. (PAWC St. No. 3-RJ, 4:6-12).

The OCA's hubris in suggesting that the Commission is not capable of adjudicating rates, is exceeded only by its generalized and speculative claims that post-merger PAWC rates will increase without restraint. (PAWC St. 3-RJ, 2:20-22). There is no "general probable" adverse rate impact of the transaction that outbalances the substantial benefits of the merger, and it remains that OCA in any event failed to produce substantial or credible specific evidence to support its general contention. Moreover, a rate case setting just and reasonable rates in the future is not as OCA implies a detriment or a harm; rather, it is what the Commission has been charged to do in setting "just and reasonable" rates; and by the Constitution that rates must cover a regulated utility's cost of service.

What is unrefuted on the record is that absent a merger, AUI will need to experience an immediate and "massive" rate increase, a fact that OCA acknowledges. (AUI St, 1-R, 6:20-23).

But that rate increase, as massive as it might be, will not add to the customer service experience of AUI's customers, AUI's ability to leverage nearby assets from other utilities, nor will it provide the in-house expertise, greater financial ability to raise capital, and economies of scale purchasing power, that would otherwise occur with a PAWC merger. In short, the merger is the only solution that resolves all concerns for all of the relevant constituencies.

II. REPLY ARGUMENT

1. Contrary to OCA's Contention, AUI and PAWC Have More Than Carried Their Burden of Proving that the Benefits of the Transaction Outweigh the Speculative Detriment. (OCA MB 7-19).

The Transaction will bring new substantial benefits and resources to AUI that it could not hope to obtain on its own, even if AUI were to obtain a massive rate increase. These include such diverse items as immediate inflow of capital and expertise on addressing AUI's immediate needs. (PAWC Exhibit MJG-3). There is no possible way that AUI could obtain those in the short timeframe that PAWC is prepared to deploy those assets. Time is of the essence and time is one of several critical factors that OCA's arguments ignore. AUI could seek a rate increase that would provide it with the funds it needs now to hire more staff and acquire the additional equipment it needs, but the reality is that the rate case process can take many months of planning and then 9 months of litigating, with all of the associated costs of both of those stages, it would be more than a year and potentially hundreds of thousands of dollars before AUI would see one additional dollar of revenue, when it is already operating at a loss. (AUI St. 1-R, 6:15-23). In contrast, the benefits of the merger will be recognized immediately, and the acquisition approval filing is pending. The irony of no good deed going unpunished has a home here in that AUI has not raised rates since 2015 and decided not to during the pandemic years and the inflation that followed as a courtesy to help customers. (AUI St. 1, 4:5-12).

OCA has no answer other than a flippant suggestion that AUI should seek a Pennvest loan – which ignores the evidence of record that the Pennvest loan acquisition process is no less if not more arduous than the rate case alternative, given its many financial and other restrictions which can render it more costly or time consuming. (OCA MB at 14).

Not only does PAWC intend to commence the deployment of at least $6 million in capital very soon after approval, it also will be able, as discussed above, to deploy its vast operational expertise immediately upon closing. (PAWC St. No. 1, 14:3). Accordingly, the projects that need to be addressed immediately will be so addressed and will not have to wait years for rates to support them or risk losing even more money.

The benefits do not stop at the ability to rapidly and meaningfully deploy capital and expertise, it also extends to the immediate benefit of being part of a system and no longer a standalone water company with no available let alone practical way to share resources with nearby companies. This ability to share resources and optimize their use is the foundation of regionalism which the Commission's Policy Statements promote.[3] It is the ability to use a backhoe and other equipment from a nearby affiliate if yours breaks, or to have the employees needed to help fix a water main break in the middle of the night so that everyone can get home safely, in less time, and with the job completed. It is these tangible and intangible benefits that accrue when companies operate in a regional fashion and not as isolated standalone companies. (PAWC St. No. 1, 16:12-17:12). These are but a few of the commonsense benefits that OCA fails to recognize or give weight.

The benefits don't stop at regionalism either, there are additional benefits that will accrue to AUI customers in the form of compliant, safe and reliable water service. (PAWC St. No. 2, 7:13-

[3] 52 Pa. Code § 69.701, et seq.

9:18). As discussed in Mr. Sargent's testimony, there have been some recent non-compliance issues as a result being short on staff. (AUI St. 1-R, 6:5-13). With AUI losing money and needing to increase rates, the staffing issues are not going away, and indeed, could get worse. (AUI St. 1-R, 6:9-13). With PAWC being able to retain the level of staffing needed and to leverage its existing assets, it will be able to provide a level of service far beyond what AUI could accomplish without the merger, even if AUI was able to increase its rates, which is not a given. Contrary to OCA's (MB 14) "brush aside" argument that PAWC will not provide better service than AUI would be capable of providing without the merger, it is clear that the opposite is true, and that the merger is the best solution for AUI's problems.

In short, when one compiles the list of the meaningful and plenteous substantial benefits of the merger and stacks them against the single speculative, generalized and unripe potential rate contention that OCA raises but has not proven – that post-merger rate increases will harm all customers – it is clear that PAWC and AUI have carried their burden of proving a net benefit to customers and to all affected constituencies. What undermines OCA's generalized rate "harm" contention, that it failed to demonstrate by facts or calculation, is that the only substantial evidence on the impact of the merger is PAWC's evidence that the impact would be [**BEGIN CONFIDENTIAL**] [redacted] [**END CONFIDENTIAL**] per customer per year. (PAWC St. No. 3-RJ, 8:20-25).

a. Allowing Owners of Small Water/Wastewater Systems to Sell such Systems to an Uncontested Qualified Purchaser is a Substantial Benefit. (OCA MB 9-11).

The OCA's attempt (OCA MB at 9) to denigrate and focus on the impact of the present owner's desire to retire instead of weighing positively the many benefits of the merger, clearly misunderstands the benefits that authorizing a merger provides. (OCA MB at 9). Mr. Sargent's desire to sell was not predicated solely on his desire to retire, which will happen regardless of the outcome of this proceeding. Mr. Sargent desired to leave the customers that he served for 30 years in a better place than when he took over the company, and that benefits everyone. (AUI St. No. 1-R, 2:10-18). Mr. Sargent also discussed his desire to leave AUI in a strong position by merging with a utility with "superior financial strength." He also made sure that the goal of future rate stability for customers was attained. (AUI St. No.1-R, pp. 3-4). Also, PAWC's Mr. Kohl, with many years of experience at DEP testified that § 1327 provides an incentive to owners of small systems to sell them at the end of their career, rather than running them to the ground, and having them become a troubled asset and go into receivership under §529,[4] in a process that would typically use market value as opposed to the depreciated book value demanded by OCA. (PAWC St. 1-RJ, 3-4). To be clear, PAWC has not decided whether it will indeed seek to recover any of the purchase price using Section 1327.

This is another benefit of allowing owners of small water companies to sell those companies, even at prices above depreciated book value, that the Commission should consider. If the Commission were to reject the merger as the OCA proposes, the general probable result will be that within a few short years, or less, AUI could be a troubled asset under the Section 529

[4] 66 Pa. C.S. § 529.

process which by its terms are above original cost minus depreciation by referencing valuation under the Pennsylvania Eminent Domain Code as it would be a "taking."

It should not be the Commission's policy to make the only viable options for selling small utilities to either allow them to become insolvent, or worse, or by putting owners through a process that does not allow them to sell the company for anything other than the depreciated net value of the assets. OCA's strident position is that this bad policy be the law.

Contrary to OCA's position, it is clear that a going concern in the real world is worth more than the current book value of its assets. The General Assembly has recognized that value in Section 1327, by making it a "rebuttable presumption that the excess is reasonable and that the excess shall be included in the rate base of the acquiring public utility" if the public utility can prove certain elements.

The OCA's argument aims to short circuit, if not in effect illegally repeal by an agency order, this statutorily mandated methodology enacted by the General Assembly, by raising generalized and speculative claims of the detriments of the Transaction.

The OCA first claims that there are not sufficient benefits because of the alleged, but not proven, ratepayer "harm" of future rate cases setting "just and reasonable" rates. The OCA then uses the same speculation regarding future rates to try to convince the Commission to foreclose the ability of the utility, here PAWC, from even having the ability to engage Section 1327 and make its case in a future rate proceeding that it meets the criteria required to include some or all of the full value of AUI into rate base. The result is inherently unfair to the acquiring utility, to the seller, and a denial of due process were to Commission to agree to not enforce the law as written. Such a denial would also have another negative impact by making the acquisition process fraught with costs, in time and money, for the acquired public utility, as well as fraught with uncertainty.

Worst of all, the OCA would prevent owners of small water and/or sewer systems from accessing the actual market value of an asset, which in this case could deprive Mr. Sargent of the real world value of his company and 30 years of work. In short, the value of a company is not just OCA's beloved original cost minus depreciation. The Legislature clearly recognizes that in Section 1327 and Section 529.

If the Commission rejects the OCA's approach and instead allows the statute to function as written, it will re-enforce the ability of small companies to engage in the regionalization that the Commission has promoted (52 Pa. Code § 69.711) which provides benefits to customers and those who own and operate small systems. In short, the Joint Applicants' position promotes and effectuates what the Legislature intended, the OCA's does not.

b. PAWC will provide multiple services that AUI does not have/cannot afford and these Benefits of the transaction will be unique to AUI. (OCA MB 10-12).

OCA cites the Commonwealth Court's decision in *Cicero*[5], which is under review by the Pennsylvania Supreme Court, for the premise that the benefits of a transaction must be unique and not necessarily flow from the general fitness of the acquiring utility. Putting aside the obvious fact that *Cicero* decision was for an application under Section 1329, which has a completely different form of valuation, and that this matter is not, in *Cicero* the Commonwealth Court concluded that the benefits that were claimed by the Commission as persuasive and conclusive were not benefits to be derived from the merger but rather from the existing size and abilities of the acquiring utility, "holding that a transaction will result in substantial affirmative public benefits because it will provide the **same services** as **already being provided** is not a benefit."[6] Such is not the case here.

[5] *Cicero v. Pa. Pub. Util. Comm'n*, 300 A.3d 1106 (Pa. Cmwlth. 2023), *appeal granted,* No. 568 MAL 2023, 2024 WL 2988362 (Pa. June 14, 2024) ("*Cicero*").

[6] *Cicero*, 300 A.3rd 1106, 1119 (emphasis in original).

The record before the Commission is clear that none of the benefits of the merger are things that AUI could accomplish on its own, even with a hypothetical rate increase that would not produce higher rates for nearly 2 years. For example, AUI does not have, nor could it justify operating a lab, nor does it have the expertise, manpower or equipment to complete the copper/lead service line survey on time (AUI St. 1-R, 2:14-3:8). AUI does not have 24 hour customer service, nor does it have the in-house capability to remain constantly vigilant against the latest cyber threats to its data infrastructure. AUI does not have these capabilities and will not obtain them except through a merger. (AUI St. 1-SR, 8:12-23).

Even if one could conceive of a world where AUI was able to mount a successful rate case and that the expertise it needs could be hired, it would most likely be too late to matter. That is why the merger is so critical to AUI's success – timing. PAWC can not only do things that AUI can only dream of, but it can do them much sooner than AUI, in time to forestall the bad things that could happen in the very near future. (AUI St. 1-R, 6:13-16).

c. The Purchase Price was Negotiated at Arm's Length and is reasonable. (OCA MB 12-14).

The purchase price was negotiated at arm's length by unaffiliated, unrelated companies, and is in excess of the depreciated original cost of the plant. (PAWC St. No. 1, 7:7-9). That the purchase price, in addition to the $6 million capital injection, will cause a mere [**BEGIN CONFIDENTIAL**] [redacted] [**END CONFIDENTIAL**] per customer per year revenue deficiency for PAWC demonstrates that its impact on PAWC existing customers will be negligible and there will be no immediate impact on AUI customers. (PAWC St. No. 3-R, 4:6-8). Those are the facts of the purchase that are relevant to the Transaction. OCA makes the effort to suggest that PAWC and AUI have not justified the purchase price on the record. OCA is wrong for two reasons.

2. OCA's contentions lack requisite legal ripeness.

First, the issue of the reasonableness of the purchase price is not ripe until PAWC seeks to include the purchase price in rate base, if it chooses to do so. Until it does, the issue of the reasonableness of the consideration is not legally ripe under longstanding Pennsylvania law. *Woods Schools v. Department of Education*, 100 Pa. Commonwealth Ct. 375, 514 A.2d 686 (1986); *Sgarlat v. Board of Adjustment of Kingston Borough*, 407 Pa. 324, 180 A.2d 769 (1962). There must be an actual, palpable cause of action before a case will be "ripe" for adjudication. *Concerned Taxpayers v. Commonwealth of Pennsylvania*, 33 Pa. Commonwealth Ct. 518, 382 A.2d 490 (1978). Hence, hypothetical or abstract questions are precluded. *Raezer v. Raezer*, 428 Pa. 163, 236 A.2d 513 (1968); *Silver v. Zoning Board of Adjustment*, 381 Pa. 41, 112 A.2d 84 (1955). This requirement applies to formal proceedings before administrative agencies including the Commission. *Process Gas Consumers Group v. Pa. Pub. Util. Comm'n*, 84 Pa. Commonwealth Ct. 76, 480 A.2d 1273 (1984). To do otherwise, particularly in the case of an acquisition where a claim has not been made under § 1327, as is the case here, is premature and a waste of the parties' legal expense and the resources of the Commission. OCA's position ignores the plain language of § 1327, which provides that if PAWC seeks to include the purchase price in rate base, and that if the Commission agrees that it meets the criteria for doing so, inherent in that decision is the rebuttable presumption that the purchase price in excess of depreciated book value is reasonable.

3. The Purchase Price is Reasonable.

Second, even if the OCA's contention was ripe, which it is not, there is evidence on the record to demonstrate that the purchase price is indeed reasonable because it was negotiated and reflects the value of AUI system, not just the cost of the hardware. (PAWC St. No. 1, 7:7-9). Mr. Sargent has invested 30 years of his life in ensuring to the best of his ability that his customers received good service and a good product. (AUI St. 1, 2:10-18). That means having capable

employees, and the means to operate a utility on a 24/7/365 basis. It is these sorts of facts that make a system value greater than the mere depreciated sum of all the parts. If OCA intended to prove that the purchase price was not reasonable, in opposition to the not yet relevant § 1327 rebuttable presumption which it has tried to nonetheless inject into this case, it could have presented evidence that the purchase price was proportionally greater than other recently approved transactions; but it did not. PAWC presented conclusive evidence (PAWC St. 1, 24-25) that the purchase price on a per customer basis was within the range of PAWC's § 1102 only acquisitions in the past 6 years. Considering that AUI has less than 1500 customers against whom to apportion the purchase price, that fact alone is remarkable. (PAWC St. No. 1, 24-25). OCA has presented no evidence that contradicts this conclusion or the conclusion that the purchase price is reasonable.

a. AUI's customers will Benefit from PAWC's capital investment and Better customer Service. (OCA MB at 14).

OCA doubles down on its ill-informed remarks in witness DeAngelo's testimony that AUI is operating without concerns, i.e., "not distressed or troubled", [7] that PAWC will bring no benefit to AUI that it cannot provide for itself, and that even if it did have major issues as it contends, everything could be fixed with a Pennvest loan. OCA's positions have no factual basis and are contrary to the record. (AUI St. 1-R, 6:5-23). Ms. DeAngelo lacks any experience in managing or operating a water system, or any other utility financing business as shown by her resume attached to her Direct Testimony. (OCA St. No. 1, Appendix A). Ms. DeAngelo's inexperience shows through in the naïve suggestion that AUI simply could obtain a Pennvest loan or grant and without any evidence of experience with Pennvest loans, she implies that such a loan or grant is easy to obtain or easy to implement. That is simply not true, and AUI's testimony – the only specific

[7] To be clear, the OCA's argument on this subject is premature in that neither Section 1102 or 1103 require such a showing, and it is not unless or until PAWC would seek to recover any portion of the purchase price in base rates under Section 1327 that such a determination would be required.

evidence of record -- shows the contrary. Mr. Sargent testified at length about the difficulties involved in both obtaining a Pennvest loan for a small private water company and manner in which Pennvest's compliance requirements would exclude AUI from even applying (AUI St. 1-RJ, 3:6-6:20). As Mr. Sargent made clear:

> In reality, we would have to hire and pay the PE to develop detailed specific plans for the project, have the accountant prepared to address financial matters, and the attorney the legal hurdles to effectuate the loan. That and the cost for the professionals are significant up-front monetary expenditures which we presently do not have the money to fund. (AUI St. 1-RJ. 3:17-21).

Even if one obtains such financing, the conditions are very stringent if the borrow is the least bit troubled financially:

> your financial condition may trigger more stringent terms and conditions of a PENNVEST loan, such as personal guarantees, not borrowing any debt during the term of the loan without PENNVEST's prior written approval and any such loan would have to take a second position to PENNVEST's security or collateral." (AUI St. 1-RJ, 5:11-14.)

The above quotes are but a minimum of the strings and detriments mentioned in Mr. Sargent's referenced testimony as to why a Pennvest loan is not a good fit or business decision solution in this matter and Ms. DeAngelo's was unaware of, or did not understand the import in making her suggestion. It should have been clear to Ms. DeAngelo that a Pennvest loan would be a non-starter for AUI, yet she pinned her conclusion that AUI would not benefit from a merger on this house-of-cards argument, nonetheless. AUI also introduced a recent Annual Report from Pennvest showing no "grants" to private companies and only 1 loan to a private company (Aqua), thus refuting OCA's get a grant or loan suggestion. (AUI Exhibit RJ-3).

Second, Ms. DeAngelo again states without context that AUI could seek a rate increase. (OCA St. No. 1-SR, 9:1-4). That again is not feasible nor good for AUI or its customers in terms of simple business judgment and managerial discretion for this small company given the pending

merger matter. Mr. Sargent testified about the asymmetrical manner in which the costs, in terms of time, money and the impact on human resources, of seeking a rate increase for a small utility, are punitive and daunting and make a rate case an impractical solution for AUI's current situation. (AUI St. 1-RJ, 6:21-7:23). Mr. Sargent made it clear that Ms. DeAngelo "fails to recognize the extreme expense of filing for a rate increase in today's world . . . would cost more than $100,000 and for a process that takes 3 months of planning and 9 months, including expensive hearings, under the PUC's process for the case to be decided." (AUI St. 1-RJ, 7:2-9).

The more stunning aspect of OCA's argument, however, is the contention that acquisition by PAWC will not bring any benefit to AUI that it could not provide itself and that PAWC's statements about the services it will provide are not specific enough. OCA's statements to that effect are contrary to a wealth of evidence of record.

The record could not be clearer that PAWC has easy access to capital markets, AUI does not. (AUI St. 1, 3:10-4:2). PAWC has a plan in place to deploy $6 million in capital in short order, while AUI may not even be able to get any loan, let alone for $6 million. (AUI St. 1-RJ, 3:6-23). PAWC's capital investment plan is intended to address the "problem areas" that are of immediate concern. (PAWC St. No. 2, 5:16-20). The OCA even admits that PAWC is capable of making the needed investments but counters with the suggestion that low interest loans or grants are a fungible solution; they are not. (AUI St.1-RJ, 3:6-6:10).

The facts show that AUI's customers will benefit from PAWC's abilities, on day one and every day thereafter, and that the inclusion of AUI into PAWC poses no harm to PAWC's existing customers through regionalization and the ability to further optimize PAWC's use of resources across its footprint.

These are not "aspirational" benefits as OCA suggests with this and other benefits. OCA's repeated claims that such benefits are "aspirational" is simply a convenient baseless soundbite for OCA to suggest that are not real benefits, because they have not yet occurred, and so should not be considered. OCA's tactic is wrong factually and legally. First, even if the commitment to invest $6 million in capital is not a binding contract, it can be considered as a benefit, as the Court in *Cicero* correctly recognized.[8] Does OCA seriously think PAWC will not keep its word and sworn testimony intentions? OCA strains credulity! Factually, that PAWC will invest substantial capital in addressing AUI's immediate needs is unrefuted on this record and cannot be tossed aside as the OCA suggests simply because the OCA wrongly attaches an "aspirational" label to it and other benefits.

The same holds true for customer service. Currently, AUI does not have the robust customer service experience that PAWC can provide including 24/7/365 emergency service (PAWC St. 1, at 13, 2; PAWC St. 2 at 14-15), and yet OCA baldly asserts (OCA MB at 14-15) that the benefits of such improved customer service do not "outweigh" the speculative and unproven "harm" of unknown future rate increases. OCA conveniently ignores its own argument that the measure is a net benefits test, and that PAWC's superior customer service is but one of a number of benefits listed in AUI's testimony and briefs, that clearly outweigh OCA's hunch about PAWC's future rate requests.

b. OCA's Claims Regarding Future Rates are Speculative and not supported. (OCA MB at 15-17).

Even OCA agrees that AUI needs a rate increase, and as Mr. Sargent testified, it will need to be massive. (AUI St. 1-R, 6:23-7:3). Nonetheless, the immediate revenue requirement deficiency for PAWC's existing customers is [**BEGIN CONFIDENTIAL**] [redacted] [**END**

[8] *Cicero,* 300 A.3d 1106, 1120.

CONFIDENTIAL] per existing PAWC customer, per year. Hardley a burden that shocks the conscience as OCA would have one believe. There is no OCA testimony quantifying the level of any future rate impact for PAWC customers, on this record, only speculation and talk of "serious risk" (OCA MB at 15) of future rate increases and subsidies. The OCA's position is that a concern about possible future rate increases, when placed on the balance against the numerous benefits documented in this record including the fact that AUI customers face a massive rate case absent a merger that will be obviated by the merger, outweigh all of the benefits on the other side of the scale. OCA's position is untenable.

There is nothing in any of the cases cited by OCA in its briefs, that elevates a concern about future rates to 'super factor status' that regardless of the benefits, always overcomes them. While the Court in *City of York* suggested, but did not mandate, that the Commission could consider future rates as part of the net benefits examination, it did not say that any concern about future rates, even speculative concerns that are not supported by evidence, trump all documented benefits of a transaction; and yet the OCA argues as much.[9] The OCA's misuse of *Cicero* does not end there however, it extends to OCA's insistence on a condition, even if the Commission agrees that mere concerns about future rates are not sufficient, that the Commission agree to foreclose PAWC's ability to claim, under a statute that creates a right for PAWC to do so, that some portion of the purchase price be included in PAWC's rate base. In other words, that today's Commission eliminate the ability of tomorrow's Commission from complying with the law. The Commission should reject both attempts to misapply, if not repeal, the law.

[9] *City of York v. Pennsylvania Public Utility Commission,* 449 Pa. 136,143*;* 295 A.2d 825, 829 (Pa. 1972).

4. There are Multiple and Substantial Net Benefits from the Transaction.

The Pennsylvania Supreme Court, in *City of York*, held that in order to approve a merger the transaction must result, on a net basis, in substantial affirmative benefits. *City of York.* Contrary to the OCA's argument, PAWC and AUI have demonstrated that there will be a net positive benefit from the Transaction. The OCA first makes a general crystal ball claim that the Transaction will result in potential ratepayer harm in the form of a future rate increase and dismisses most of the benefits that are proven in this record, as being something that AUI could have achieved on its own. Neither of these arguments is correct.

The contention of future ratepayer harm is incorrect for several reasons, not the least of which is that there is no claim for a future rate increase in this application case. It should also be noted that the alleged future rate increase only applies to PAWC's existing customers as OCA has already conceded that a massive rate increase for AUI is inevitable. (OCA St. No. 1-R, 9:1-4). OCA seeks to bolster its specious argument, but actually undermines it, by contending that a future rate increase for AUI customers post-merger could be as high as $52.21 per month or approx. $900,000 per year. That OCA contention is consistent with Mr. Sargent's testimony concerning the needs AUI would face, absent a merger, considering two years of operating at a loss. (OCA St. No. 1,12:1-6). However, OCA's own argument or contention refutes its reliance on *Cicero*, because the Court there pointed to the fact that the township was equally capable of providing those same services as Aqua *without a rate increase*.[10] That is not the case here as AUI clearly requires a rate increase.

This renders the OCA's argument - that AUI could remain as is, borrow huge sums that it cannot realistically obtain, and yet be a better alternative than the acquisition -- incredible. In

[10] *Cicero,* 300 A.3d 1106, 1120.

contrast to OCA's argument and conflation of the holding in *Cicero*, despite it being on appeal to the PA Supreme Court, there is nothing credible on this record as to the AUI acquisition that there is any chance of AUI deploying $6 million in capital projects in the next 24 months. Based upon Mr. Sargent's testimony, AUI could not raise that level of capital, let alone put it into improving the system at all, and certainly not in the near term. (AUI St. 1-R, 5:19-23). OCA's twisted logic must be rejected.

5. The OCA's Repeated Reliance on Assertions it Deems as "General Probable", are Without Support and are Incorrect. (OCA MB 22-24).

The OCA's objection to the merger is premised on its speculative assertion that rates for both AUI customers and existing PAWC customers will be unjustly increased as a result of the transaction. The OCA's fundamental assumption is that any purchase price above depreciated book value is unjustified. In this case, the OCA also surmises that because the purchase price is greater than depreciated book value, that it is "probable" that PAWC will seek to include the entire purchase price in rate base and that doing so will harm customers. The consequence of OCA's argument is to insist that the merger be denied outright or that the Commission impose a condition that would effectively bar itself from considering any facts or arguments that are contrary to OCA's skewed point of view in a future § 1327 proceeding. OCA's argument relies upon and thus misuses the holding in *McCloskey* as suggesting that future rate impact should be conclusively addressed in a Chapter 11-only proceeding.[11] *McCloskey* was a Section 1329 case where, as permitted by the statute, the acquiring utility had asked the Commission to determine what portion of the purchase price was to be included in rate base. Such a request is not part of this case and *McCloskey* cannot therefore be read as authorizing speculation instead of evidence in that regard.

[11] *McCloskey v. Pa. PUC,* 195 A.3d 1055, 1066-67 (Pa. Cmwlth. Ct. 2018), alloc. denied, 207 A.3d 290 ("*McCloskey*").

The Commonwealth Court in Cicero made it clear that nothing in *McCloskey* changed anything in Sections 1102 or 1103.[12] OCA's contention that the future rate base determinations must or should be reviewed without cost-of-service studies and all of the evidence to support the request is plainly neither supported nor required by *McCloskey*. Further, OCA's suggestion that the Commission should make a decision now, to preempt or foreclose a decision later, when there would be an actual record of financial conditions and costs at that time, and the needed information would be available, is impractical at best, legally infirm, and would result in a clear denial of due process.

6. The OCA's Statutory Construction Argument Incorrectly States the Law.

The Legislature could have amended Chapter 11 to authorize the Commission to foreclose Section 1327 requests in future rate cases, but it has not done so. More importantly, however, is the fact that Section 1327 was passed more recently in time than Chapter 11. Under the Rules of Statutory Construction, to the extent that OCA would argue, or cause due to its position on rate base value, that the two provisions are in conflict or irreconcilable, Section 1327 was passed later in time and would control.[13] Section 1327 became effective in 2012, while Chapter 11 was added to the Public Utility Code in 1978. Even if the Commission were to find that the statutes address the same subject matter and must thus be read in *pari materia*, the statutes must be read together, not with Chapter 11 wiping out § 1327.[14] Additionally, OCA's argument that the two provisions can be read to not conflict, given its position, is pure sophistry. In reality, OCA's position results in usurping Section 1327 from consideration by the Commission in the future under future economic conditions, if not striking Section 1327 from the statute as-applied to this acquisition. The OCA's argument must be rejected, as must its condition that would have the Commission

[12] *Cicero,* 300 A.3rd 1106, 1120.
[13] 1 Pa. C.S. § 1936.
[14] 1 Pa. C.S. § 1932.

refuse to enforce a statute, Section 1327, that grants substantive rights to sellers and purchasers of small water systems.

III. CONCLUSION

This case boils down to a few simple facts. AUI is not yet a troubled water system under Section 529, but there are clear signs that it is financially and technically challenged and headed in that direction, including losing money two years in a row, DEP notices of violations over the last 4 years, need for immediate rate relief, and on and on. PAWC is positioned to address the "problems" that face AUI in the near term and to ensure that service continues to be compliant for all customers all the time, in addition to bringing the benefits of regionalism and its superior access to capital markets, well trained employees, etc. These benefits, including $6 million in upgrades and a list of others are real and will occur if the merger is approved, and yet the OCA would have the Commission believe that they are not real by labelling them as "aspirational", because they have not yet materialized, not considering however, that the merger has neither been approved nor closed and so that the benefits of the merger have not yet been realized, should be no surprise. Instead, the OCA has promoted an agenda that seeks to block the Commission from allowing and deciding in the future a relatively newer statute (Section 1327) that is applicable to these circumstances, as a condition of the merger. What this really tells about OCA, is that the merger and substantial benefits identified by the Joint Applicants are ok if it extracts in its favored rate of original cost minus depreciation for rate cases. OCA is not the Legislature and should not be allowed to substitute its radical position here over what the Legislature created in Section 1327. OCA would foreclose the ability of PAWC to prove in some future rate case that it meets the requirements of § 1327 and should thus be permitted to include all, or some requested portion of the sale price in rate base. The OCA's subjective premise for making such a demand (one that deprives PAWC of a statutory right) is that future rate cases will cause so much harm to PAWC

and AUI customers as to outweigh all of the benefits of the merger that are stacked up on the opposite side of the scale. The problem with the OCA's premise, however, is that there is no future harm demonstrated on this record, only the oft repeated yet unproven claim of probable future harm. The only evidence of any future rate impact is PAWC's evidence of a [**BEGIN CONFIDENTIAL**] [redacted] [**END CONFIDENTIAL**] per customer per year impact.

There is nothing else on the OCA's side of the balance to overcome the multiple benefits of the merger and yet it argues, because it does not like § 1327, that § 1327 should not be used in this or any future case, based on its "take our word for it" approach. The Commission should refuse to take the bait, reject the OCA's unsupported claims, and instead rely on the record and approve the merger and the stock transfer as requested.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing document upon the parties, listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

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