

COMMONWEALTH OF PENNSYLVANIA



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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 Reply Brief in the above-referenced proceeding. Being submitted is a **Public** and redacted version of the OCA's Reply Brief. The **CONFIDENTIAL** version of the OCA's Reply 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,

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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 Reply 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 6th day of November 2024.

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I. INTRODUCTION

The Office of Consumer Advocate (OCA) submits this Reply Brief in response to the Briefs of Pennsylvania-American Water Company (PAWC) and Appalachian Utilities, Inc. (AUI), which were filed on October 23, 2024. The OCA's Main Brief contained a comprehensive discussion of the evidence and its position on all issues. Thus, in this Reply Brief, the OCA only responds to those matters raised by PAWC and AUI that were not previously addressed or that require clarification or response.

II. LEGAL STANDARDS

The burden of proof applicable in this matter is addressed in detail in the OCA's Main Brief. OCA M.B. at 4-5. PAWC mischaracterizes its burden of proof by stating that the preponderance of the evidence standard is satisfied by presenting evidence that is "more convincing, by even the smallest amount, than that presented by the other parties." PAWC M.B. at 6 (citing *Se-Ling Hosiery, Inc. v. Margulies*, 70 A.2d 854 (1950) (*Se-Ling*)). PAWC improperly cites *Se-Ling* for this proposition without a page cite. To the contrary, the Supreme Court in *Se-Ling* stated that the proponent's evidence must *fairly outweigh* the probative value of any proof offered against its claim. *Se-Ling*, 70 A.2d at 856. In *Se-Ling*, the Supreme Court stated as follows:

In charging a jury in a civil case it is the established practice for the trial judge to say that not only has the plaintiff the burden of proof but also that this proof must be by the fair preponderance of the evidence, yet this wordage may possibly be somewhat prolix because when a litigant 'has the burden of proof' it means that he has made a claim which he cannot expect to have accepted until he offers proof sufficient to support it; and the least degree of proof any claimant can offer in order to obtain persuasion is proof which *fairly out-weighs* the probative value of any proof offered against the claim. If the evidence does not fairly preponderate in favor of his claim he has failed to carry his burden of proof.

...

To illustrate what is meant by the phrase 'proof by the fair preponderance of the evidence' a trial judge sometimes says to the jury: 'If we visualize evidence as

something weighed in an ordinary balance scales and if the evidence plaintiff offers in support of his claim is so much more weighty in probative value than the evidence offered in opposition to tip the scales on the side of the plaintiff, the latter has proved his claim by the fair weight of the evidence.

Id. (emphasis in original). As the Pennsylvania Supreme Court indicated, the Company meets its burden of proof in this proceeding if it presents evidence that fairly “preponderates in evidentiary weight against the opposing evidence.” *Id.* Moreover, PAWC must prove its case using substantial evidence that is legally credible and cannot be mere ‘suspicion’ or a ‘scintilla’ of evidence. *Lansberry v. Pa. PUC*, 578 A.2d 600, 602 (Pa. Cmwlth. Ct. 1990).

PAWC correctly identifies that, while the burden of production may shift, the burden of proof never shifts and always remains on the party seeking affirmative relief. PAWC M.B. at 7 (citing *Burleson v. Pa. PUC*, 443 A.2d 1373 (Pa. Cmwlth. 1982), *aff'd*, 461 A.2d 1234 (1983); *Milkie v. Pa. PUC*, 768 A.2d 1217 (Pa. Cmwlth. 2001)). By way of further clarification, the party with the burden of proof may successfully bear the burden of production, but not be entitled to a verdict in its favor because the party did not bear the burden of persuasion.

It is entirely possible for a party to successfully bear the burden of production but not be entitled to a verdict in his favor because the party did not bear the burden of persuasion. Unlike the burden of production, the burden of persuasion includes determinations of credibility and acceptance or rejection of inferences. Even un rebutted evidence may be disbelieved. *Suber v. Pa. Comm'n on Crime and Delinquency*, 885 A.2d 678 (Pa. Cmwlth. 2005), *appeal denied*, 586 Pa. 776, 895 A.2d 1264 (2006). In order to bear the burden of proof and be entitled to a decision in his favor, a party must bear both the burden of production and the burden of persuasion.

Applications of Transource Pa., LLC, 2021 PaPUC LEXIS 143 (May 24, 2021), Order, *28. As further stated by the Commission:

[t]he burden of proof has not been met even if no contradictory testimony is presented. We, being the trier of fact and the agency possessing expertise in the matter of utility regulation, are not required to accept even uncontradicted testimony as true.

Re West Penn Power Co., 1980 PaPUC LEXIS 49 (May 29, 1980), Order, *22.

Accordingly, PAWC and Appalachian carry both the burden of production and persuasion and must present evidence that fairly outweighs the evidence presented by the opposing parties in order to meet their burden of proof. Moreover, such evidence must be substantial and legally credible tending to preponderate the Applicants' claims in this proceeding.

III. SUMMARY OF REPLY ARGUMENT

At its core, this case turns on whether the proposed transaction as structured by PAWC and AUI creates affirmative public benefit. It does not. PAWC (1) seeks approval to pay AUI

[BEGIN CONFIDENTIAL] [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] [END CONFIDENTIAL]; and (2) will reasonably likely seek to place the burden of those costs onto PAWC's ratepayers in a future rate case. The only reason cited for the sale is that the owner wishes to exit the business. However, the seller's desire to exit the business and sell the system to PAWC at a [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] premium that will be paid for by ratepayers is not a substantial affirmative public benefit.

The general probable rate impact of this transaction is known based on this record and the Commission must consider it in this Section 1102 proceeding. The Commission cannot avoid consideration of the rate impact by deferring the issue to PAWC's next rate case as doing so is contrary to legal precedent. Whether a substantial affirmative public benefit arises out of the transaction must be decided in the Application proceeding under the standards of Section 1102/1103, not in a subsequent base rate case under Section 1308(d), 66 Pa. C.S. § 1308(d).

While the detailed rate impact will be determined by the Commission in a future PAWC rate case regarding the rate base value and the allocation of costs, in the instant proceeding, such details need not be decided by the Commission. Rather, the Commission must consider the general probable rate impact when considering whether the transaction would create net substantial affirmative benefits.

Based on this record, it is evident that PAWC wants to pay AUI [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] the depreciated cost of its system and retain the right to seek to have all that excess included in ratemaking rate base with the effect of increasing the revenue requirement that customers will be required to pay. When determining whether there is an affirmative public benefit, the Commission must consider the real likelihood that PAWC will seek to impose all of the cost burden of this transaction onto its ratepayers and the Commission must consider that potential rate impact in weighing whether there is an affirmative public benefit.

The magnitude of the purchase price over depreciated original cost, alone, creates a known and quantifiable risk of rate harm that outweighs the totality of possible benefits from PAWC ownership. Without placing any conditions on the acquisition, PAWC's existing ratepayers will pay more than double net book value for PAWC's ownership of AUI. PAWC claims that it will move AUI to PAWC's Rate Zone 1 over time and do so gradually to avoid rate shock. There is no denying that AUI's customers will pay increased rates in the future under PAWC's ownership. Until that happens, PAWC's existing customers will subsidize the cost of Manwalamink's system, which includes a [BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED]

██████████ [END CONFIDENTIAL]. The unjustified premium will only exacerbate rate shock, not lessen it.

The Applicants have failed to demonstrate the necessary public benefits required for approval of the Application and the transaction should be denied as proposed. Alternatively, if the Commission determines to approve the transaction, it should do so only if conditioned on the requirement that PAWC cannot claim more than depreciated original cost of the AUI system in rate base in the first base rate case where the Commission allows the system to be included, as well as the OCA's other recommended conditions. Contrary to the contentions of PAWC, the Commission has broad statutory authority and discretion under Section 1103(a) to impose conditions that it deems to be just and reasonable when granting certificate of public convenience (CPC) authority, and the Commission's exercise of that authority and discretion does not infringe upon PAWC's due process rights to be heard in a subsequent base rate case or the nondelegation doctrine.

The Commission's duty in this case is to determine whether there is an affirmative public benefit resulting from the transaction. This is a net benefits test and requires the Commission to consider probable rate harm. If the Commission can ameliorate that rate harm through imposing conditions on its grant of a CPC, the only proceeding in which that can be done is this proceeding. The Commission's authority to impose conditions clearly includes a limitation on what PAWC can include in future ratemaking rate base in order to prevent probable rate harm based on substantial record evidence. Furthermore, if PAWC or AUI are dissatisfied with the condition, they could choose to not close the transaction given that the Commission's grant of CPC authority merely serves as permission to proceed with the acquisition, and not as a mandate requiring the parties to close the purchase and sale of stock and property. Accordingly, PAWC's

constitutional rights and the nondelegation doctrine are not impinged by the Commission acting pursuant to its express and broad authority and discretion under Sections 1102 and 1103(a) to protect the public interest. Furthermore, as evidenced in its argument below, the OCA's requested conditions are consistent with the doctrines of statutory construction.

As the OCA has demonstrated in its Main Brief and as expressed further below, the OCA's comprehensive analysis demonstrates, and the record supports, that the Applicants have failed to demonstrate that the proposed transaction would provide an affirmative public benefit. In fact, the record shows the opposite: the averred benefits are outweighed by the substantial harm to customers. As such, PAWC and AUI have not met their burden of proof under 66 Pa. Code §§ 1102 and 1103. Thus, pursuant to applicable law, the Commission must deny the application; or, in the alternative, condition the grant of CPC authority to limit PAWC's ability to place any amount in excess of depreciated original cost at the time of closing in rate base in a future rate case.

IV. ARGUMENT

A. PAWC's Legal, Technical and Financial Fitness

The OCA does not dispute PAWC's fitness. See PAWC M.B. at 10-12; AUI M.B. at 12-13. Notwithstanding PAWC's fitness, PAWC's acquisition of AUI at a **[BEGIN CONFIDENTIAL]** [REDACTED] **[END CONFIDENTIAL]** premium over depreciated original cost does not produce substantial affirmative public benefits. OCA M.B. at 7-20.

B. Substantial Public Benefits Test

1. Public-at-Large

In its Main Brief, PAWC submits that the transaction benefits all members of the public-at-large by promoting regionalization and consolidation of the water industry and related synergies and economies of scale. PAWC M.B. at 13-15. However, as argued in OCA's Main

Brief at 18-19, 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 in this case 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, this 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 issues¹, 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.*

¹ See e.g. *Pa. PUC v. Pa.-American Water Co.*, Docket Nos. R-2023-3043189 et al (Opinion and Order entered July 22, 2024) (*PAWC 2023*) (directing an investigation into the quality-of-service issues in PAWC's northeastern service territory), available at <https://www.puc.pa.gov/pdocs/1838564.pdf>; see also *PAWC 2023* Motion of Chairman Stephen M. DeFrank (referencing a "trend of customers claiming negative quality of service experiences mainly due to a lack of water quality" in the City of Scranton and greater Lackawanna service territory of PAWC), available at <https://www.puc.pa.gov/pdocs/1837269.pdf>; see also *PAWC 2023* Statement of Commissioner Kathryn L. Zerfuss (recounting testimony of customers "who voiced concerns about having to buy filtered water because their water has rust contaminants, is dirty, is cloudy, smells funny, tastes like metal, and is not fit to drink or to use for household purposes. Customers also testified about poor water pressure and hard water, resulting in the use of water softeners and secondary filtration systems. Several customer stated that they were afraid to consume the water because of the odor and appearance.), available at <https://www.puc.pa.gov/pdocs/1837306.pdf>.

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.

Additionally, in its Main Brief, PAWC argues that the transaction will benefit the public-at-large because PAWC sponsors and donates to local causes. PAWC M.B. at 16. However, PAWC has not shown how this status quo will change or improve by approving the transaction.

Thus, PAWC's averred benefits to the public-at-large are either not benefits at all – because they do not differ in any substantial way from the technical, legal, or financial capability of PAWC – or they do not outweigh the adverse rate impact on existing PAWC customers and to-be-acquired AUI customers.

2. AUI as Seller

In PAWC's and AUI's Main Briefs, they assert that the sole shareholder of AUI will achieve personal goals of rewarding his dedicated employee by transferring stock to that employee and that both the shareholder and dedicated employee will benefit from the proceeds of the sale. The sole shareholder will get to exit the business and retire, while the dedicated employee will continue working PAWC. PAWC M.B. at 17; AUI M.B. at 14. Furthermore,

they assert that AUI “is currently providing reasonable and adequate service at just and reasonable rates, but its future is doubtful.” PAWC M.B. at 18, 20.

However, as asserted in the OCA’s Main Brief, 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 M.B. at 9; OCA St. 1 at 8-9; OCA 1SR at 6. There is no doubt that the shareholder and dedicated employee will benefit from the proceeds of the sale that is valued at **[BEGIN CONFIDENTIAL]** [REDACTED] **[END CONFIDENTIAL]** higher than the system assets depreciated original cost, but there is no net affirmative public benefit in PAWC paying that premium as it harms consumers. Moreover, PAWC admits that AUI is currently provide reasonable and adequate service, which is the status quo. While AUI and PAWC speculate about a future of demise, they do so while ignoring the options available to AUI to avoid just that, including filing a general rate increase if its revenues are insufficient, OCA St. 1 at 11, and applying for PENNVEST loans and grants, which AUI could apply for, which could help mitigate some of the costs for design, engineering, and construction. OCA St. 1SR at 8-9; *see* OCA M.B. at 14.

3. AUI’s Existing Customers

In its Main Brief, PAWC argues that AUI’s customers are members of the public-at-large and so will benefit like all members of the public-at-large. PAWC M.B. at 18. However, as the OCA argues above, PAWC’s averred benefits to the public-at-large are either not benefits at all – because they do not differ in any substantial way from the technical, legal, or financial capability of PAWC – or they do not outweigh the adverse rate impact on to-be-acquired AUI customers.

Additionally, PAWC argues that AUI’s customers will benefit from PAWC’s ability to comply with environmental regulations, like the lead and copper rule and PFAS treatment requirements, and PAWC’s planned capital improvements of more than \$6.25 million within the first five years of closing. PAWC M.B. at 19-20. However, as argued in the OCA’s Main Brief

at 11-12, while it may be easier for PAWC to ensure compliance, there is no evidence that AUI cannot or will not comply and as a public utility AUI must comply with requirements the same as PAWC. OCA St. 1SR at 6. Since both utilities are required to comply, this is effectively a maintenance of the status quo. *Id.* Moreover, while PAWC clearly has more resources, its resources are sized to its system. OCA St. 1 at 12. Same with AUI; they require fewer resources because they are a smaller system. *Id.* More to the point, however, 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.” *Id.* Thus, PAWC’s lead service line replacement program is not a clear benefit, rather it is a speculative benefit in the event lead service lines are located in AUI’s service territory under PAWC ownership. *Id.* OCA M.B. at 11-12.

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. 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. OCA M.B. at 14.

PAWC also argues that AUI's customers will benefit from having access to customer assistance programs offered by PAWC. However, while PAWC may offer extended customer service and hours, the benefit does not outweigh the harm of the rate increase customers will face. OCA M.B. at 15. Further, the only functional difference between PAWC's billing system and AUI's is the ability to pay over the phone or by e-check. OCA M.B. at 15; OCA St. 1 at 13.

PAWC further asserts that this case is distinguishable from *Cicero v. Pa. Pub. Util. Comm'n.*, 300 A.3d 1106 (Pa. Cmwlth. 2023) *alloc. granted Cicero v. Pa. PUC*, Nos. 47-49 MAP 2024 (Pa. June 14, 2024) (*Cicero*) because AUI is not capable of providing the same benefits that it would receive from the acquisition without a "massive" rate increase. PAWC M.B. at 24. However, such argument is meritless and should be rejected as 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 M.B. at 9-10; 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.* 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.

The rate harm that AUI’s existing customers will likely face is known based on this record, even putting aside the purchase price premium and resulting revenue deficiencies and such rate harm is only exacerbated by the purchase price premium proposed by the Applicants. Specifically, 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; OCA M.B. at 10. Factoring in the purchase price premium, PAWC is proposing to purchase AUI at a purchase price of [BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]

[REDACTED] [END CONFIDENTIAL]. AUI’s customers – should they become PAWC customers – would be required to pay for the premium and resulting revenue deficiency through increased rates.

4. PAWC as Buyer

PAWC argues that by acquiring the AUI system, it gives “PAWC a greater presence in the region” near three existing PAWC systems and “will help PAWC run all four system more efficiently and effectively.” PAWC M.B. at 26. This statement in this paragraph is not supported by a record cite and is mere speculation. As the OCA witness testified, 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. OCA St. 1SR at 5. PAWC did not address this testimony in the record.

Moreover, PAWC asserts that by gaining an additional 1,456 water customers, it should make the Company a stronger, more financially stable utility. PAWC M.B. at 26 (citing PAWC St. No. 1 p. 24). However, rate affordability is as important as the number of customers for the financial health of a utility. As the OCA witness testified, 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. It is not clear how consolidation of water companies at cumulative inflated rate base values will sincerely create an affirmative public benefit. *Id.*

Finally, PAWC asserts that it is paying a reasonable price for the acquisition because the purchase price of the system is less than PAWC's average net plant in serve for other water customers. PAWC M.B. at 26. Purchase price per customer is simply a comparative tool and not a test for reasonableness of the purchase price or an affirmative public benefit. Nevertheless, as the OCA stated in its Main Brief, the purchase price per customer for AUI is higher than three out of the four Section 1102 acquisitions in the last six years. OCA M.B. at 13 (citing 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.*

5. PAWC's Existing Water Customers

In its Main Brief, PAWC again argues that PAWC's existing customers are members of the public-at-large and so will benefit like all members of the public-at-large. PAWC M.B. at 27. However, as the OCA argues above, PAWC's averred benefits to the public-at-large are

either not benefits at all – because they do not differ in any substantial way from the technical, legal, or financial capability of PAWC – or they do not outweigh the adverse rate impact on existing PAWC customers.

Additionally, PAWC asserts that the addition of the AUI customer base will benefit PAWC's existing customer by spreading costs across a larger customer base (i.e., economies of scale). PAWC M.B. at 27. However, PAWC has provided no concrete benefits to existing PAWC customers which will result from this transaction, outside of vague, illusory, aspirational and unsupported statements regarding cost-sharing, regionalization, and consolidation. OCA M.B. at 15. It is both likely and foreseeable that the rates paid by existing PAWC customers will increase as a result of this transaction. *Id.* It would take years for acquired AUI customers to move to Rate Zone 1 rates and, in the meantime, PAWC's existing customers would be subsidizing this system as noted above. OCA M.B. at 16; 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 M.B. at 16; OCA St. 1SR at 9. Thus, there is a serious risk that current PAWC customers will end up subsidizing the cost to provide service to AUI that are not recovered from AUI customers. OCA M.B. at 15; OCA St. 1SR at 9.

Further, as the OCA argued in its Main Brief, 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, 66 Pa. C.S. § 1329. 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. OCA M.B. at 15-16.

Finally, PAWC argues that if PAWC requests and receives an acquisition adjustment in the full amount of the purchase price, the impact on PAWC's existing water customers would be *de minimus*, submitting that the acquisition premium and annual revenue deficiency of [BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED] [END CONFIDENTIAL]. PAWC M.B. at 28-29. PAWC further asserts that the actual impact will likely be even less if the Commission allows AUI's rates to move toward consolidation with PAWC's Zone 1 rates. PAWC M.B. at 29 (citing PAWC St. No. 3-R pp. 6-7; PAWC St. No. 3-RJ pp. 5-6.) PAWC argues that "[s]uch a small rate impact...should receive little weight in the Commission's net benefits assessment." PAWC M.B. at 29.

First, PAWC suggest that the Commission should overlook any rate harm if the acquisition is small even if there is little to no benefit from the transaction. OCA St. 1SR at 8. While the OCA does not dispute the rate calculations that PAWC presented, it was based on the purchase price premium alone; when you include the capital improvements, the estimated annual revenue deficiency is [BEGIN CONFIDENTIAL] [REDACTED] [REDACTED] [REDACTED] [END CONFIDENTIAL] as Ms. Everette acknowledged in her testimony. *Id.* It is obvious that when a company has almost \$1 billion in authorized water revenues that a [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] revenue deficiency from an acquired system would

produce small annual impacts on a per customer basis. *Id.* However, where there is little to no benefit from the transaction overall, there is no reason why PAWC's customers should have to pay hundreds of thousands of dollars more per year even when spread out over PAWC's large customer base. *Id.*

Under any objective standard, asking the Commission to approve a transaction that with [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] premium over net book value for a system that based on this record is not troubled or distressed, without imposing any conditions on what happens to that premium and who pays for it is not a mere risk to ratepayers but rather a multi-million dollar foreseeable risk to ratepayers.

6. PAWC's Existing Wastewater Customers

In its Main Brief, PAWC again argues that PAWC's existing customers are members of the public-at-large and so will benefit like all members of the public-at-large. PAWC M.B. at 30. However, as the OCA argues above, PAWC's averred benefits to the public-at-large are either not benefits at all – because they do not differ in any substantial way from the technical, legal, or financial capability of PAWC – or they do not outweigh the adverse rate impact on existing PAWC customers.

Additionally, PAWC asserts that its wastewater customers will benefit because the addition of the AUI customers will increase the water customer base to subsidize wastewater rate increases under Section 1311(c). PAWC M.B. at 30. Unlike the known rate harm that will result from the acquisition premium, PAWC's assertion about benefits to wastewater customers due to an Act 11 shift in a future rate case is pure speculation and unsupported by the record.

7. The Commission Must Consider the Rate Harm of the Purchase Price, Which Is Supported by Substantial Record Evidence, in Weighing the Harms and Benefits of the Proposed Transaction under Sections 1102/1103.

According to PAWC, it and only it, can determine whether to bring ratemaking issues into an application under Section 1102 by choosing or declining to elect Section 1327 treatment in its application proceeding or in a rate case. As PAWC exercised its right to request Section 1327(a) treatment in a future rate case proceeding rather than have it decided in the acquisition proceeding, PAWC argues that it is premature and speculative as whether PAWC will make such a claim and thus the Commission has no authority to consider the reasonableness of the purchase price or assign it any weight in weighing the benefits against the harms of the proposed transaction. PAWC M.B. at 22, 26-29.

PAWC's analysis is incorrect. The Commission need not (and is not being requested to) make a ratemaking rate base determination in this proceeding. Rather, 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 v. Pa. PUC*, 295 A.2d 825, 829 (Pa. 1972) (*City of York*); *McCloskey v. Pa. PUC*, 195 A.3d 1055, 1066-67 (Pa. Cmwlth. 2018) (*McCloskey*). 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.***

determination whether the transaction provides an affirmative public benefit under the test established by *McCloskey*.

PAWC and AUI erroneously rely on the Commission's decision in *Scranton* 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 M.B. at 35; AUI M.B. at 10-11. *Scranton* is not applicable here. The PUC's decision in *Scranton* was decided before *McCloskey*, where the Court reaffirmed and clarified the *City of York* holding – a holding that is applicable to all applications brought under Section 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* 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 at 1067 (emphasis added).

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 under Section 1102. *See id.*

Furthermore, 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. 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.

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 and AUI want the Commission to do. It defies logic, common sense and, most significantly, the Commonwealth Court's precedent for the

Applicants to argue that the Commission could not or should not consider that fact in determining whether there is an affirmative public benefit.

8. 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.

C. Conditions Necessary for Approval

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.

1. The OCA's Proposed Condition Regarding the Acquisition Premium Is Not Premature.

In PAWC's Main Brief, PAWC argues that the Code does not prohibit a utility from paying more than depreciated original cost to acquire property. PAWC M.B. at 32. While the OCA agrees that PAWC's shareholders can pay acquisition premiums, Section 1311(b) requires that utility property for non-distressed/troubled water system can be recovered in rates from ratepayers at depreciated original cost and Section 1102/1103 requires the Commission to make a finding that a proposed acquisition produce affirmative substantial public benefit. 66 Pa.C.S. §§ 1311(b), 1102, 1103(a).

Additionally, PAWC argues that Commission should reject the OCA's recommended condition regarding the acquisition premium as premature and asserts that the Commission should defer the issue of rate harm until PAWC's next case. PAWC M.B. at 32-35. PAWC argues that its shareholders will bear the risk of recovery of the premium and that the appropriate safeguards exist that will give the OCA the opportunity in the next rate case to oppose PAWC's Section 1327 claim related to the AUI system. PAWC M.B. at 32-35, 40. The Commission should reject PAWC's arguments. As argued in the OCA's Main Brief, 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 OCA could oppose such a claim and 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. OCA M.B. at 23-24.

2. PAWC's Nondelegation Doctrine Arguments are Meritless and Should Be Rejected.

PAWC argues that the OCA's recommended condition under Section 1103(a) would effectively allow the Commission to repeal Section 1327 by taking away PAWC's right to make a Section 1327 claim and that such result would violate the constitutional nondelegation doctrine. PAWC M.B. at 37-39. PAWC's argument is meritless. While PAWC generally cited Pennsylvania Supreme Court decisions explaining the nondelegation doctrine and a law review article, PAWC has not explained how these cases support its argument. PAWC's argument about nondelegation is inapplicable here as no party – including the OCA – is asking the Commission to make, repeal, or modify 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. PAWC somehow twists this 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. The Commission should reject PAWC's argument.

3. The OCA's Proposed Condition Regarding the Acquisition Premium is Not Arbitrary, Is Necessary to Protect Consumers, Would Not Harm PAWC, and Is Not Against Public Policy.

PAWC argues that imposing the condition proposed by OCA regarding the acquisition premium would be arbitrary because PAWC alleges the proposed transaction passes the affirmative public benefits test. PAWC M.B. at 39-40. PAWC also argues that an acquisition premium should not be considered a “harm” because the Legislature determined that an acquisition adjustment to rate base is in the public interest in certain circumstances. PAWC M.B. at 40. Additionally, PAWC argues that the OCA's proposed condition undermines the General Assembly's intent of enacting Section 1327. PAWC M.B. at 41-42.

Here, if PAWC's argument is adopted, it means that the election right under Section 1327 allows the utility – and only the utility – to place limitations on the Commission's foundational, gatekeeping statutory authority and responsibility to do the necessary weighing of harms against benefits under Section 1103(a). 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). PAWC's reading of the statute would produce an absurd/impossible to execute result where the utility and only the utility can determine the type and level of record evidence that the Commission can consider when considering the general probable rate impact of the acquisition. However, this is contrary to the standards articulated under *City of York* and *McCloskey*.

Rather, a more reasonable construction of Section 1327 and 1102/1103 is that 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 consider the rate harm demonstrated in this record as part of the weighing of benefits and harms as required under *City of York* and *McCloskey*.

Along these lines, PAWC asserts that the OCA's proposed condition would deprive the Company from ever exercising its statutory right to request an acquisition adjustment even if the transaction satisfies all the criteria in Section 1327. PAWC M.B. at 41. This argument is meritless. Contrary to PAWC's assertion, at the time of filing its Section 1102 application, PAWC can elect to satisfy the more burdensome notice requirements to consumers and put on its case to the Commission that the criteria of Section 1327 are satisfied. The OCA would have the opportunity to oppose, but if PAWC is able to satisfy the criteria, a condition to limit the adjustment would not be just and reasonable. However, based on this record in this proceeding, there is *no* evidence to show that the AUI system is troubled or distressed. Rather, AUI and PAWC admit that AUI is providing safe and reasonable service to its customers.

Furthermore, the OCA's proposed condition is in support of public policy and the public interest because, without the condition, ratepayers are very highly likely on the hook for paying the acquisition premium in rates. Contrary to PAWC's assertion, the acquisition premium condition is not against public policy because if PAWC or AUI are dissatisfied with the condition, they still have choices (unlike ratepayers if there is no condition). They could choose to proceed with closing with the knowledge that PAWC's shareholders, and not ratepayers, will bear the cost of the acquisition premium *or* they can choose to not close the transaction given

that the Commission's grant of CPC authority merely serves as permission to proceed with the acquisition, and not as a mandate requiring the parties to close the purchase and sale of property. 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, 1103.² Accordingly, neither PAWC's due process rights nor the nondelegation doctrine are impinged by the Commission acting pursuant to its express and broad authority and discretion under Sections 1102 and 1103(a) to protect the public interest by imposing the just and reasonable condition to limit what PAWC can include in future ratemaking rate base in order to prevent known rate harm based on substantial record evidence.

The Commission has broad discretion to impose conditions that it may deem to be just and reasonable. 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 certificate they hold, the Commission has the authority to grant, deny, or even condition a utility's request to begin, transfer, or abandon service. *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:

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

² 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/pdocs/1785100.pdf>.

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).

4. The OCA's Proposed Condition to Require a Cost-of-Service Study is Just and Reasonable.

PAWC argues that the OCA's proposed condition to produce a cost-of-service study for the AUI system after acquisition is not just and reasonable because one should not be necessary given that the system is "very small compared to PAWC's water operations."

PAWC does not dispute that AUI has never prepared a class cost-of-service study. Given that AUI will be a standalone system, the proposed condition to produce a class cost-of-service study is just and reasonable because it will determine the appropriate cost allocation of the system's revenue requirement for residential, commercial, and industrial customers based on cost causation principles. That PAWC intends to propose that AUI customers be included in Rate Zone 1 rates is of no consequence to this issue, especially given that 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.

In conclusion, the OCA's recommended conditions are just and reasonable based on this record and offered to satisfy the affirmative public benefits standard. They do not contradict statute or Commission precedent. As discussed in the OCA's Main Brief, the Commission has broad discretion to impose conditions that it may deem to be just and reasonable.

IV. CONCLUSION AND REQUEST FOR RELIEF

For the reasons stated above, and in the OCA's Main Brief, the Application should be denied. Pennsylvania-American Water Company and AUI have failed to meet their burden of proof under Sections 1102 and 1103. If the Commission determines to grant the Application, such approval should include the OCA's recommended conditions.

Respectfully submitted,

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