



March 12, 2025

VIA E-FILE

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Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor North
Harrisburg, PA 17120

Re: 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-2024-3046068, A-2024-3046084, A-2024-3046092

Exceptions of Pennsylvania-American Water Company (Public and Proprietary Versions)

Dear Secretary Chiavetta:

Enclosed for filing with the Pennsylvania Public Utility Commission ("Commission") are the Exceptions of Pennsylvania-American Water Company (Public Version) in the above-referenced proceedings. The Proprietary Version of these Exceptions will be filed via the Commission's Sharepoint site. A copy of this document has been served in accordance with the attached Certificate of Service.

If you have any questions regarding this filing, please direct them to me. Thank you for your attention to this matter.

Sincerely,

COZEN O'CONNOR

By: David P. Zambito

Counsel for *Pennsylvania-American Water Company*

DPZ

Enclosure

cc: Honorable Administrative Law Judge Conrad A. Johnson
Per Certificate of Service
Erin Fure, Esq.

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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 : Docket Nos. A-2024-3046068
Water Works Company, Inc., by merger, of all : A-2024-3046084
property of Appalachian Utilities, Inc. used and : A-2024-3046092
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 :

CERTIFICATE OF SERVICE

I hereby certify that I am this 12th day of March, 2025, serving the foregoing **Exceptions of Pennsylvania-American Water Company (Public and Proprietary Versions)** upon the persons and in the manner indicated below, which service satisfies the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

Joint Application of Pennsylvania-American :
Water Company and Appalachian Utilities, :
Inc., Pursuant to Section 1102 of the Public : Docket Nos. A-2024-3046084
Utility Code, for approval of (1) the transfer : A-2024-3046092
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 :

**EXCEPTIONS OF PENNSYLVANIA-AMERICAN WATER COMPANY
PUBLIC VERSION**

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AND NOW COMES Pennsylvania-American Water Company (“PAWC” or the “Company”) pursuant to 52 Pa. Code § 5.533, to file these Exceptions to the Initial Decision (“Initial Decision” or “I.D.”) issued by Administrative Law Judge Conrad A. Johnson (the “ALJ”) on February 20, 2025. PAWC respectfully requests that the Pennsylvania Public Utility Commission (the “Commission”) reverse the Initial Decision and approve the Joint Application filed by PAWC and Appalachian Utilities, Inc. (“Appalachian” or “AUI”) (together with PAWC, the “Joint Applicants”) on February 2, 2024. The Joint Application requests approval of PAWC’s acquisition, by merger, of Appalachian (the “Transaction”). The evidentiary record developed in this proceeding clearly demonstrates that the Transaction would produce affirmative public benefits of a substantial nature and any determination by the Commission regarding the appropriate rate base under Section 1327 of the Code, 66 Pa. C.S. § 1327, is properly reserved for the expert discretion of the Commission in a future base rate case.

In addition, PAWC respectfully submits that the Commission should find that the Application filed by Appalachian on February 2, 2024, requesting approval to transfer 40% of Appalachian’s stock from Frank R. Sargent, Jr. to Kyle Gallagher (the “Stock Transfer”) is non-jurisdictional. In the alternative, if the Commission finds the Stock Transfer is jurisdictional, the Commission should approve it.

I. PROCEDURAL HISTORY

To avoid unnecessary repetition, PAWC incorporates by reference its Main Brief and Reply Brief.¹ The Procedural History of this case is summarized at pages 1-2 of PAWC’s Main Brief and page 1 of PAWC’s Reply Brief.

¹ For the Commission’s convenience, these Exceptions frequently reference the Briefs, where references to the testimony and exhibits can be found.

To update the Procedural History: On November 6, 2024, PAWC, Appalachian, and the Office of Consumer Advocate (“OCA”) filed Reply Briefs. On February 20, 2025 the ALJ issued his Initial Decision.

II. SUMMARY OF ARGUMENT

The primary issue to be decided in this case is whether to approve the Joint Application. The Initial Decision disapproved the Joint Application, in part, because it disapproved the Stock Transfer. According to the Initial Decision, disapproval of the Stock Transfer collapsed the Joint Application, causing it to be moot. This decision was error because the Commission lacks jurisdiction over the Stock Transfer pursuant 66 Pa. C.S. § 1102 and the Commission’s statement of policy concerning utility stock transfers. 52 Pa. Code § 69.901. PAWC can raise this issue at this stage of the proceedings because the issue of the Commission’s jurisdiction is never waived.

Under the applicable legal standard, Appalachian and PAWC, as joint applicants, must show that the Transaction will “affirmatively promote the service, accommodation, convenience, or safety of the public in some substantial way.” *City of York v. Pa. Pub. Util. Comm’n*, 295 A.2d 825, 828 (Pa. 1972). This is commonly known as the “affirmative public benefit” test. Although the Initial Decision found the Joint Application to be moot, it analyzed the Transaction and recommended that the Commission find that the Transaction does not pass the affirmative public benefit test. This was error.

When the benefits of the Transaction are weighed against the detriments, the preponderance of the evidence shows that the specific benefits that will flow from this particular Transaction outweigh the detriments. This is evident when one compares what happens if the Commission approves the Transaction (allowing PAWC’s acquisition and merger of Appalachian) to what happens if the Commission disapproves the Transaction (maintaining the *status quo*).

Although not addressed directly in the Initial Decision, the imposition of conditions under Section 1103, 66 Pa. C.S. § 1103, as recommended by the OCA and Office of Small Business Advocate (“OSBA”), is unnecessary to produce affirmative public benefits. The Transaction, as structured, will produce substantial affirmative public benefits. Additionally, the imposition of conditions on the Transaction would be unjust and unreasonable for several reasons. Foremost among these reasons is that the Commission’s power to impose conditions is not unlimited. One limit is that the Commission cannot impose conditions that are contrary to the Pennsylvania Public Utility Code (“Code”). Several conditions proposed by the OCA and the OSBA are not just and reasonable because they improperly seek to modify the Code.

III. LEGAL STANDARDS

As the parties seeking affirmative relief from the Commission, the Joint Applicants have the burden of proof in this proceeding. 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).

The Commission may issue a certificate of public convenience (“Certificate”) upon a finding that “the granting of such certificate is necessary or proper for the service, accommodation, convenience, or safety of the public.” 66 Pa. C.S. § 1103(a). In doing so, the Commission may impose conditions that are “just and reasonable.” *Id.*

An applicant for a Certificate must demonstrate that it is technically, financially, and legally fit to own and operate the acquired public utility assets. *Seaboard Tank Lines v. Pa. Pub. Util. Comm’n*, 502 A.2d 762, 764 (Pa. Cmwlth. 1985); *Warminster Twp. Mun. Auth. v. Pa. Pub. Util. Comm’n*, 138 A.2d 240, 243 (Pa. Super. 1985). The fitness of a currently certificated public utility

is rebuttably presumed. *See, e.g., South Hills Movers, Inc. v. Pa. Pub. Util. Comm'n*, 601 A.2d 1308, 1310 (Pa. Cmwlth. 1992).

An applicant for a Certificate must also demonstrate that the transaction will “affirmatively promote the service, accommodation, convenience or safety of the public in some substantial way.” *City of York*. The Supreme Court of Pennsylvania has described the affirmative public benefit test as a “net benefits assessment.” *Popowsky v. Pa. Pub. Util. Comm'n*, 937 A.2d 1040, 1056 (Pa. 2007). This requires a showing that, on net, the public is better off because of the transaction than it would have been in the absence of the transaction. *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). Where there are known harms, the transaction must have benefits that differ substantially from the benefits already being provided by the existing system operator to support approving the transaction. *Id.*

Section 2102 of the Code, 66 Pa. C.S. § 2102, requires that written and unwritten agreements between a public utility and an affiliated interest be filed with the Commission for approval. “The commission shall approve such [affiliated interest] contract or arrangement . . . if it shall clearly appear and be established upon investigation that it is reasonable and consistent with the public interest.” 66 Pa. C.S. § 2102(b).

The Commission has jurisdiction over certain stock transfers involving a “controlling interest” (an interest that allows the holder to control at least 20% of the voting interest in the utility). Specifically, the Commission has jurisdiction where the transfer creates a new controlling interest resulting in a different entity becoming the holder of the largest voting interest in the utility, or where the transfer eliminates a controlling interest in the utility. 52 Pa. Code § 69.901(b)(2).

IV. EXCEPTIONS

The Initial Decision began by addressing the Stock Transfer, which it denied. According to the Initial Decision, this conclusion collapsed the Joint Application, and the Joint Application became moot because there was no evidence that Appalachian would proceed with the Joint Application if the Stock Transfer is denied. I.D. p. 19. Nevertheless, the Initial Decision addressed the question of whether the Transaction will affirmatively benefit the public in a substantial way.

It concluded in a summary manner:

Additionally, as OCA argues, the evidence is lacking proof of substantial affirmative benefits to the public. As OCA argues PAWC's averred benefits of the merger are either not benefits at all – because they do not differ in any substantial way from the technical, legal, or financial capability of AUI—or they do not outweigh the adverse rate impact on existing PAWC customers and to-be-acquired AUI customers. Additionally, OCA established approval of the Joint Application will likely result in sizeable and frequent rate increases in the future for AUI customers as customers of PAWC. OCA St. 1 at 6; OCA St. 1SR at 9. Rate harm of the purchase price must be considered by the Commission in its weighing of harms and benefits in determining whether the transaction as proposed would produce affirmative public benefit. As OCA notes the general probable rate harm of the proposed transaction is known and not speculative, and the timing of the rate harm is tied directly to PAWC's next base rate case filing where it can seek to include in ratemaking rate base the acquisition premium above depreciated original cost. Additionally, AUI is currently providing reasonable and adequate service to its customers. AUI St. 1-R pp. 5,6. Approval of the Joint Application would result in a revenue deficiency. OCA St. 1 at 12; OCA St. 1SR at 8. (*See Confidential version*). Considering the above Findings of Fact as well as harm to ratepayers, approval of the Joint Application is not warranted.

I.D. 32.

PAWC respectfully submits that the Initial Decision put the cart before the horse. The Stock Transfer is contingent on approval of the Joint Application, not the other way around. AUI St. 1 at 2. Therefore, this brief begins by focusing on whether the Joint Application should be approved and related issues. The Stock Transfer will be analyzed last.

Specifically, PAWC will address first whether the Joint Applicants carried their burden of proving that the Transaction will affirmatively promote the service, accommodation, convenience

or safety of the public in some substantial way as required by *City of York*. PAWC will then address several issues in this proceeding which the Initial Decision failed to address (*i.e.*, whether PAWC is fit to own and operate Appalachian’s water system (the “System”), whether the Agreement and Plan of Merger (“Merger Agreement”) should be approved as an affiliated interest agreement, and whether the Commission should grant the conditions requested by the OCA and the OSBA). Finally, PAWC will address the Stock Transfer.

A. EXCEPTION 1: THE JOINT APPLICANTS PROVED, BY A PREPONDERANCE OF THE EVIDENCE, THAT THE TRANSACTION WILL AFFIRMATIVELY PROMOTE THE SERVICE, ACCOMMODATION, CONVENIENCE OR SAFETY OF THE PUBLIC IN SOME SUBSTANTIAL WAY.

PAWC argued that the Transaction passes the affirmative public benefit test because the benefits of the Transaction outweigh the detriments for all of the stakeholder groups impacted by the Transaction: the public-at-large; Appalachian; Appalachian’s existing customers; PAWC; and PAWC’s existing customers. PAWC Main Brief at 12-31; PAWC Reply Brief at 6-22. Even if the Transaction does not benefit each stakeholder group, PAWC submits that, taken as a whole, all the benefits of the Transaction outweigh all its detriments.

The Initial Decision erred in finding that “the evidence is lacking proof of substantial affirmative benefits to the public,” and “PAWC’s averred benefits of the merger are either not benefits at all—because they do not differ in any substantial way from the technical, legal, or financial capability of AUI—or they do not outweigh the adverse rate impact on existing PAWC customers and to-be-acquired AUI customers.” I.D. at 32. The Initial Decision also erred by failing to weigh the benefits against the detriments of the Transaction as a whole. As summarized below, the Transaction will yield substantial affirmative benefits to the public that are real,

material, and specific to the Transaction; these benefits, on net, outweigh the detriments of the Transaction.

1. The Transaction Benefits the Public-at-Large

The Transaction benefits the public-at-large (all residents of the Commonwealth, whether or not they are customers of PAWC or Appalachian), primarily because it promotes the Commission's policy of favoring regionalization and consolidation of water systems (which also benefits the customers of PAWC and Appalachian). 52 Pa. Code § 69.721(a). The Transaction would merge two public utilities into one. PAWC Main Brief, at 13. A merger is a classic example of a consolidation of utilities.²

The Transaction would also promote regionalization of water service. PAWC's existing Nittany, Boggs, and Milton operations are in close proximity to Appalachian, which, upon approval of the Transaction, allows for the sharing of staff and equipment. PAWC Main Brief at 14; PAWC Reply Brief at 7. Having operations in the vicinity which Appalachian can rely upon for resources will allow for faster resolution of issues, especially in emergency circumstances. PAWC Main Brief at 18, PAWC Reply Brief at 7. Systems do not need to be interconnected to promote regionalization. PAWC Main Brief, at 13.

The Commission has stated: "The regionalization of water and wastewater systems through mergers and acquisitions will allow the water industry to institute better management practices and achieve greater economies of scale." 52 Pa. Code § 69.721(a). The Transaction will allow both better management practices and greater economies of scale to be achieved.

² "Consolidation of corporations" is defined as "The union or merger into one corporate body of two or more corporations which had been separately created for similar or connected purposes." The Law Dictionary, <https://thelawdictionary.org/consolidation-of-corporations/>

The Transaction will provide economies of scale that Appalachian could not achieve on its own, such as a centralized lab that completes testing in-house at less expense than contracted lab services. PAWC Main Brief at 14-15. PAWC can obtain supplies at lower per unit prices than Appalachian because it can buy in bulk. PAWC Main Brief at 14-15. PAWC can move equipment around its system whereas Appalachian currently must either buy or rent any equipment that it needs. PAWC Main Brief at 14. PAWC has an internal engineering department which allows it to avoid contracting out work at higher costs to consulting engineers. PAWC Main Brief, at 14.

These economies of scale yield benefits to consumers that differ substantially from the service already being provided by Appalachian to its customers. Appalachian acknowledged this difference in its direct testimony: “[PAWC] can centralize an inventory system and lower the per unit cost, they buy products (chemicals, etc.) in bulk that we could never imagine. The same is true for services.” PAWC Main Brief, at 15. The Transaction will also benefit customers because PAWC has better management practices addressing staffing, public safety, and community engagement. PAWC Main Brief at 15-17. Contrary to the Initial Decision’s finding that the identified benefits are generalizations, these benefits are very specific to the Transaction.

Additionally, the Transaction will provide for better management practices because it will enable a planned and orderly transition of management. The Initial Decision determined that “It is clear from the testimony of Joint Applicant AUI’s president that the driving force behind the Joint Application is that its president and sole stockholder wishes to retire.” I.D. at 31. If the Transaction is disapproved, the future of Appalachian is unclear, given that the president of Appalachian intends to retire “and that is non-negotiable.” AUI St. No. 1-R p. 4. The OCA’s response – that Appalachian will continue to comply with the Code in the future because it is required to do so, OCA St. No. 1-SR p. 6 – is overly simplistic. The Commission can take official

notice of its own records, which show numerous instances in which a utility was required to comply with the Code but failed to do so.

Owners of systems such as Appalachian, who question their own viability in the near future, should be permitted (even encouraged) to sell before the System becomes non-viable. PAWC Main Brief, at 9. Appalachian sought a buyer for the System before a crisis occurs, and the avoidance of Appalachian ending up in a receivership and a forced sale. The Joint Application would provide for a smooth transition to new management, which is a benefit to the public-at-large. Appalachian Main Brief at 17; Appalachian Reply Brief at 7.

The Transaction has no material detriments for the public-at-large, and therefore the Transaction yields a net benefit for the public-at-large. PAWC Main Brief at 17; PAWC Reply Brief at 9.

2. The Transaction Benefits the System's Sellers

Approval of the Transaction will produce many benefits for the System's sellers. Appalachian is a privately held system with currently one shareholder who is aging and wants to retire after thirty years of running the company. Appalachian Main Brief at 14. Because the Stock Transfer is contingent on approval of the Joint Application, approval of the Joint Application means that Mr. Sargent will reward Mr. Gallagher for being a loyal employee by transferring 40% of Appalachian's stock to him; Mr. Sargent and Mr. Gallagher will benefit from receiving proceeds from the sale proportionate to their stock interest in Appalachian; Mr. Sargent will be permitted to retire; Mr. Gallagher (who is intimately familiar with the System) will become an employee of PAWC and assist in the transition of ownership; and Appalachian will be sold to a company that can provide reasonable and adequate service to Appalachian's customers in the future. PAWC

Main Brief at 17. No party rebutted PAWC's *prima facie* case that the Transaction benefits the System's sellers. PAWC Reply Brief, at 9.

The Initial Decision determined that "that the driving force behind the Joint Application is that AUI's president and sole stockholder wishes to retire. While the Commission is not unsympathetic to the owners' desire to retire, this is not ground to warrant approval of the Joint Application." I.D. at 31-32. The desire of Appalachian's owner to retire, in and of itself, does not justify the Transaction, but the affirmative public benefit test does. The System's sellers are members of the public, just as the System's ratepayers are members of the public. The benefits and detriments of the Transaction for the sellers therefore should be included in the net benefit analysis to determine if the Transaction affirmatively benefits the public as a whole in a substantial way. *Middletown Twp. v. Pa. Pub. Util. Comm'n*, 482 A.2d 674, 683 (1984) (when looking at the benefits and detriments of a transaction, the focus of the analysis must be on all affected parties).

When all of the benefits and detriments of the Transaction for the sellers are considered, the Transaction benefits the sellers of Appalachian, and will allow Mr. Sargent to be able to retire on the proceeds of the sale. In addition, as discussed below, the Transaction benefits the existing customers of Appalachian, who will enjoy enhanced service from PAWC. As noted by Appalachian:

Mr. Sargent's desire to sell was not predicated solely on his desire to retire, which will happen regardless of the outcome in 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. 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.

Appalachian Reply Brief at 7. Here, it is important to consider what will happen if the Transaction is approved versus what will happen if the Transaction is disapproved and the *status quo* is

maintained. The Transaction will allow a sale of Appalachian to PAWC, which is experienced in undertaking and completing acquisitions and successfully integrating those assets into its business operations. PAWC Main Brief, at 11. If the Transaction is not approved, the record in this case establishes that on-going operations are at risk.

The Transaction yields benefits to the sellers of Appalachian and there are no detriments for the sellers. PAWC Main Brief at 18, PAWC Reply Brief at 10. The Transaction therefore yields a net benefit to this stakeholder group.

3. The Transaction Benefits Appalachian's Existing Customers

a. Impacts of the Transaction on Service for Appalachian's Existing Customers

The Initial Decision notes that Appalachian is currently providing reasonable and adequate service to its customers. I.D. at 32. The Initial Decision ignores the record evidence that Appalachian's ability to continue to provide reasonable and adequate service in the absence of the Transaction is doubtful.³ PAWC Main Brief at 20; PAWC Reply Brief at 11. Appalachian is a financially troubled system and its financial condition will not improve in the near future. PAWC Reply Brief at 11. Additionally, Appalachian needs to make expensive capital improvements to the System and incur significant expenses to comply with regulatory requirements. PAWC Reply Brief at 11-12.

³ Even if the Initial Decision was correct in its assessment of the future capabilities of Appalachian (which it is not), this fact alone should not prevent the acquisition. Over the years, the Commission and the Courts have approved many acquisitions of utilities that were providing reasonable and adequate service. Moreover, the Commission should not treat the ratepayers of PAWC as a piggybank for rehabilitating troubled systems while denying them the benefit of acquiring systems that have not yet reached the point that they need to be acquired by a capable public utility. The Commission can take official notice of its own records, which demonstrate that PAWC is currently the receiver or purchaser of several troubled systems, including systems acquired through the forced acquisition process of 66 Pa. C.S. § 529. It is unfair to PAWC's customers to repeatedly force them to pay for the rehabilitation of troubled systems while simultaneously denying them the benefit of increasing the number of customers to share costs by acquiring systems that have not yet become "troubled."

The Transaction would benefit Appalachian's existing customers in numerous ways that differ substantially from what customers can be offered under current ownership. PAWC has prepared a capital investment plan which anticipates making capital improvements in the System of approximately \$6.25 million during the first five years of ownership. These improvements will update service to more modern standards consistent and compliant with environmental and operational requirements. PAWC Main Brief at 19; Appalachian Main Brief at 15. This benefit of the Transaction is unique to the System itself and is a benefit that differs substantially from what Appalachian can provide to its customers in the future if the Transaction is disapproved. Appalachian cannot make the capital improvements planned by PAWC because Appalachian lacks the funds to make those same improvements. PAWC Main Brief at 19-20. Appalachian lost more than \$90,000 in 2023 and, through September 17, 2024, had net income of -\$31,711. PAWC Main Brief at 20. Appalachian has limited options to access capital and its ability to borrow is constrained due to the size of the company and its low levels of income. Appalachian Main Brief at 14. Appalachian's problems are not easily solved by borrowing money through a Pennsylvania Infrastructure Investment Authority ("PENNVEST") loan or seeking a rate increase, as these options are costly and complex. Appalachian Main Brief, at 15. Further, rate cases are time consuming and do not always provide the desired funding level. PAWC Main Brief at 20; Appalachian Main Brief at 4. There is no possible way that Appalachian could obtain the capital and expertise in the short timeframe PAWC is prepared to deploy those assets. Appalachian Main Brief at 4.

Appalachian has only three employees, which makes it difficult to keep up with increasingly complex regulatory requirements. PAWC Main Brief at 20. Appalachian does not have the resources to hire more staff and would have to seek an increase in rate revenue in order

to add employees. Appalachian Main Brief at 14. The Transaction would allow PAWC to address improvements to the System that need to be addressed immediately so that the System will not have to wait years for rates to support capital improvements. Appalachian Reply Brief at 5. Additionally, Appalachian has had trouble in obtaining contractors and necessary help -- the Transaction will enable PAWC staff to be available to the System in emergency situations. Appalachian Main Brief at 16. With Appalachian losing money and needing to increase rates, absent the Transaction, staffing issues are not going away and could worsen. Appalachian Reply Brief at 6.

Appalachian's Non-Revenue Water ("NRW") is almost 20%; the Commission considers levels above 20% to be excessive. PAWC Main Brief, at 20; 52 Pa. Code § 65.20. If the Transaction is approved, once Appalachian's assets are in PAWC's Geographic Information System ("GIS") system, PAWC will install remote monitoring equipment and perform leak detection, and after the leaking assets are identified, PAWC will develop and implement a plan to reduce NRW. PAWC Main Brief at 20. This improvement will benefit Appalachian's existing customers because they are currently paying a lot in rates to treat water that is being wasted through leaks. Appalachian does not have the personnel, access to advanced equipment or expertise to address NRW as well as would PAWC; this affirmative benefit of the Transaction differs substantially from the service that the existing owners can provide to the System's customers. PAWC Main Brief at 20.

Consistent with the Commission's recently-adopted Statement of Policy regarding Public Fire Protection Service and System Hydraulic Monitoring, PAWC will also test each hydrant, load System assets into PAWC's GIS and perform hydraulic and water quality modeling to make sure all hydrants can provide the necessary fire service. PAWC Main Brief at 20-21. This will benefit

Appalachian's existing customers by promoting public safety. Appalachian's customers will also benefit from PAWC's superior capabilities for notifying customers in emergency situations as well as being eligible for participation in PAWC's developed lead service line replacement program. PAWC Main Brief at 20-21; PAWC Reply Brief at 11-12.

The Transaction would allow Appalachian's customers to benefit from several customer service enhancements. Appalachian does not have 24-hour customer service. Appalachian Reply Brief at 10. PAWC's call center is available from 7:00 a.m. to 7:00 p.m., Monday through Friday for routine business and 24/7/365 for emergency situations. PAWC's customers dealing with emergency situations can always contact a live customer service representative and PAWC customers are able to reach out to customer service representatives through email. *See* PAWC Main Brief at 21.

This case is easily distinguished from *Cicero, supra* in which the Commonwealth Court of Pennsylvania ("Commonwealth Court") found that the seller was "already providing and is capable of providing the same or similar benefits [as the buyer] *without the acknowledged rate increase that will occur as a result of the transaction.*" Here, if the Transaction would be disapproved, Appalachian would not be providing, and would not be capable of providing, the same or similar benefits as PAWC without a rate increase (possibly a rate increase that is even greater than the rate increase that will occur as a result of the Transaction, as discussed below).

In short, there can be no question that the Transaction will benefit the existing customers of Appalachian by improving their service in the future, compared to what it will be if the Transaction is disapproved.

b. Financial Impacts of the Transaction for Appalachian's Existing Customers

In contrast to the Transaction's numerous benefits for the customers of Appalachian, the primary, if not the only, purported harm of the Transaction for Appalachian's existing customers is its alleged rate impact. The OCA and OSBA's emphasis on rate impacts, however, overlooks the financial benefits of the Transaction for Appalachian's customers. To give a more balanced analysis, these exceptions will discuss the financial benefits of the Transaction for Appalachian's existing customers before discussing the rate impacts.

The Transaction would allow Appalachian's customers to become part of a system with a larger customer base, allowing them to share the costs of system improvements with many customers and reducing the risk of rate spikes that they, as customers of a small system, currently face.⁴ PAWC Main Brief at 19. Appalachian's rates were last increased following its 2015 rate case. Appalachian Main Brief at 15; Appalachian Reply Brief at 4. If the Transaction is disapproved, Appalachian will need to increase rates in the near term. PAWC Main Brief at 23. Appalachian has described the necessary increase as "massive" but notes that even if it were successful in obtaining a massive rate increase, it could not match the substantial benefits that would materialize from the Transaction. PAWC Main Brief at 23; Appalachian Reply Brief at 4. Again, for the past two years Appalachian has been operating at a deficit and continues to do so. Appalachian Main Brief at 15. If the Transaction is approved, PAWC will incorporate Appalachian's current rates into PAWC's tariff as a separate rate zone and Appalachian's customers will be able to share the costs of operating and upgrading the System with over 680,000 customers. PAWC Main Brief at 25; PAWC Reply Brief at 10.

⁴ The OCA argues that the Transaction will have a negative impact on rates for PAWC's existing customers but ignore the benefits that flow to Appalachian's customers from sharing the costs of improving the System with PAWC's customers. These are flip sides of the same coin; both the benefits to Appalachian's customers and the detriments to PAWC's customers must be considered.

The Transaction would also allow Appalachian's customers to benefit from PAWC's customer assistance programs. PAWC's tariffed discounts available to low-income customers range from 30% to 90% on water service charges and 20% to 80% on water usage charges. There are four tiers of discounts, depending on the PAWC customer's percentage of Federal Poverty Level. PAWC Main Brief at 19. PAWC also offers hardship grants of up to \$500 per year to income-eligible customers. Appalachian Main Brief, at 11. In 2023, PAWC provided grants averaging \$347 to 3,144 of its water customers. PAWC Main Brief at 19. PAWC also offers payment arrangements and budget billing to qualifying residential customers. Appalachian Main Brief, at 11. Appalachian has no customer assistance program or any formal income-based repayment options. PAWC Main Brief at 19; Appalachian Main Brief at 10. The Transaction's benefit of allowing Appalachian's current customers to participate in PAWC's low-income assistance programs is an affirmative benefit that differs substantially from the services provided under Appalachian's current ownership because Appalachian has no low-income assistance options available to customers. PAWC Reply Brief at 10. No party argued that this affirmative public benefit stems from the size and fitness of PAWC. PAWC Reply Brief at 10.

In terms of the rate impacts of the Transaction, the Initial Decision stated: "Rate harm of the purchase price must be considered by the Commission in its weighing of harms and benefits in determining whether the transaction as proposed would produce affirmative public benefit." I.D. at 32. This statement misstates established precedent and is erroneous. *City of York* does not require the Joint Applicants to demonstrate that the purchase price benefits the public.⁵ Rather, *City of York* established that in evaluating an acquisition, the Commission must consider, at least

⁵ The reasonableness of the purchase price is one element of the test for a Section 1327 acquisition adjustment, 66 Pa. C.S. § 1327(a)(6), but PAWC has not requested a Section 1327 acquisition adjustment in this proceeding.

in a general fashion, the rate impacts of an acquisition when determining if an acquisition passes the affirmative public benefits test.

The Initial Decision improperly equates purchase price with rate impact. Although the Commission must consider the Transaction's impact on rates, in at least a general fashion, rate base is not set in a proceeding seeking approval of an acquisition under Section 1102 (unless the acquiring utility seeks an acquisition adjustment under Section 1327 of the Code in that acquisition proceeding). PAWC has not requested a Section 1327 determination in this proceeding and there is no claim before the Commission to set rate base in this acquisition proceeding.

The Initial Decision concludes that "the general probable rate harm of the proposed transaction is known and not speculative, and the timing of the rate harm is tied directly to PAWC's next base rate case filing where it can seek to include in ratemaking rate base the acquisition premium above depreciated original cost." I.D. at 32. The Initial Decision never explains how the ability of PAWC to *request* an acquisition adjustment, a right granted to it under 66 Pa. C.S. § 1327, in a future rate case produces a detriment as a result of the Transaction. The Initial Decision also fails to discuss how the "general probable rate harm" it finds will result from the Transaction is reconciled with Section 1327's requirements that, in order for the purchase price to be placed into rate base, the Commission must find, *inter alia*, that (1) the purchase price is reasonable and (2) the rates charged by the acquiring public utility to its preacquisition customers will not increase unreasonably because of the acquisition.

Contrary to the Initial Decision, the rate impact of the Transaction on consumers is completely speculative at this time. If the Transaction is approved, the depreciated original cost of the Appalachian system could be placed into PAWC's rate base in a future rate case. 66 Pa. C.S. § 1311(b)(1); PAWC Main Brief at 32. The amount placed into PAWC's rate base in a future rate

case could be the purchase price **only** if PAWC decides to seek Section 1327 treatment of the System, and the Commission approves the request. In seeking approval of the instant application without requesting Section 1327 treatment in this acquisition proceeding, PAWC's shareholders have assumed the risk that the Commission may not award an acquisition premium in a future base rate case.⁶ If PAWC would seek Section 1327 treatment of the System in a future rate case and the Commission denies that request, PAWC will place the System into rate base at depreciated original cost. Both OCA and OSBA agree that the Transaction's benefits outweigh the detriments if the System is placed into PAWC's rate base at depreciated original cost. PAWC Main Brief at 22.

Any alleged rate harm is pure speculation at this point and does not rise to the level of substantial record evidence upon which the Commission can rightly rely in this proceeding. *Norfolk & Western Ry. Co. v. Pa. Pub. Util. Comm'n*, 413 A.2d 1037 (Pa. 1980) (Commission decisions must be supported by substantial evidence, which requires more than a mere trace of evidence or a suspicion of the existence of a fact sought to be established). Any rate impact is reserved for the reasonable discretion of the Commission in a future base rate case. If the Commission were to deny the Joint Application on the basis of a detrimental rate impact resulting from the award of recovery of an acquisition premium under Section 1327, the Commission would -- for all intents and purposes -- be admitting that it is, at this point in time, improperly predisposed to allow recovery of an acquisition premium in the future. OCA and OSBA are essentially arguing that the Commission should deny the Joint Application because the Commission should not trust itself to make a proper and lawful decision in the future when the issue of Section 1327 treatment for the System is properly raised and ripe for review.

⁶ Significantly, the OCA and OSBA have not argued that approval of the application would be contrary to the public interest because PAWC's shareholders could not absorb the non-recovery of an acquisition premium (if recovery is requested by PAWC but denied by the Commission in a future base rate case).

The Initial Decision justified its recommended denial of the Transaction by concluding, in part, that “OCA established approval of the Joint Application will likely result in sizeable and frequent rate increases in the future for AUI customers as customers of PAWC.” I.D. at 32. The record establishes that the timing of PAWC’s first base rate in which the System may be included is unknown. PAWC Main Brief, at 23. In the long term, PAWC expects to move the System to Zone 1 rates, but this will probably take several rate cases, over a number of years, based on such rate-making principles as gradualism and avoidance to rate shock to customers. PAWC Main Brief at 23. Any post-Transaction rate impact will first be reviewed by the Commission, which ensures there will be no undue increase, no harm to customers by setting “just and reasonable” rates. Appalachian Main Brief at 16.

The Initial Decision also incorrectly relied on the OCA’s estimate of the Transaction’s rate impacts because the OCA included the rate impact of post-acquisition capital improvements. PAWC Reply Brief at 13. The rate impact of the Commission’s decision to approve an acquisition should be limited to the increase in the rate base of an acquiring entity based on the Commission’s approval of the acquisition. PAWC Reply Brief at 13. That is the only rate impact directly caused by the Commission’s decision in this proceeding. Rate impacts caused by future Commission proceedings should not be considered when calculating the rate impacts of the Commission’s decision in this case. If the rate impact of every future Commission decision impacting rates would be considered a rate impact of the Commission’s decision in an acquisition proceeding, no acquisition would ever be approved because the rate impacts would be infinite and would always outweigh the benefits of the proposed acquisition.

The Initial Decision was also incorrect because it failed to acknowledge that the record demonstrates that Appalachian’s customers face the risk of a rate increase whether the Transaction

is approved or disapproved. If the Transaction is disapproved, Appalachian will need to seek a substantial increase to its rates in the near term because (1) rates have not been increased since Appalachian's 2015 rate case, (2) inflation and new regulatory requirements since Appalachian's last rate increase require a significant rate increase, (3) Appalachian needs to make expensive capital improvements to continue to provide reasonable and adequate service, (4) the rate case Appalachian will need to file will itself be costly, and (5) Appalachian has a smaller customer base to shoulder the burden. PAWC Main Brief at 23; Appalachian Main Brief at 14. If the Transaction is disapproved, a rate case is inevitable—Appalachian is operating at a deficit which is not sustainable. Appalachian Main Brief at 15. Additionally, even pursuing a rate case, it would be more than a year and potentially hundreds of thousands of dollars before Appalachian would see one dollar of revenue. Appalachian Reply Brief at 4. Approval of the Transaction, by comparison, would allow an immediate inflow of capital and expertise from PAWC to address Appalachian's immediate needs. Appalachian Reply Brief at 4.

In contrast, if the Transaction is approved, there will be no immediate impact on the rates of Appalachian's existing customers because PAWC will adopt Appalachian's rates at Closing. Rates will not increase until PAWC's first base rate case in which the System is included. It is not known when that will be. Additionally, the outcome of PAWC's future base rate case is unknown. PAWC may not request an acquisition adjustment under Section 1327 for the System. If it does, the Commission may grant or deny the request. PAWC Main Brief at 23.

Because the rate impact of the Transaction is uncertain, it is unclear whether the rate increase for maintaining the *status quo* will be more or less than the rate increase for the Transaction. Therefore, it is unclear whether the rate impact of the Transaction will be a benefit or a detriment for Appalachian's existing customers. While the rate impact should be considered

by the Commission, it should be given little weight because the evidentiary record establishes the rate impact is unknown. PAWC Main Brief at 22-23.

c. Balancing the Transaction’s Known Benefits Against its Uncertain Detriments, the Transaction Yields Net Benefits for Appalachian’s Existing Customers

The Transaction will provide numerous benefits to Appalachian’s customers, and the only potential detriment, rate impact, is unknown. In fact, the Transaction may actually be a benefit if the rate impact of approving the Transaction is less than the rate impact of maintaining the *status quo*.

The Commission should follow the precedent established in *Application of Pennsylvania-American Water Company Pursuant to 66 Pa. C.S. §§ 1102 and 1329 for the Acquisition of the Butler Area Sewer Authority’s Wastewater Collection and Treatment System*, Docket No. A-2022-30337047 (Opinion and Order entered November 16, 2023) p. 62 (emphasis added), where the Commission stated: “The benefits of the acquisition outweigh the detriments for PAWC’s existing wastewater customers *when considering the uncertainty of the extent of the rate impacts on PAWC’s existing customers and the certainty of the benefits.*” Therefore, the Transaction provides a net benefit to Appalachian’s current customers.

4. The Transaction Benefits PAWC

Just as the Commission must consider the benefits and detriments of the Transaction for the sellers, it must consider the benefits and detriments of the Transaction for the buyer. When considering whether to approve an application, the Commission routinely considers whether the acquisition will jeopardize the continued viability of the buyer. *Application of 52 Pa. Code § 3.501 to Certificated Water and Wastewater Utility Acquisitions, Mergers and Transfers*, Docket No. L-2020-3017232 (Final Rulemaking Order entered October 25, 2024) p. 55. No party to this

proceeding has alleged that the Transaction will jeopardize the continued viability of PAWC – even if PAWC places the System into rate base at depreciated original cost.

The Transaction will allow PAWC to become a larger, financially stronger, and more stable public utility, which benefits all current and future PAWC customers. The Transaction would allow PAWC to immediately gain approximately 1,456 additional water customers at a purchase price per customer that is lower than PAWC’s average plant in service for existing PAWC customers. PAWC Main Brief at 26. The System is near three existing PAWC systems, including two other groundwater systems. PAWC Main Brief at 26. The Transaction would give PAWC a greater presence in the region and help PAWC run all four systems more efficiently and effectively. PAWC Main Brief at 26.

In contrast, no party has alleged that the Transaction has any material detriments for PAWC. Consequently, the Transaction has net affirmative benefits for PAWC.

5. The Transaction Benefits PAWC’s Existing Water Customers

When an acquisition makes the acquiring utility stronger, ratepayers are the ultimate beneficiary. *City of York*, 295 A.2d at 829. The Transaction will make PAWC a larger, financially stronger, and more stable company. The Transaction expands PAWC’s water customer base, adding more customers to share future infrastructure investment costs in every future rate case. Increasing the number of customers who share the costs of operating PAWC’s water system benefits PAWC’s existing water customers, just as it benefits Appalachian’s existing water customers. Increasing the number of customers promotes stable rates across PAWC’s entire system because customers who benefit from near-term improvements will one day help to pay for improvements on behalf of other customers in other parts of PAWC’s system. This benefit stems

from 1,456 Appalachian customers joining PAWC's customer base (an increase of 0.21%). PAWC Main Brief at 27, 30; PAWC Reply Brief at 18-19.

Rates for PAWC's existing water customers will not increase immediately as a result of the Transaction. If the Transaction is approved, the rate impact of the Transaction for PAWC's existing customers is speculative. The depreciated original cost of the System could be placed into PAWC's rate base in a future rate case. 66 Pa. C.S. § 1311(b)(1). Whether PAWC will seek a Section 1327 acquisition adjustment for the System and whether the Commission would grant or deny the adjustment is unknown.

In weighing the benefits and detriments for PAWC's existing water customers, the certainty/uncertainty of the benefits and detriments must be considered – just as they were for the existing customers of Appalachian. Once again, the certain benefits of the Transaction for the existing customers of PAWC outweigh the Transaction's uncertain detrimental rate impacts for PAWC's customers. Therefore, the Transaction has a net affirmative public benefit for PAWC's existing customers.

In any event, the Transaction's benefits outweigh its detriments even if PAWC requests and receives an acquisition adjustment in the full amount of the purchase price. This is because the Transaction's rate impact on PAWC's existing water customers would be *de minimis*. According to the OCA, PAWC would receive an acquisition adjustment of [BEGIN CONFIDENTIAL]

[REDACTED]

[REDACTED]

[REDACTED] [END CONFIDENTIAL] The actual

impact could be even less if the Commission allows Appalachian's rates to move toward

consolidation with PAWC's Rate Zone 1 rates. PAWC Main Brief at 28-29. PAWC respectfully submits that the Transaction's benefits for PAWC's customers outweigh such a small rate impact.

6. The Transaction Benefits PAWC's Existing Wastewater Customers

As discussed above, when an acquisition makes the acquiring utility stronger, ratepayers are the ultimate beneficiary. *City of York*, 295 A.2d at 829. The Transaction will make PAWC a larger, financially stronger, and more stable company. As a result, the Transaction benefits PAWC's wastewater customers.

The Transaction will not adversely impact rates for PAWC's wastewater customers because any additional costs for operating PAWC's water system cannot be shared with wastewater customers. However, the Transaction could beneficially impact rates for PAWC's wastewater customers because a portion of PAWC's wastewater revenue requirement may be allocated to PAWC's water customers if the Commission finds that such result is in the public interest. 66 Pa. C.S. § 1311(c); PAWC Main Brief at 30. By growing PAWC's water customer base, the Transaction will help keep rates stable for PAWC's existing wastewater customers. PAWC Reply Brief at 21.

The Transaction has no material detriments for PAWC's existing wastewater customers. Consequently, the Transaction yields a net benefit for this stakeholder group.

7. The Aggregate Benefits of the Transaction Outweigh the Aggregate Detriments

In weighing the benefits and detriments of a transaction, the Commission must consider all benefits and all detriments. *McCloskey v. Pa. Pub. Util. Comm'n*, 195 A.3d 1055, 1067 (Pa. Cmwlth. 2018), *alloc. denied*, 207 A.3d 290 (Pa. 2019). An acquisition provides an affirmative benefit if the benefits of the transaction outweigh the adverse impacts of the transaction. *CMV*

Sewage Co., Inc., 2008 Pa. PUC LEXIS 950. When looking at the benefits and detriments of a transaction, the focus of the analysis must be on all affected parties. *Middletown Twp., supra*.

The Joint Applicants met their burden of establishing that affirmative public benefits will materialize from the Transaction by proving that the Transaction yields a net benefit for each major affected stakeholder group. Even if the Commission disagrees and finds that the Transaction yields net detriments for one particular stakeholder group, the benefits for all stakeholder groups considered as a whole outweigh the detriments for all stakeholder groups.

B. EXCEPTION 2: THE JOINT APPLICANTS PROVED, BY A PREPONDERANCE OF THE EVIDENCE, THAT PAWC IS LEGALLY, TECHNICALLY AND FINANCIALLY FIT TO OWN AND OPERATE APPALACHIAN.

The Initial Decision did not include any discussion regarding PAWC's fitness to own and operate Appalachian, other than noting that "Pursuant to Section 1103 of the Code, PAWC must show that that (sic) it is technically, legally, and financially fit to own and operate the assets of the utilities that it seeks to acquire. As a certificated public utility, there is a rebuttable presumption that PAWC possesses the requisite fitness." I.D. at 14. The Initial Decision does not include in its findings of fact or conclusions of law a finding that PAWC is fit to own and operate Appalachian, or, alternatively, that no party rebutted the presumption afforded to PAWC as a certificated public utility.

The Initial Decision apparently concluded that this issue was moot because of the recommended findings that the Stock Transfer be disapproved, that the Joint Application was moot and that the Transaction failed to pass the affirmative public benefit test. As discussed elsewhere in these Exceptions, the Initial Decision erred in reaching these conclusions. Therefore, the conclusion that this issue was moot was also error.

The record in this proceeding demonstrates that PAWC is technically, financially and legally fit to own and operate Appalachian. PAWC Main Brief at 10-12. No party in this proceeding even attempted to rebut the presumption that PAWC possesses the required fitness. PAWC Main Brief at 10-12; PAWC Reply Brief at 5. Therefore, the Commission should find that PAWC is legally, technically and financially fit to own and operate Appalachian.

Since the Joint Applicants have established that PAWC is fit to own and operate Appalachian, and that the Transaction will affirmatively benefit the public in a substantial way, the Commission should approve the Joint Application.

C. EXCEPTION 3: THE MERGER AGREEMENT SHOULD BE APPROVED AS AN AFFILIATED INTEREST AGREEMENT.

The Joint Application includes a request that the Commission approve an arrangement with affiliated interests pursuant to 66 Pa. C.S. § 2102 because, following Closing on the Appalachian-Merger Sub Merger, PAWC and Appalachian will be affiliated entities for a brief period (both will be wholly-owned subsidiaries of American Water Works Company (“American Water”)). Pursuant to the Merger Agreement, Appalachian would then merge with and into PAWC, with PAWC as the surviving corporation. PAWC Main Brief at 44.

The Initial Decision, however, did not analyze whether the Merger Agreement should be approved pursuant to Section 2102. The Initial Decision apparently concluded that this issue was moot because of the recommended findings that the Stock Transfer be disapproved, that the Joint Application was moot and that the Transaction failed to pass the affirmative public benefit test. As discussed elsewhere in these Exceptions, these conclusions were error. As a result, the Initial Decision’s conclusion that the request for Section 2102 approval of the Merger Agreement was moot was also error.

The Merger Agreement provides for an acquisition that satisfies the requirements of Section 1103, including the affirmative public benefit test. Therefore, the Commission should approve the Merger Agreement as reasonable and consistent with the public interest. PAWC Main Brief 44-45.

D. EXCEPTION 4: THE INITIAL DECISION FAILED TO ADDRESS THE CONDITIONS PROPOSED BY THE OCA AND THE OSBA

The Initial Decision did not discuss the appropriateness of imposing the conditions requested by the OSBA or the OCA. The Initial Decision apparently concluded that this issue was moot because of the recommended findings that the Stock Transfer be disapproved, that the Joint Application was moot and that the Transaction failed to pass the affirmative public benefit test. As discussed elsewhere in these Exceptions, the Initial Decision erred in reaching these conclusions. Consequently, the conclusion that this issue was moot was also error.

The OCA and the OSBA each argue that, if the Commission recommends approval of the Transaction, it should impose conditions on the approval of the Transaction.⁷ PAWC objects to these proposed conditions. PAWC Main Brief at 31-43; PAWC Reply Brief at 23-29. The Commission should reject all of these conditions for the reasons set forth below.

1. The OSBA's and OCA's Proposed Conditions to Limit What PAWC Can Seek to Recover in a Future Base Rate Case are not Just and Reasonable Because They are Inconsistent with Section 1327 of the Code

Section 1103 of the Code permits the Commission to impose conditions that it deems just and reasonable, but this power is not unlimited. For example, the Commission could not condition approval of a Certificate on the applicant making a donation to a specified political candidate. 66

⁷ The OSBA does not oppose the merger, subject to a condition that would limit the amount that PAWC could receive in an acquisition premium in a subsequent rate case. OSBA St. No. 1 p. 3. In the alternative, the OSBA does not oppose the OCA's proposed conditions. OSBA St. No. 1-S p. 4.

Pa. C.S. § 319(a)(10). The conditions proposed by the OCA and the OSBA exceed the Commission's authority to impose conditions on the grant of a Certificate because they are inconsistent with Section 1327. Pursuant to that section, if a public utility acquires property at a purchase price in excess of depreciated original cost, there is a rebuttable presumption that the acquiring utility may place the entire purchase price into rate base if certain conditions are met. Additionally, Section 1327 gives the acquiring utility the option of electing that the Commission consider its request for an acquisition adjustment in an application proceeding or a base rate proceeding. 66 Pa. C.S. § 1327(b). PAWC Reply Brief at 25-26.

In this case, PAWC did not elect to make a request for a Section 1327 acquisition adjustment. If PAWC chooses, it may exercise its option under Section 1327 to request an acquisition adjustment for the full amount of the purchase price in a future base rate case. The conditions proposed by the OCA and the OSBA are inconsistent with the procedure created by Section 1327 because they would prevent PAWC from having its Section 1327 request heard in a subsequent base rate case. PAWC Main Brief at 41.

As an agency created by the General Assembly, the Commission has only the powers given to it by the General Assembly, either explicitly or implicitly. *Feingold v. Bell Tel. Co. of Pa.*, 383 A.2d 791, 794 (Pa. 1977). Those powers do not include re-writing state statutes. *Valuation of Acquired Municipal Water & Wastewater Systems – Act 12 of 2016 Implementation*, Docket No. M-2016-2543193 (Final Supplemental Implementation Order entered July 2, 2024) (“2024 FSIO”) p. 90. Section 1327 gives PAWC the statutory right to choose whether its Section 1327 claim will be adjudicated in an acquisition proceeding or a base rate case. The Commission cannot take away that option – especially when doing so would effectively prevent PAWC from ever having its 1327 claim heard by the Commission. Instead, the Commission must give effect to

PAWC's choice to have its Section 1327 claim adjudicated in a base rate case. PAWC Main Brief at 37-38.

The conditions proposed by the OCA and the OSBA would violate the rules of statutory construction by interpreting Section 1103(a) in a way that is unconstitutional. Article II, Section 1 of the Pennsylvania Constitution states that the legislative power of the Commonwealth is vested in the General Assembly. The OCA and the OSBA essentially contend that Section 1103(a) gives the Commission authority to repeal a state statute by imposing a condition that takes away PAWC's right to request a Section 1327 acquisition adjustment for the full amount of the purchase price in a future base rate case. Such an interpretation of Section 1103(a) would violate the non-delegation doctrine by construing Section 1103(a) as delegating to the Commission the General Assembly's power to make and repeal laws. The General Assembly cannot delegate its power to make or repeal laws to any other branch of government. *See, e.g., West Phil. Achievement Charter Elem. Sch. v. Sch. Dist. of Phil.*, 132 A.3d 957 (Pa. 2016); *Protz v. Worker's Comp. App. Bd.*, 161 A.3d 827 (Pa. 2017); Pennsylvania Supreme Court Justice David N. Wecht and Lawrence McIntyre, Nondelegation in Pennsylvania, 46 *Harv. J. of Law & Pub. Policy* 377 (2023). The Commission is an independent administrative commission of the Commonwealth, not part of the Legislative Branch. Section 1103(a) should not be read in a way that would violate the nondelegation doctrine. PAWC Main Brief at 37.

2. The OSBA's and OCA's Conditions to Limit What PAWC Can Seek to Recover in a Future Base Rate Case are not Just and Reasonable Because They are Premature

The conditions proposed by the OSBA and the OCA to limit what PAWC can seek to recover in a future base rate case are not just and reasonable because PAWC has not sought

approval of an acquisition adjustment under Section 1327 in this proceeding. As a result, no party has provided evidence that would be relevant under Section 1327.

Making a determination regarding an acquisition adjustment in this proceeding would be premature. *Joint Petition of Metropolitan Edison Company et al. for Approval of Smart Meter Technology Procurement and Installation Plan*, Docket No. M-2009-2123950 (Opinion and Order on Reconsideration entered August 3, 2010) (“We are persuaded that the *June 2010 Order* should not include an advisory opinion on an [electric distribution company’s] ability to roll smart meter costs into base rates in a future base rate proceeding. That issue should be left for consideration in an appropriate future case.”); *Application of Exelon Corporation et al. for Certificates of Public Convenience*, Docket Nos. A-2009-2093057 *et al.* (Opinion and Order entered June 25, 2009) (time should not be spent litigating hypothetical scenarios that are not yet ripe for review). PAWC Reply Brief at 24.

3. The OSBA’s and OCA’s Proposed Conditions to Limit What PAWC Can Seek to Recover in a Future Base Rate Case are not Just and Reasonable Because They Exceed the Scope of this Litigation

Ratemaking issues are appropriately resolved in base rate cases, not acquisition proceedings. For this reason, the Commission has expressed its preference that acquiring entities request acquisition adjustments in rate cases rather than acquisition proceedings:

We note OCA’s comment that proposed Section 69.711(e) of the policy statement appears to be inconsistent with Section 1327(b) of the Code. We agree with this assessment. We recognize that an acquiring utility that is eligible to receive a 1327(a) acquisition adjustment can request such an adjustment before the acquisition is consummated or prior to its next filed rate case. *See* 66 Pa. C.S. § 1327(b). Therefore, we will modify Section 69.711(c) of the policy statement so that it states expressly that an acquiring utility can elect to request a 1327(a)-acquisition adjustment in accordance with Section 1327(b) of the code or during its next rate case. *Nevertheless, given the interrelationship of acquisition adjustments and just and reasonable rates, the Commission prefers that an acquiring utility request a 1327(a) acquisition adjustment during its next filed rate case and not outside the context of a rate case.*

Final Policy Statement on Acquisitions of Water and Wastewater Systems, Docket No. M-00051926 (Final Policy Statement entered August 17, 2006) at 15-16 (emphasis added). Consequently, the conditions proposed by the OCA and OSBA should be denied. PAWC Main Brief at 42-43.

The Commission has ultimate rate setting authority and can render the decision that will result in just and reasonable rates within the context of a base rate case. The Commission can and should be trusted to make the proper determination when an issue is ripe for decision and properly raised. PAWC is not requesting a Section 1327 decision in this proceeding, and may, in fact, never make such a request. Nevertheless, the OCA and OSBA request a condition that shows a total lack of confidence in the Commission because they seek to have a rate issue predetermined during an acquisition proceeding. The Commission should be trusted to render an appropriate decision if a Section 1327 claim is before it in the context of a future rate case. PAWC Main Brief at 40-41.

4. The OSBA’s Proposed Condition to Limit What PAWC Can Seek to Recover in a Future Base Rate Case is not Just and Reasonable Because It is Based on an Implementation Order that Implements 66 Pa. C.S. § 1329, Which Has No Relation to This Case

In addition to the reasons discussed above, the OSBA’s proposed condition should be rejected because it is based on the Commission’s *2024 FSIO*. The *2024 FSIO* adopted the use of a Reasonableness Review Ratio (“RRR”) to evaluate Section 1329 applications. This case does not involve a Section 1329 application; it involves a Section 1102 application where the acquiring utility may in the future request Section 1327 treatment of the acquisition. Section 1327 explicitly states that, if certain criteria are met, there is a rebuttable presumption that an acquiring public utility paying more than depreciated original cost for property may place the *entire purchase price* into rate base. The Commission should apply the governing statute. PAWC Main Brief at 36-37.

A Commission Implementation Order does not establish a binding norm and has the same effect as a statement of policy. The OSBA's proposed condition is based on a statement of policy intended for applications governed by a different section of the Code. Adopting the OSBA's proposed condition would be neither just nor reasonable. PAWC Main Brief at 37-38.

Furthermore, the OSBA's proposed condition would effectively modify Section 1327 by depriving PAWC of its statutory right to recover the full amount of the acquisition's purchase price. The Commission, as an independent administrative commission of the Commonwealth, does not have the power to modify statutes. Interpreting Section 1103 as empowering the Commission to impose a condition that modifies a statute violates the non-delegation doctrine. PAWC Main Brief at 37-38.

Finally, the rules of statutory construction require every statute to be construed to give effect to all its provisions. 1 Pa. C.S. § 1921(a). It would be neither just nor reasonable for the Commission to impose a condition pursuant to Section 1103(a) that would not give effect to Section 1327, which permits the recovery of an acquisition adjustment of the full amount of the purchase price of the System. PAWC Main Brief at 38.

For the above reasons, OSBA's proposed condition should be rejected.

5. The Commission Should Deny the OCA's Proposed Condition to Require PAWC to Submit a Cost of Service Study in its Next Base Rate Case

The OCA recommends that, if the Transaction is approved, PAWC should be required to submit a cost of service study that removes all costs and revenues associated with the operation of the System and provide a separate cost of service study for the System. PAWC Main Brief at 43. PAWC initially interpreted the OCA's recommendation as requesting a separate revenue requirement study. PAWC Main Brief at 43. A separate revenue requirement study should not be

required for Appalachian in PAWC's next base rate case because the System is very small compared to PAWC's water operations. Regardless of whether PAWC seeks an acquisition adjustment, the rate impact of the Transaction on the rates of PAWC's existing customers, if any, will be *de minimis*. PAWC Main Brief at 43.

To the extent the OCA's recommendation is for PAWC to submit a class cost of service study for Appalachian, there is no indication that a class cost of service study for the System is needed when PAWC files its next base rate case. PAWC intends to gradually move the System's rates toward PAWC's Rate Zone 1 rates. PAWC Main Brief at 43. The OCA did not oppose that approach. PAWC Main Brief at 43, *citing* OCA St. 1SR at 9.

Neither a separate revenue requirement study or a class cost of service study for Appalachian is warranted and the proposed condition should be rejected.

E. EXCEPTION 5: THE INITIAL DECISION IMPROPERLY DENIED THE STOCK TRANSFER BECAUSE THE COMMISSION LACKS JURISDICTION OVER THE STOCK TRANSFER

In the proceedings below, PAWC argued that the Stock Transfer should be approved. PAWC Main Brief 45; PAWC Reply Brief 29. PAWC still believes that the Stock Transfer should be approved -- if the Commission has jurisdiction over it. PAWC submits, however, that the Commission lacks jurisdiction over the Stock Transfer. PAWC may raise this issue at this stage of the proceedings because issues concerning an agency's jurisdiction are never waived. *Capital City Cab Service v. Pa. Pub. Util. Comm'n*, 138 A.3d 119, 123 n.5 (Pa. Cmwlth. 2016, citing *Blackwell v. State Ethics Comm'n*, 567 A.2d 630, 636 (Pa. 1989).

As an independent commission created by the General Assembly, the Commission only has such powers as expressly conferred or necessarily implied by statute. *Feingold v. Bell Tel. Co. of Pa.*, 383 A.2d 791, 794 (Pa. 1977); *Allegheny Cnty. Port Auth. v. Pa. Pub. Util. Comm'n*, 237

A.2d 602, 605 (Pa. 1967). Section 1102 of the Code gives the Commission jurisdiction over transfers of utility property to or from any person by any method, including by the transfer of stock. 66 Pa. C.S. § 1102(a)(3). The Commission has developed a statement of policy providing guidance on the utility stock transfers that are subject to Commission jurisdiction. 52 Pa. Code § 69.901 (Utility stock transfer under 66 Pa. C.S. § 1102(a)(3)).

According to that statement of policy, certain transfers of a “controlling interest” in a utility are jurisdictional. A “controlling interest” in a utility is an interest that enables the beneficial holder(s) to control at least 20% of the voting interest in the utility. Two transfers of a “controlling interest” are jurisdictional:

- A transaction resulting in the *creation of a new controlling interest* is jurisdictional “when the transaction ... result[s] in a different entity becoming the beneficial holder of the largest voting interest in the utility.” 52 Pa. Code § 69.901(b)(1) (emphasis added).
- A transfer “resulting in the *elimination of a controlling interest*” is jurisdictional “when the transaction ... result[s] in the dissipation of the largest voting interest in the utility or parent. *Id.* (emphasis added).

In this case, Mr. Sargent currently owns 100% of the outstanding shares of Appalachian. The Stock Transfer would allow 40% of the outstanding shares of Appalachian to be transferred to Mr. Gallagher while Mr. Sargent would retain 60% of the outstanding shares of Appalachian, allowing him to remain the majority shareholder. PAWC Main Brief, at 3. The Stock Transfer would result in the creation of a new “controlling interest,” but is not jurisdictional because the Stock Transfer would not result in a different entity becoming the beneficial holder of the largest voting interest in Appalachian. Additionally, the Stock Transfer is not jurisdictional because it would not result in the elimination of a “controlling interest” in Appalachian.

Of course, a statement of policy does not establish a binding norm and does not have the force and effect of law. *Pa. Human Relations Comm’n v. Norristown Area Sch. District*, 374 A.2d

671, 679 (Pa. 1977). Nevertheless, finding that the Stock Transfer is not jurisdictional is consistent with Section 1102 of the Code because the Stock Transfer will not transfer any utility property. After the Stock Transfer, Mr. Sargent will continue to own the majority of the shares in Appalachian. Consequently, the Commission should find that it lacks jurisdiction over the Stock Transfer.

V. CONCLUSION AND REQUEST FOR RELIEF

WHEREFORE, for all the reasons set forth above, Pennsylvania-American Water Company respectfully requests:

1. That the Pennsylvania Public Utility Commission reverse the Initial Decision.
2. That the Pennsylvania Public Utility Commission find that it lacks jurisdiction over the Application filed by Appalachian Utilities, Inc. on February 2, 2024 at Docket No. A-2024-3046068.
3. That the Pennsylvania Public Utility Commission approve the Joint Application filed by Pennsylvania-American Water Company and Appalachian Utilities, Inc. on February 2, 2024 at Docket Nos. A-2024-3046084 and A-2024-3046092.
4. That the Pennsylvania Public Utility Commission issue such Certificates of Public Convenience as may be necessary to evidence its approval under 66 Pa. C.S. § 1102(a) of:
 - (a) the transfer to American Water Works Company, Inc., by merger, of all property and rights in Appalachian Utilities, Inc. used or useful in the public service in accordance with the Agreement and Plan of Merger dated September 22, 2023 between American Water Works Company, AUI Acquisition Company, Appalachian Utilities, Inc., and Frank R. Sargent, Jr.;

- (b) the transfer to Pennsylvania-American Water Company, by merger, of all property and rights of Appalachian Utilities, Inc. used or useful in the public service, in accordance with the Agreement and Plan of Merger;
- (c) the commencement by Pennsylvania-American Water Company of water service to the public in Avis Borough, Pine Creek Township, and Dunnstable Township, Clinton County, Pennsylvania, currently served by Appalachian Utilities, Inc.; and
- (d) the abandonment by Appalachian Utilities, Inc. of all water service to the public in Avis Borough, Pine Creek Township, and Dunnstable Township, Clinton County, Pennsylvania.

5. That the Pennsylvania Public Utility Commission permit Pennsylvania-American Water Company to issue a compliance tariff supplement, consistent with the *pro forma* tariff supplement attached to the Joint Application as Appendix “N,” and the implementation of all other rates, and the rules and regulations regarding conditions of Pennsylvania-American Water Company’s water service, as reflected in Pennsylvania-American Water Company’s prevailing water tariff, to become effective immediately upon completion of the proposed merger.

6. That the Pennsylvania Public Utility Commission approve the Agreement and Plan of Merger attached to the Joint Application pursuant to 66 Pa. C.S. § 2102 (approval of contracts with affiliated interests).

7. That the Pennsylvania Public Utility Commission issue any other approvals or certificates appropriate, customary, or necessary under the Pennsylvania Public Utility Code to carry out the Transaction contemplated in the Joint Application in a lawful manner.

8. That nothing herein shall be construed as an approval or determination of rate base, costs or expenses for the purpose of just or reasonable rates.

Respectfully submitted,



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