



# THE BOROUGH OF BRENTWOOD

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**VIA E-FILING**

Pennsylvania Public Utility Commission

Chairman Stephen DeFrank

400 North Street

Harrisburg, PA 17120

**RE: Docket #M-2016-2543193 – Revisions to Guidelines for Section 1329 Acquisitions**

Dear Chairman DeFrank:

On behalf of the Borough of Brentwood (“Brentwood”), I am submitting comments regarding the changes the Commission proposed to the process for applications under Section 1329 of the Public Utility Code.

Brentwood is located in Allegheny County, Pennsylvania, with a population in excess of 10,000 people. In September of 2019, and after a thorough and complete analysis of its sewer assets, including recognition of several environmental non-compliance problems and anticipated, ever-increasing environmental requirements and mandates, Brentwood decided to explore a sale of its wastewater system. Brentwood held numerous public meetings on the issue, solicited comments from its constituents, and ultimately decided it was in the municipal public’s best interest to sell the system. So, Brentwood voted to sell its system, consistent with the requirements of the Borough Code, to the highest bidder: Pennsylvania-American Water Company.

In March of 2023, Pennsylvania-American filed an application for a certificate of public convenience under Section 1329 of the Public Utility Code. Despite the Brentwood citizenry’s decision that the sale of its system was necessary and proper, given the substantial environmental hazards plaguing it, the Commission denied the application, silencing the voices of Brentwood’s citizens.

Given Brentwood’s experience with Section 1329, Brentwood presents the following comments in response to the TSIO.

## Introduction

Local governments are critical in a country as large as the United States. They oversee the day-to-day operation of a locale by managing daily services such as police and fire protection, road infrastructure, sewage collection, parking and traffic control, zoning, and park maintenance. Overall, local governments provide the services that the overarching state government cannot provide: customizable, boots-on-the-ground contact with, and representation for, the citizenry specific to the locality.

In Pennsylvania, local governments are so critical that the Pennsylvania Constitution specifically requires them. See Pa. Const., art IX § 1. Divided into 67 counties and subdivided into 2,560 municipalities, Pennsylvania's nearly 13-million-person population speaks to its Commonwealth representatives through its municipal officials.

Because municipal officers in Pennsylvania are elected, local citizenries have the power to choose the officers who they deem most capable of representing their daily needs. If citizens feel their day-to-day needs are not being satisfied, they have tangible ways to respond: they can meet their local officials, attend one of the many available public meetings, and, if they are not satisfied, then they can vote in local elections. And because local elections are smaller than national elections, one vote in a local election has the power to disband an entire municipal leadership. For this reason, the need for accountability tends to be higher at the municipal level than at other levels of government.

The TSIO issued on February 17, 2024, by the Pennsylvania Public Utility Commission purports to upend the voices of local governments and, by extension, local citizenries. Among other things, the TSIO seeks to order municipalities—which are not “public utilities” subject to the Commission’s jurisdiction—to engage in procedures expressly and exclusively contemplated and governed by municipal laws. While the PUC has the authority to scrutinize a transaction presented for its review and approval, including the process employed leading up to the transaction occurring, it cannot mandate municipal action or proscribe any predetermined process a municipality must take prior to that occurring.

Respectfully, the Commission lacks authority to order municipal governments in this fashion. The Pennsylvania Constitution requires the creation and maintenance of local governments for a specific reason: local citizenries—the people directly and acutely impacted by local decision-making—must have a tangible voice in the matters that impact their daily lives. The TSIO, albeit unintentionally, unlawfully muffles those voices and deprives citizens of adequate representation in decisions that affect their communities. The Pennsylvania Constitution safeguards self-governance at the local level precisely to prevent disenfranchisement of residents from issues that shape their day-to-day experiences.

Even if it had such authority, the process proposed by the TSIO undercuts what has been the norm for municipalities: complete and total transparency as to all potential benefits and harms ancillary to a proposed transaction. Setting forth procedures that focus entirely on rates will have

the effect of undercutting municipalities' ability to transact as they deem to be in the overall best interests of their residents. While we in no way seek to minimize or undercut transparency as to rate impact, any consideration given to that aspect of these transactions should be presented as part of a complete picture of potential benefits and harms, as is required in the PUC's review and approval function.

### **Brentwood's Comments to the TSIO**

#### **A. The TSIO's pre-application requirements improperly interfere with local governance.**

The TSIO proposes pre-application requirements, such as a public-hearings requirement. Under the TSIO, all acquiring and selling utilities using the procedure set forth in Section 1329 must hold two in-person public hearings before an asset purchase agreement is signed. The public hearings must address specifically delineated topics, including the proposed acquisition and the potential rate impacts. According to the TSIO, the hearings must be held at venues within the municipal boundaries of the selling utility, or at the nearest reasonable venues with Commission notification.

Brentwood agrees that pre-application public hearings are critical and that municipal citizenries deserve full transparency in any matters that will impact their daily lives. That said, the TSIO's pre-application requirements—although salutary—are a Commission overreach and represent an improper usurpation of the role of a municipality's duly-elected officials.

As a regulatory agency, the Commission has only those powers, duties, responsibilities, and jurisdiction given to it by the Commonwealth's General Assembly. *See Western Pa. Water Co. v. Pa. P.U.C.*, 311 A.2d 370 (1973). Through Section 501 of the Public Utility Code, the General Assembly endowed the Commission with "general administrative power and authority to supervise and regulate all public utilities doing business within the Commonwealth." 66 Pa.C.S. § 501(b). An entity is subject to the Commission's jurisdiction only if it is a "public utility."

A municipally operated utility is a "public utility" subject to the Commission's jurisdiction only if it offers and sells service to users who are not residents of the municipality. *See* 66 Pa.C.S. § 1501 ("Any public utility service being furnished or rendered by a *municipal corporation beyond its corporate limits* shall be subject to regulation and control by the commission as to service and extension, with the same force and in like manner as if such service were rendered by a public utility."); *see also Cty. of Dauphin v. Pa. P.U.C.*, 634 A.2d 281, 283 (Pa. Cmwlth. 1993); *State College Borough Auth. v. Pa. P.U.C.*, 31 A.2d 557 (Pa. Super. 1943). Thus, if a municipally operated utility offers and sells service only to users who are residents of that municipality, the utility is not a "public utility" and, thus, not subject to the Commission's jurisdiction.

Many selling utilities throughout Pennsylvania, including Brentwood, are not "public utilities" subject to the Commission's jurisdiction, as they offer and sell their water-treatment-and-collection services only to their own municipal residents. In these circumstances, the Commission

has no authority to dictate the procurement process of these selling utilities. Such process is, instead, governed by municipal codes, such as the Borough Code.

As a borough, Brentwood is subject to the Borough Code. The Borough Code expressly delineates a procedure for the sale of real and personal property, such as a borough's wastewater system. Under the Code, none of a borough's real or personal property may be sold or disposed of unless the council, by resolution, approves it. *See* Borough Code §§ 1201.1(a), 1201.2(a). In terms of real estate, "no real estate owned by the borough may be sold for a consideration in excess of \$6,000, except to the highest bidder after due notice by advertisement for bids or advertisement of a public auction." *Id.* § 1201.1(a). As to personal property that the council approves for sale, "council shall estimate the fair market value of the entire lot to be disposed of." *Id.* § 1201.2(a).

The Borough Code also governs how boroughs, like Brentwood, must advertise the sale to their communities. In terms of real property, where the transaction price exceeds \$6,000, and a borough decides to sell real estate to the highest bidder, the borough must advertise the sale consistent with the Borough Code. Specifically, the borough must publish the advertisement "once in one newspaper of general circulation not less than ten days prior to the date scheduled for the opening of bids or public auction." *Id.* § 1201.1(a.1). The advertisement must announce "[t]he date for opening bids or public auction." *Id.*

As to personal property with a fair market value estimate in excess of \$2,000, the sale must be "advertised . . . once in at least one newspaper of general circulation not less than ten days prior to the date scheduled for the opening of bids or public auction." *Id.* § 1201.2(a). The advertisement must announce "[t]he date of opening of bids or public auction." *Id.* The borough must sell the advertised personal property "to the best responsible bidder." *Id.*

For real property, once the borough awards the contract, it must publicly announce the award "at a regular or special meeting of council or at the public auction." *Id.* § 1201.1(a.2). The council has the authority to reject all bids—for real and personal property—if they are *deemed to be less than the fair market value* of the real property. *See id.* §§ 1201.1(b), 1201.2(a.2) (emphasis added).

As set forth above, the Borough Code imposes on municipal leaders certain obligations regarding the sale of borough property, including to accept the highest possible bid and to communicate the sale to municipal residents in a specific fashion.

Although facially positive, the TSIO purports improperly to override the Borough Code and to constrain municipal leaders into giving their constituents only limited information about a transaction, in the way the Commission deems appropriate. But the duly elected municipal leaders—rather than the Commission—are better suited to decide how best to communicate information to their constituents. And those same duly elected leaders understand the problems facing their specific communities better than the Commission and are better suited to decide what information is crucial for its citizenry to make an informed decision. If implemented as written, the TSIO—which attempts to handicap the manner in which certain transactions are communicated

to a municipality's residents—will be an improper overstep by the Commission into matters beyond its expertise and jurisdiction.

The duly elected officials of a municipality know better than the Commission what their constituents require. These boots-on-the-ground officials speak to their constituents on a regular basis and frequently gather information regarding the municipality's needs. In electing these officials, the municipality decided that these officials were the best-suited people to manage and service the municipality's needs. Given their intimate knowledge of their community, and the frequency with which they speak to their community, municipal leaders do not require the Commission's rules to ensure their citizenry is appropriately informed. Regardless of the TSIO and the Commission's rules, municipal leaders are committed to ensuring their citizens are properly informed about all transactions occurring in the community—both the negative *and* the positive. The Commission's attempt, through the TSIO, to constrain municipal leaders in how they communicate with the public is an improper overreach.

**B. The TSIO is not binding because it did not follow the proper regulatory process to have the force of the law.**

Beyond purporting to regulate matters outside of the Commission's control, the TSIO is invalid and not binding.

The TSIO intends to revise the Commission's Section 1329 Application Filing Checklist to impose new duties on Section 1329 applicants, such as additional public hearings and an affirmative declaration of rate impact on customers. By imposing these new standards of conduct, the Commission appears to intend that approval of a Section 1329 application will be conditioned on compliance with the revised Checklist.

Generally, agency pronouncements take two forms: statements of policy<sup>1</sup> and substantive regulations. A policy statement is an agency pronouncement that “merely explain[s] or offer[s] specific and conforming content to existing statutes or regulations within the agency's purview.” *Nw. Youth Servs., Inc. v. Com., Dep't of Pub. Welfare*, 66 A.3d 301, 311 (Pa. 2013). Because policy statements are mere interpretations of existing rules, they are non-binding and need not comply with notice-and-comment and regulatory procedures to be valid.

A substantive regulation, on the other hand, is a pronouncement that establishes “standards of conduct and carr[ies] the force of law,” otherwise known as a “binding norm.” *Id.* at 306. Unlike policy statements, substantive regulations are binding but only if they are promulgated following notice-and-comment and regulatory procedures. *See e.g., Nw. Youth Servs., Inc.*, 66 A.3d at 304; *Marcellus Shale Coalition v. Dep't of Env'l. Protection*, 193 A.3d 447 (Pa. Cmwlth. 2018), *subsequent determination*, 216 A.3d 448 (Pa. Commw. 2019), *appeal quashed*, 223 A.3d 655 (Pa. 2019) *and appeal quashed*, 223 A.3d 655 (Pa. 2019). If the desired substantive regulatory does not comply with the notice-and-comment and regulatory procedures, the resulting

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<sup>1</sup> Also referred to as “guidance document,” “non-legislative rule,” and “interpretive regulation.”

pronouncement is an interpretative statement of policy only and does not have the force of the law. *See Slippery Rock Area Sch. Dist. v. Unemployment Comp. Bd. of Review*, 983 A.2d 1231, 1237 (Pa. 2009).

To determine whether an agency's pronouncement is a substantive regulation or a policy statement, Pennsylvania courts look at the language of the pronouncement, the manner of the agency's implementation, and the effect of the pronouncement on the agency. *Nw. Youth Servs., Inc.*, 66 A.3d at 311.

Here, the TSIO is a policy statement with no binding effect, rather than a valid substantive regulation with binding effect. Although framed as an amendment of "procedures and guidelines" that are "within the Commission's purview," the actual language of the TSIO purports to impose binding norms. For example, the TSIO requires Section 1329 applicants to comply with additional conduct that cannot be found in the statute, including, for example, holding at least two in-person public hearings and verifying or declaring by affidavit a detailed overall dollar and percentage of the transaction's potential rate impacts on customers. Considering the language of the TSIO, the manner the Commission implements the TSIO, and the effect of the TSIO on the Commission's discretion, the TSIO is drafted as a substantive regulation that establishes standards of conduct.

But the TSIO is not a valid substantive regulation with binding force because, in preparing it, the Commission did not follow the proper regulatory procedures. Accordingly, the TSIO's requirements cannot be administered as prerequisites for submission and approval of a Section 1329 application. If used as a prerequisite, "courts will not hesitate to invalidate [it] on the ground that the agency did not use proper procedures to adopt it." *Nw. Youth Servs., Inc.*, 66 A.3d at 315 (quoting John F. Manning, *Nonlegislative Rules*, 72 Geo. Wash. L.Rev. 893, 893 (2004) ("If a purported nonlegislative rule has operative characteristics that only a legislative rule can legitimately possess, courts will not hesitate to invalidate that rule on the ground that the agency did not use proper procedures to adopt it.")).

For these reasons, the TSIO is an invalid and non-binding substantive regulation. Consequently, its requirements cannot be prerequisites for submission and approval of a Section 1329 application.

**C. The TSIO's requirements cannot be applied retroactively to pending Section 1329 applications.**

The TSIO can be applied prospective only and, thus, cannot affect existing Section 1329 applications.

A substantive rule and regulation cannot be retroactively construed unless the regulation clearly permits as much. *Neuhard v. Travelers Ins. Co.*, 831 A.2d 602, 606–07 (Pa. Super. 2003); *see also Moyer v. Berks Cnty. Bd. of Assessment Appeals*, 803 A.2d 833, 842 (Pa. Cmwlth. 2002). Substantive regulations are those that create controlling standards of conduct. *Slippery Rock Area Sch. Dist.* at 1238.

As set forth above, the TSIO is a “substantive” rule, albeit an invalid one, because it purports to create new controlling standards of conduct that are absent from the governing statute. As a substantive regulation imposing new duties on Section 1329 applicants, the TSIO may not be applied retroactively. Consequently, the TSIO’s new obligations cannot be applied to existing Section 1329 applications that already comply with the pre-existing requirements.

**D. Several of the TSIO’s specific provisions ignore the voices of elected municipal leaders, are vague, or are contrary to Pennsylvania law.**

In addition to being an overreaching, invalid substantive regulation with no binding effect or retroactive applicability, the TSIO’s specific provisions are also problematic because they (1) ignore the voices of elected municipal leaders, (2) are vague, or (3) are contrary to Pennsylvania law.

**i. The “Public Hearings” requirement undermines municipal governance and is vague.**

Preliminarily, Brentwood reiterates that transparency is critical. In this regard, public hearings are an important component to municipal government and should be held before decisions are made by municipalities. For the reasons previously explained, however, the Commission lacks authority to require that municipalities hold them or to dictate how municipalities must do so.

But even if the Commission was permitted to dictate municipal government in this fashion, the public-hearings requirement as set forth in the TSIO vague. The word “prior” is ambiguous and could mean either years before or a day before. Additionally, while the TSIO provides examples of “effective notice,” it fails to clarify whether the examples are exhaustive. Moreover, the TSIO fails to detail whether selling and acquiring utilities are limited to telling the public about the proposed acquisition and its potential rate impacts, or whether the selling and acquiring utilities are permitted to give customers more information, including how rates might change absent the transaction or the environmental hazards that prompted the selling utility’s decision to explore a sale in the first instance.

**ii. The “Rate Impact Notice” requirement undercuts transparency and harms municipalities.**

The Rate Impact Notice proposal requires both the acquiring and selling utility to “verify[] or declare by affidavit” in the initial application that “both parties acknowledge the selling utility is aware of the potential rate impacts the transaction may have on the selling utility’s customers.” TSIO at 4. Such verifications or affidavits also must detail “the overall dollar and percentage impact implicated from stand-alone rates from the transaction price.” *Id.*

The TSIO’s Rate Impact Notice requirement is problematic from a municipal perspective for three reasons.

First, and despite its stated purpose of “fortify[ing] the public notice requirements with . . . additional information,” the proposal requires utilities to convey one-sided, incomplete information to the selling utility’s customers. While the proposal requires acquiring and selling utilities to detail the overall price impact implicated from the transaction price, it does not require selling utilities to advise existing customers of the rate impacts or tax increases they might face absent the transaction. In many cases, rate impacts are likely regardless of whether the transaction is approved, given necessary upgrades to utilities’ water systems. Requiring only one-sided information—namely, how the *transaction price* might impact rates—will not provide potentially impacted customers with a clear and informed understanding of the possible rate impacts attendant to the transaction’s approval or denial, let alone any other potential transaction-related benefits. In the interest of keeping rates low, municipal customers who do not fully appreciate the condition of their water and wastewater systems will opt to continue receiving water from decaying systems that, while so-far viable, are on the brink of collapse.

Second, the proposal threatens to create a speculative record that is lopsidedly focused on one issue, namely, rate impact, without consideration of the numerous benefits attendant to the transaction.

Third, the proposal positions municipalities and acquiring utilities for failure. The Commission—not the selling or acquiring utilities—decides rates. In requiring selling and acquiring utilities to swear under penalty of perjury to “the overall dollar and percentage impact implicated from stand-alone rates from the transaction price,” the Commission is requiring acquiring and selling utilities to swear to something theoretical and, ultimately, out of their control.

**iii. The “Reasonableness Review Ratio” belies the Borough Code and disproportionately harms municipalities, rendering their voices immaterial and irrelevant.**

The TSIO also seeks the implementation of a Reasonableness Review Ratio (“RRR”) to “foster a more informed judgment by the Commission on the merit of the overall Section 1329 application.” TSIO at 6. The purpose of the RRR proposal is to “determine the ratio of the fair market value to depreciated original costs (DOC) of a barometer group of similar situated investor-owned water utility companies (IOUs).” *Id.* Although this proposal is a non-binding guidepost, it undermines the Borough Code, eliminates the analysis already required by case law to determine the “overall prudence of . . . Section 1329 applications,” and harms municipalities seeking to sell their water systems. *Id.*

First, the RRR undermines the Borough Code, which requires boroughs to accept the highest bid in these circumstances, Borough Code § 1201.1(a), because it encourages bidders to present identical bids based on the RRR, regardless of the at-issue system’s assets and needs.

Second, the RRR ignores the needs and desires of the Pennsylvania municipalities who, by vote, decided to sell their water system and, thus, is problematically imbalanced against municipalities. Pennsylvania law is well-settled that the prudence of a Section 1329 application



is determined by considering the substantial affirmative public benefits of the transaction. *See City of York v. Pa Pub. Util. Comm'n*, 295 A.2d 825, 828 (Pa. 1972). In deciding whether a transaction has substantial affirmative public benefits, the Commission must analyze whether the affirmative public benefits outweigh the transaction's potential harm. *See McCloskey v. Pa Pub. Util. Comm'n*, 195 A.3d 1055, 1067 (Pa. Cmwlth. 2017). The balance requires the Commission to assess whether the transaction provides Pennsylvania-specific, and system-specific, public benefits. *See Popowsky v. Pa Pub. Util. Comm'n*, 937 A.2d 1040, 1057 n. 20 (Pa. 2007). Put another way, Pennsylvania law requires a holistic analysis of a transaction that goes well beyond the speculative future rates and considers fact-specific circumstances affecting each individual transaction.

At its core, the RRR eradicates the need for a system-specific analysis, which, in turn, disregards the voice of Pennsylvania's duly-elected municipal leaders and their constituents. Acting as a standardized test for transactions, the RRR ignores the selling utility's assets, needs, and environmental condition and focuses, instead, on comparing investor-owned utility sales to other investor-owned utility sales. Put differently, the RRR treats municipal decisions, needs, and votes as nonexistent, as if the municipalities' interests—and the needs and desires of the community that elected the officials who decided to sell the system—are both immaterial and irrelevant.

### **Conclusion**

Each of the 13-million people who live in Pennsylvania deserves a voice. Pennsylvania's founders decided as much when they enshrined in the Commonwealth's Constitution a requirement for the existence of local governments.

Through their local governments, Pennsylvanians are accorded the opportunity to elect the officials who they deem best able to act in their best interests. Through their duly-elected officials, Pennsylvanians opine on the critical matters that impact their daily lives, including the quality of their water.

The TSIO—however salutary it may be—will subordinate Pennsylvanians' local elected voice, reducing their needs and votes to nothing. No doubt, Pennsylvanians are worried about rate impacts. But more important than rate impacts—more important than any monetary figure—is a Pennsylvanian's health. The water and wastewater hazards plaguing Pennsylvania's water systems are increasingly dangerous, and the TSIO threatens to make the selling of municipal water systems far more difficult under the guise of transparency.

The TSIO does not serve the public. To the contrary, it harms municipalities in more ways than one, reducing municipal voices to nothing but one line—a name—in a Section 1329 application.

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Municipal leaderships—elected by their specific communities to represent their needs—are well-equipped to speak to and for their communities without the Commission’s unsolicited and unauthorized roadmap. The Commission should reconsider the TSIO for the reasons Brentwood outlines in this Comment.

Respectfully submitted,

**BRENTWOOD BOROUGH**

A handwritten signature in blue ink that reads "George Zboyovsky". The signature is written in a cursive style with a large, sweeping flourish at the end.

George Zboyovsky, PE  
Borough Manager