April 2, 2024

**VIA E-FILING**

**David P. Zambito**
Direct Phone 717-703-5892
Direct Fax 215-989-4216
dzambito@cozen.com

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

**Re: Valuation of Acquired Municipal Water and Wastewater Systems – Act 12 of 2016 Implementation; Docket No. M-2016-2543193**

**Pennsylvania-American Water Company's Replies to Comments on the Tentative Supplemental Implementation Order**

Dear Secretary Chiavetta:

Enclosed for filing with the Pennsylvania Public Utility Commission are the Replies to Comments of Pennsylvania-American Water Company on the Tentative Supplemental Implementation Order at Docket No. M-2016-2543193, which was published in the *Pennsylvania Bulletin* on February 17, 2024.

Thank you for your attention to this matter. Please do not hesitate to contact me if you have any questions.

Sincerely,

COZEN O'CONNOR

By: David P. Zambito
Counsel for *Pennsylvania-American Water Company*

DPZ
Enclosures
cc: Andrew L. Swope, PAWC, Vice President and Managing General Counsel
Chairman Stephen M. DeFrank
Vice Chairman Kimberly Barrow
Commissioner Ralph V. Yanora
Commissioner Kathryn L. Zerfuss
Commissioner John F. Coleman, Jr.

**BEFORE THE**
**PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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| Valuation of Acquired Municipal Water and Wastewater Systems – Act 12 of 2016 Implementation | : : : | Docket No. M-2016-2543193 |

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**PENNSYLVANIA-AMERICAN WATER COMPANY'S REPLIES TO COMMENTS ON THE TENTATIVE SUPPLEMENTAL IMPLEMENTATION ORDER**

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AND NOW COMES Pennsylvania-American Water Company ("PAWC"), pursuant to the Tentative Supplemental Implementation Order ("*2024 TSIO*") entered by the Pennsylvania Public Utility Commission ("Commission") on February 7, 2024, and published in the *Pennsylvania Bulletin* on February 17, 2024, to submit these Replies to Comments in this matter.

## I. INTRODUCTION

PAWC is the largest regulated public utility corporation duly organized and existing under the laws of the Commonwealth of Pennsylvania, engaged in the business of collecting, treating, storing, supplying, distributing and selling water to the public, and collecting, treating, transporting and disposing of wastewater for the public. It has completed approximately one dozen application proceedings pursuant to Section 1329 and has several additional Section 1329 applications at various stages of the process (*i.e.*, executed contracts, in preparation, filed but not yet conditionally accepted, pending before the Commission and pending before the Commonwealth Court of Pennsylvania ("Commonwealth Court")[1]).

[1] In addition to cases that have been finally accepted for filing, PAWC has signed Asset Purchase Agreements to acquire the following systems: (1) the wastewater system of Towamencin Township, (2) the wastewater system of the Elizabeth Borough Municipal Authority, and (3) the wastewater system of East Coventry Township.

At the outset, PAWC seeks to reorient and refocus the scope and current procedure before the Commission. The *2024 TSIO* proposed four revisions to the Commission's existing Section 1329 procedures. *See* PAWC Comments, at 19-25, providing specific comments to these four proposed revisions. The *2024 TSIO* is not an opportunity to rewrite or nullify the statute, nor is it an invitation to enact regulations and establish binding norms through the Commission's rulemaking authority. The purpose of the *2024 TSIO* is to improve the existing Section 1329 processes through the provision of guiderails in the interest of transparency and uniformity in the approval and review process of future Section 1329 applications.

It also bears emphasis that as discussed below and in PAWC's Comments in this proceeding dated March 18, 2024, Section 1329 acquisitions have proven successful in delivering environmental and economic benefits to consumers, based in part on investor-owned utilities' ability to institute better management practices and achieve greater economies of scale. This success has included PAWC acquisitions of systems in disrepair in which PAWC has already made progress to improve compliance, reliability, and the safety of these vital systems. The success of Section 1329 acquisitions is consistent with the statutory intent to promote increased regionalization and consolidation and to encourage such acquisitions in the public interest.

PAWC appreciates the opportunity to provide its input to the Commission. In these Replies, PAWC will respond to some of the comments made in this proceeding by various interested parties.

## II. REPLIES TO COMMENTS

### A. Replies to Comments of the Office of Consumer Advocate ("OCA")

The Comments submitted by the OCA advocate for the Commission to use the *2024 TSIO* to essentially rewrite or nullify the statute. This includes OCA's suggestions to use only the

original cost new less depreciation ("OCNLD") method for the cost approach to valuation, and to apply a 1.25x fixed cap on what is included in rate base from a Section 1329 transaction, among other suggestions. PAWC will respond in turn to these proposals set forth in OCA's Comments. However, many of OCA's suggestions are incompatible with Section 1329 and, if accepted, would require the Commission to exceed its statutory authority.

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). These powers do not include rewriting or nullifying existing statutes, either directly or indirectly. Any substantive changes to Section 1329 must be done by the General Assembly through its exercise of legislative powers. Unless and until that occurs, the Commission must continue to abide by its duties as specified by the Legislature. The Commission must continue to implement Section 1329 pursuant to the powers delegated to the Commission by the General Assembly.

Moreover, the *2024 TSIO* cannot establish binding norms and cannot replace the process to enact a valid regulation under Pennsylvania law. The Commission has explained before that Implementation Orders "are not adjudications," and accordingly "they should not be construed to have created 'binding norms' that have the force of law." *Chapter 14 Implementation,* Docket No. M-00041802F0002 (Declaratory Order entered Nov. 21, 2005) at 12-13. If an Implementation Order establishes a "binding norm," then it "would be illegal because [it is] in the nature of unpromulgated regulations." *Id.* (citing *Pa. Human Relations Comm'n v. Norristown Area Sch. Dist.,* 374 A.2d 671, 679 (Pa. 1977); *Hardiman v. Cmwlth, Dep't of Public Welfare,* 550 A.2d 590 (Pa. Cmwlth. 1988)). If the Commission intends to strictly enforce any of the four proposals in the *2024 TSIO*, it must adopt a regulation in compliance with the Pennsylvania Regulatory Review

Act (71 P.S. § 745.1 *et seq.*) and the Commonwealth Documents Law (45 P.S. § 1102 *et seq.*) – not a mere Implementation Order.

### *1. Reply to OCA Comments on Public Hearings*

In its Comments, OCA supports the requirement of at least two in-person hearings before the execution of an asset purchase agreement, with direct outreach to customers, and that these hearings should be stand-alone and not combined with any other municipal business. (OCA Comments, at 2-4). OCA further proposes that potential rate impacts should be addressed at these public hearings. (OCA Comments, at 4-8). As PAWC stated in its Comments, it does not oppose the proposal as set forth in the *2024 TSIO*. In PAWC's experience, municipal entities provide multiple opportunities for the public to ask questions and express their views about a proposed transaction before an asset purchase agreement is signed. (PAWC Comments, at 19).

Nevertheless, some commenters, such as the Borough of Brentwood (at 2) raise valid concerns about the Commission's authority to micromanage municipal entities in the Section 1329 process. Requiring public hearings in the form of a quasi-judicial or formal evidentiary proceeding and mandating that these hearings be stand-alone and not combined with other business impedes a municipal entity's power under applicable municipal codes and local home rule charters. Until an application is filed with the Commission, there is nothing for the Commission to regulate; the Commission has no statutory basis to regulate a municipality's procurement process.

### *2. Reply to OCA Comments on Rate Impact Notice*

PAWC supports a rate impact notice that provides a reasonable projection of the rate impact of the acquisition for customers, in a meaningful and easy-to-understand format, based on the best available information at the time of the projection. Nevertheless, PAWC reiterates the limited purpose of the rate impact notice, as described in *McCloskey v. Pennsylvania Public Utility*

*Commission,* 195 A.3d 1055 (Pa. Cmwlth. 2018), *alloc. denied,* 207 A.3d 290 (Pa. 2019): to ensure that customers' due process rights are protected by providing them with notice of the application for the proposed acquisition because that proceeding determines the rate base that will be used to set rates in future base rate cases.

Fair market value rate base is the only rate issue being finally decided by the Commission at the acquisition application stage and, accordingly, notice of the potential rate base impact is the only direct customer notice that should be required at the application stage. Other ratemaking issues are not decided until subsequent base rate cases, for which separate notices will be given. Under *McCloskey*, the purpose of the notice is to advise customers of the potential rate impact of the Commission approval of the application. The purpose of the notice should not be to scare customers unnecessarily with worst case scenarios that likely will not occur or that if they do occur it will be at some indeterminate point in the future.

OCA proposes that the rate impact notice include many things that are not directly related to rates including, first year capital expenditure commitments made in the asset purchase agreement. (OCA Comments, at 8-9). In its Comments, PAWC offered a modification to the rate impact notice set forth in the *2024 TSIO* based on a settlement of a prior Section 1329 matter in which the Commission approved a rate impact notice methodology for PAWC to use going forward. (PAWC Comments, at 20-21, *citing Application of Pennsylvania-America Water Company Pursuant to Sections 1102 and 1329 of the Public Utility Code for Approval of its Acquisition of the Water System Assets of the Steelton Borough Authority*, Docket No. A-2019-3006880 (Opinion and Order entered Oct. 3, 20190 ("*Steelton Order*")). While the *2024 TSIO* proposes that customers receive a notice of the rate impact from "stand alone rates" — which OCA supports, the *Steelton Order* required PAWC to use the Section 1311(c) allocation from PAWC's

prior rate case. PAWC proposed that, where the Commission has already issued an order instructing a utility how to calculate customer notice, that methodology should continue to be used. It would reduce customer confusion and ensure increased uniformity for the *2024 TSIO* to implement an approach to rate impact notice that is the same as the notice sent to customers at the time a Section 1329 application is filed. It would also ensure consistency with the Commission's prior order concerning rate impact methodology.

Again, the rate impact notice serves a limited but important purpose. Some comments on the *2024 TSIO* could be interpreted to support scare tactics that are designed to push a political agenda -- opposing the transaction. The Commission should reject such proposals; the Commission should not pre-judge the merits of a proposed transaction before an application is even filed. Some Section 1329 acquisitions are for water and wastewater systems that are in disrepair and will require considerable investments to bring them into compliance. It is clear in these cases that rates would necessarily be increased by the municipal entities without an acquisition by a public utility in order to improve the systems and ensure safe and reliable systems. Further, rate projections may vary over time based on changing facts and circumstances. Rate impact notice should provide a realistic projection based on the best available information that was reasonably available at the time of the projection, but rate impact information should not be taken out of context, nor should it be biased against an acquisition, especially where that acquisition would greatly improve water and wastewater systems to the benefit of the public.

### *3. Reply to OCA Comments on Default Weights for Appraisals*

In its Comments, OCA goes beyond the scope of the TSIO and claims that with respect to default weights for appraisals, the cost approach should *only* use OCNLD as the method of valuation. (OCA Comments, at 10-17). This is plainly incompatible with the statute and if adopted

would be a nullification of the statute. As discussed at length in PAWC's Comments, the Commission has elaborated on the legislative intent behind the statute, stating that Section 1329 is designed to encourage acquisitions for municipally-owned water and wastewater systems where "sale to a larger, well-capitalized and well-run regulated public utility company can be prudent because it can facilitate necessary infrastructure improvements and access to capital markets" that will ultimately "ensure the long-term provision of safe, reliable service to customers as reasonable rates." *Implementation of Section 1329 of the Public Utility Code*, Docket No. M-2016-2543193 (Tentative Supplemental Implementation Order entered Sept. 20, 2018) ("*2018 Tentative Supplemental Implementation Order*") at 4-7. To that end, the statute is designed to remedy Section 1311(b), which "worked to discourage the acquisition of these systems" because Section 1311(b) requires "for rate setting purposes, that the Commission value acquired property at the original cost of construction less accumulated depreciation." *Id.* The Commission further elaborated that for "municipalities and authorities, applying the 'depreciated original cost' valuation method is problematic for multiple reasons" and that "in contrast to mandating original cost valuation, Section 1329 seeks to examine valuation from a market-based perspective" — accordingly, "Section 1329 mitigates these risks to both the Seller and to the Buyer. Section 1329 enables a Seller to price its public assets at a market value based on reasonable business valuation principles and enables a Buyer to recover its investments in those public assets at that market-based value." *Id.* To return to OCNLD for the cost approach would abandon the legislative aims of the statute, which is to encourage a realistic approach to the sale of water and wastewater assets based upon the fair market value of those assets.

As explained above, any substantive changes to Section 1329 must be done by the General Assembly and not in the Commission's processes through the *2024 TSIO*. The OCA's proposal is

exactly the type of substantive change that must be done by the Legislature. The General Assembly enacted the statute with a definition of "fair market value" and an express approach to valuation that is statutorily prescribed. 66 Pa. C.S. § 1329(g). That definition cannot now be rejected by the *2024 TSIO*.

### *4. Reply to OCA Comments on Reasonableness Review Ratio*

In its Comments, OCA prefers 1.25x of depreciated original cost as a fixed cap or the maximum that would be allowed for ratemaking rate base, which OCA claims would be easier to understand as a purported "guidepost" than the proposed Reasonableness Review Ratio ("RRR"). (OCA Comments, at 17-26). PAWC explained in its Comments that the RRR proposal should be modified to avoid legal challenges, including by ensuring that the Commission is not trying to re-define a term that is already defined in the statute or otherwise imposing a binding norm outside of the rulemaking process. (PAWC Comments, at 21-22). OCA's 1.25x cap is an attempt at nullifying the statute. OCA endorses a cap that is inconsistent with the statute, at an arbitrary threshold with no rational basis, and in a stark deviation from fair market value. The intent of the statute, as discussed above and in PAWC's Comments, is to encourage acquisitions in the interest of regionalization and consolidation through a *fair market value* approach to valuing municipally-owned assets, with "fair market value" being a defined term in the statute. While OCA may disagree with this approach, its suggestion for the Commission to implement a 1.25x cap through the *2024 TSIO* would usurp the legislative authority of the General Assembly. Any attempt to re-define "fair market value," to impose a cap on the amount allowed for ratemaking rate base, or to otherwise deviate from a market-based formula must be done legislatively by the General Assembly.

In its Comments on the *2024 TSIO*, PAWC suggested that the controlling RRR should be the one that applied at the time an asset purchase agreement was executed and that the RRR should not be considered a binding norm or predispose the Commission to deny applications where the fair market value (as defined by statute) exceeds the value calculated using the RRR. (PAWC Comments, at 22); *see also* (PAWC Comments, at 15-17, explaining that the Commission should not focus exclusively on the RRR in weighing the benefits of the proposed transaction). PAWC further encourages the Commission to modify its proposed RRR formula to utilize a "Rate Base Proxy" in lieu of "Net Property, Plant and Equipment" to create a fairer guidepost to be weighed among other relevant factors in making an overall affirmative public benefit determination. (PAWC Comments, at 23-24). This would be more consistent with the legislative intent of Section 1329, as previously recognized by the Commission, in that municipal entities would be allowed to realize an amount closer to the fair market value of their assets in order to address financial challenges. *See 2018 Tentative Supplemental Implementation Order*, at 4-7 ("Section 1329 recognizes that no reasoned argument would propose that these public assets are of marginal value simply because the book value and the Commission's traditional rate setting methodology dictate as much. Rather, the valuation methods of Section 1329 provide municipalities and authorities with a wholistic recognition of the fair market value of the public assets they seek to sell based on a balancing of accepted business valuation principles[.]").

### *5. Reply to Additional Proposals Made by OCA*

OCA's Comments conclude with additional suggestions beyond the four proposed revisions in the *2024 TSIO*, including modifications to the timing for conditional acceptance, shortened timing for discovery responses, and an automatic extension of the six-month suspension period. (OCA Comments, at 27-31). PAWC submits that this is not the appropriate forum in

which to raise these issues; the Commission has proposed, and solicited comments from interested stakeholders, with respect to only four specific revisions to the processes for Section 1329 applications. Raising new issues in comments to the *2024 TSIO* with only a 15-day period in which other parties can submit a reply to these comments provides insufficient notice and opportunity to be heard concerning substantive changes to the Section 1329 process. Some of the concerns identified by OCA have been settled and dealt with through prior Implementation Orders, and this is not an opportunity to revisit or rehash these issues that are the subject of a Commission final order. OCA's additional proposals to the *2024 TSIO* undermine the regulatory certainty that is critical for public utilities operating in the Commonwealth.

PAWC will nevertheless briefly address each of these additional proposals specifically. OCA claims that conditional acceptance of an application should permit the case to move forward for protests, intervention, discovery, and other procedural issues. (OCA Comments, at 27-29). This proposal should be rejected. The extensive application checklist and the Bureau of Technical Utility Services' ("TUS") deficiency reviews are intended to limit the need for discovery because of the statutory six-month timeline.

Since the inception of the TUS deficiency review process, the reviews have become increasingly detailed and the preparation of responses have become very time-consuming. It now routinely takes several months to satisfy TUS and convince its analysts that an application should be permitted to move forward in the process through a conditional acceptance. In fact, the TUS review process often goes far beyond assuring that application checklist items have been satisfied (*i.e.*, the original intent of the checklist) and delves deeply into substantive legal and factual issues that are properly reserved for an on-the-record proceeding before an Administrative Law Judge. Indeed, the current TUS deficiency review process limits the need for extensive discovery by

parties to the protested application proceeding. Applicants are essentially now required to go through an unprotested application process before TUS and then a protested application process before an Administrative Law Judge. This dual process was never the intent of the Commission's earlier implementation orders, and subverts the Legislature's intent of a streamlined six-month process.

OCA's request for early discovery is unnecessary and would violate the Commission's Rules of Practice and Procedure because discovery rules do not apply until official acceptance of the application, *i.e.*, there is an officially-docketed proceeding. OCA's proposal would make the application acceptance process even more unwieldy and difficult, and would cause further delays in contravention of the statute.

If the Commission elects to upend its own Rules of Practice and Procedure as suggested by OCA (which it should not), the Commission should revisit TUS's authority to engage in extensive application deficiency reviews and its ability -- as a prerequisite to conditional acceptance of an application -- to demand acquiescence by applicants to the substantive legal and factual positions of TUS analysts. The role of TUS should be scaled back to the role originally intended by the Commission – to ensure that the applicants have submitted all items required by the application checklist.

OCA also proposes modified discovery schedules with shortened response periods. (OCA Comments, at 29-30). This is unnecessary as the discovery rules have already been routinely modified at the discretion of the presiding Administrative Law Judge to provide short five-day periods for discovery responses. In Section 1329 cases, this process has worked. To modify them again introduces greater uncertainty to the process.

OCA further suggests that the six-month suspension period should be extended automatically to allow the Commission to hold a public meeting and act beyond the six-month window for a decision. (OCA Comments, at 30-31). The statute requires the Commission to issue a final order within six months of the filing date of an application. 66 Pa. C.S. § 1329(d)(2). The Commission cannot extend this statutory requirement. OCA's proposal to allow the Commission to act at a public meeting after the six-month period is incompatible with the statute. The Commission should refrain from adopting any of OCA's additional proposals.

**B. Replies to Comments of the Office of Small Business Advocate ("OSBA")**

In its Comments, the OSBA voiced concern over perceived perverse incentives in Section 1329 transactions. (OSBA Comments, at 1-3). It bears consideration that what the OSBA finds to be "perverse incentives" is a transaction in which a municipal entity is afforded the opportunity to realize the full value of its assets. Section 1329 is legislatively designed to encourage acquisitions where an investor-owned utility can implement necessary infrastructure improvements and at the same time relieve a municipality of capital-intensive assets. In these acquisitions, the sale proceeds may be used to improve a municipal entity's financial condition. To claim that the result is an artificially inflated purchase price ignores the negotiated nature of the purchase price and the Commission's review of the overall benefits of the transaction in the approval process. Moreover, the statute is intended to encourage these types of acquisitions in the public interest.

In discussing the legislative intent behind Section 1329, the Commission previously explained that prior law dictated by Section 1311(b) of the Public Utility Code discouraged these types of acquisitions; "[s]ystems that are greatly depreciated or that were constructed using grants or contributions in aid of construction could have valuations so low that sales of the systems would

be less advantageous or would cause financial hardships to the municipal corporations and authorities." *Implementation of Section 1329 of the Public Utility Code*, Docket No. M-2016-2543193 (Tentative Implementation Order entered Jul. 21, 2016) ("*Tentative Implementation Order*") at 2. Section 1329 is intended to encourage these transactions to further the public interest. *See also Application of Pennsylvania-American Water Company to Acquire the Wastewater Collection and Treatment System Owned by the Butler Area Sewer Authority*, Docket No. A-2022-3037047 (Opinion and Order entered Nov. 16, 2023) at 59 (citing, *inter alia*, the *Tentative Implementation Order* for the proposition that "Section 1329 reflects a determination by the General Assembly that fair market value acquisitions of municipal water and wastewater systems furthers the public interest").

The OSBA also commented that it would be reasonable to consider that a premium above an arbitrary threshold (50% of the RRR in excess of 1.0), should be borne by shareholders. (OSBA Comments, at 4-5). This is not compatible with the statute. The statute explicitly allows recovery of the fair market value in rates. The Commission's elaboration on the legislative intent behind Section 1329 explained that Section 1329 works to "allow a Buyer to recover market-based investment in those public assets through regulated rates." *2018 Supplemental Implementation Order*, at 4. Recovery of the fair market value through rates is a hallmark of the legislation, designed to encourage viable public utilities to acquire municipal water and wastewater systems.

Encouraging shareholders to absorb a premium on the transaction price disincentivizes public utilities from moving forward with such acquisitions (in contravention of the legislative intent). Even worse, if the public utility moves forward with the acquisition, the OSBA's proposal results in the Commonwealth's public utilities being less stable and making themselves less financially viable because investors will be less willing to become public utility shareholders. It

is in the interest of the Commonwealth and its residents for public utilities to be financially sound and able to achieve a fair return on equity, which in turn allows public utilities to borrow money, issue debt, fund capital improvements, and maintain reasonable rates. To encourage or suggest a policy in which shareholders are to bear an identified premium for acquisitions, contrary to the text and intent of the statute, will result in fewer acquisitions and otherwise may risk the ongoing financial stability and viability of these public utilities, to the detriment of customers. The *2024 TSIO* should improve upon the statute, but it should not contradict the statute or disregard the statute's intent in seeking to attract capital and acquisitions for the betterment of the Commonwealth's utility infrastructure.

### C. Replies to Comments of the Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania ("CAUSE-PA")

CAUSE-PA submitted Comments that focused primarily on public notice and participation in Section 1329 acquisitions. CAUSE-PA suggested that the Commission should be more prescriptive in the requirements concerning public hearings, including the satisfaction of formal requirements concerning transcripts for the hearings, advance notice and publication, accessibility, timing of the hearings, attendance, content, and other suggestions. (CAUSE-PA Comments, at 7-12). For example, CAUSE-PA proposes that there should be two hearings before an asset purchase agreement is reached, the first being well before negotiations conclude, and that key personnel from the involved entities should address at the second hearing how they responded to public concerns raised at the first hearing. (CAUSE-PA Comments, at 7-10). CAUSE-PA also provided detailed suggestions for the rate impact notice, again with suggested formal requirements concerning timing, accessibility, and content. CAUSE-PA contends that the rate impact notice should be accompanied with certain customer statistics and should include a mitigation plan for economically vulnerable customers. (CAUSE-PA Comments, at 12-15). As explained above in

response to OCA's Comments, PAWC is concerned that CAUSE-PA is advocating for the Commission to impermissibly establish binding norms through an Implementation Order. PAWC is also concerned about the Commission's authority to micromanage municipal entities in the municipal procurement process.

PAWC submits that municipal public hearings should not be required to be in the form of public input hearings that are held during rate cases; an opportunity for the public to comment and ask questions at a meeting of the governing body of the municipality should be sufficient. Further, any requirements for such public hearings should be accomplished through regulations to ensure uniformity to all acquiring public utilities and to Commission staff in reviewing Section 1329 applications. With respect to rate impact notice, to avoid redundancy, PAWC incorporates by reference its comments above, responding to the OCA's proposals regarding rate impact notice.

### D. Replies to Comments of James H. Cawley and Other Interested Parties in Opposition to Section 1329

James H. Cawley, a former Commissioner and Chairman of the Commission, provided Comments that were largely against Section 1329 and unrelated to the specific proposals in the *2024 TSIO*. In his Comments, Mr. Cawley, among other things, called the statute "a corruption of public utility ratemaking," urged the Commission to involve itself in the legislative process by requesting the General Assembly repeal the statute, and told the Commission how to act in ongoing cases to deny more applications under the statute. (Cawley Comments, at 2-5, 37-39). Mr. Cawley's sentiment in opposing the statute and focusing less on the actual substance of the *2024 TSIO* is shared by other commenters, including the Pennsylvania State Association of Township Supervisors, the Pennsylvania Municipal Authorities Association, Chester Water Authority, Bucks County Association of Township Officials, Township of Warwick, Keep Water Affordable, Stop Predatory Water System Pricing, and others. These comments provided little actual guidance to

the Commission for the task at-hand, namely consideration of the *2024 TSIO*. As stated above, the *2024 TSIO* is not an opportunity to rewrite the statute, to repeal or otherwise nullify the statute, to establish binding norms for Section 1329 applications, or to otherwise contravene the delegated authority from the General Assembly to the Commission.

As explained in PAWC's Comments (at 9-11), Section 1329 has proven successful to allow municipal entities within the Commonwealth to address their financial challenges and allow these municipal entities the opportunity to realize the full value of their property. To be clear, repealing or effectively nullifying the statute would force municipal entities to continue to own certain assets that in turn directly affect the public health and safety through the provision of water and wastewater utility services. Rather, through Section 1329, public utilities are equipped to purchase these assets from municipal entities and deliver greater environmental and economic benefits to consumers, in part, because private industry is capable of instituting better management practices and achieving greater economies of scale.

For example, PAWC purchased the Exeter Township ("Exeter") wastewater system in 2019. At the time of the sale, the system was in disrepair and Exeter was under an order from the Pennsylvania Department of Environmental Protection ("PADEP") to remedy a long list of deficiencies in its system and its operational procedures. The citations against Exeter by PADEP totaled approximately fifty (50), including, among other violations, twenty-six (26) sanitary sewer overflows to the surface of the ground and to waters of the Commonwealth, one permitted discharge of an estimated five (5) million gallons of raw sewage to a tributary of the Schuylkill River, five (5) unpermitted discharges of raw sewage from the wastewater treatment plant's treatment units to the surface of the ground and the plant's stormwater collection and conveyance system, two (2) unpermitted discharges of sewage to the surface of the ground and to waters of the

Commonwealth, and one (1) spill of sewage sludge to the wastewater treatment plant's stormwater collection and conveyance system.

Concurrent with the closing of the transaction, PAWC entered into a Consent Order and Agreement with PADEP to resolve the deficiencies and bring the system back into compliance. Since acquiring the system, PAWC has been working diligently on the remedial actions identified by the PADEP and has met every deadline established by the PADEP. PAWC has invested approximately $20 million in capital improvements to the collection system and wastewater treatment plant. Work has included major projects, including remedying the issues identified by PADEP as well as projects to improve environmental compliance, system reliability, and the capacity to accommodate heavy rains and increased community growth. Section 1329 enabled PAWC to purchase the Exeter wastewater system, a system that was in disrepair and deemed deficient, and PAWC has worked to improve the system and bring it into compliance, benefiting Commonwealth residents.

PAWC had a similar experience with the City of York ("York") in which providing safe, reliable wastewater service became increasingly difficult for York, in part due to aging infrastructure and the lack of funding for maintenance. Numerous permit violations resulted in an administrative order on consent with the United States Environmental Protection Agency. Surrounding municipalities that received bulk treatment from York were highly concerned with York's continuing ability to provide adequate service and quality and the consequences this would have on local economic development. PAWC's acquisition of York's wastewater system allowed York to remedy its fiscal condition, while enabling PAWC to improve quality and reliability of wastewater utility services, and surrounding municipalities now have a bulk treatment provider upon which they can rely.

Mr. Cawley and other commenters overlook the success of Section 1329 and the reality that many of the water and wastewater systems that PAWC and other public utilities have acquired under the statute were in disrepair. Municipal entities with their own fiscal concerns and their own budgeting capabilities should be empowered to sell their own assets, particularly when they are selling assets that are so capital-intensive to operate and the sale is to regulated public utilities that are well-positioned to handle such vital services with environmental, health, and safety implications. This has been acknowledged by the Commission as the legislative intent of the statute:

> The development of water and wastewater service throughout the Commonwealth over the years has led to the creation of large numbers of geographically dispersed water and wastewater systems owned by municipal corporations or authorities. For these systems, sale to a larger, well-capitalized and well-run regulated public utility or entity can be prudent because it can facilitate necessary infrastructure improvements and access to capital markets, and ultimately, it can ensure the long-term provision of safe, reliable service to customers at reasonable rates.

*2018 Tentative Supplemental Implementation Order*, at 4-7.

The Commission should not overlook the successes resulting from Section 1329 and the public benefits of these transactions. PAWC's experience in acquiring systems under the statute, including through Exeter and York as examples, has already proven successful in remedying noncompliant systems, improving safety and reliability, and ensuring environmental and economic benefits to customers.

### E. Replies to Comments of Pennsylvania State Association of Boroughs ("PSAB") and Other Municipalities

The Pennsylvania State Association of Boroughs ("PSAB") submitted Comments which sought to reduce the administrative complexity of public meetings for municipal entities, to include distressed systems as good cause to deviate from default weighting, and to advocate for the Commission to adhere to the public policy of the statute by not undermining the fair market

valuation. (PSAB Comments, at 1-3). Additional municipal entities, many of which are in various stages of Section 1329 acquisitions, submitted comments in general support of the statute and to ensure that the effective dates of proposals in the *2024 TSIO* do not disrupt current acquisitions already in progress. These municipal entities include: Allegheny County Boroughs Association, Elizabeth Borough Municipal Authority, Borough of Brentwood, Borough of Big Beaver, Patterson Township, City of Beaver, Towamencin Township, Borough of West Mayfield, and Borough of Eastvale.

Consistent with these comments, municipal entities seeking to sell their water and wastewater systems at fair market value should be enabled to proceed according to the statute and realize an amount that is close to the fair market value of their assets in order to address financial challenges. As explained in PAWC's Comments, Section 1329 has proven successful to address such municipal financial challenges, including the City of McKeesport, which avoided becoming a distressed municipality by selling its wastewater system, and the City of York, which addressed a significant budget deficit by selling its wastewater assets. (PAWC Comments, at 9-10).

With respect to the effective dates of the proposals in the *2024 TSIO*, PAWC recommends that the Commission reconsider the proposed effective dates in order to avoid any potential *ex post facto* and impairment of contract issues with regard to acquisitions in progress. The standards proposed in the *2024 TSIO* should not apply to acquisitions in which an asset purchase agreement was signed prior to the adoption of the Chairman's Motion on which the *2024 TSIO* is based. Consistent with the comments of PSAB and other municipal entities, it would be fundamentally unfair to parties that have expended considerable time, money, and effort to structure transactions based on existing Commission precedent and instructions. (PAWC Comments, at 18). An application should not be denied where the parties complied with existing Commission precedent

or where compliance with the *2024 TSIO* is impossible because the acquisition is already in progress. A flexible approach in applying the proposals in the *2024 TSIO* to existing Section 1329 applications is a fairer and more equitable approach.

## III. CONCLUSION

PAWC thanks the Commission for the opportunity to submit these Replies to Comments and for the Commission's consideration of PAWC's Comments. PAWC continues to look forward to working together with the Commission and other interested stakeholders to improve the implementation of Section 1329.

[Signatures appear on next page.]

Respectfully submitted,


Andrew L. Swope, Esquire (PA ID 55817)
Elizabeth Rose Triscari, Esquire (PA ID 306921)
Erin K. Fure, Esq. (PA ID 312245)
Pennsylvania-American Water Company
852 Wesley Drive
Mechanicsburg, PA 17055
Telephone: (717) 550-1574
E-mail: Andrew.Swope@amwater.com
E-mail: Elizabeth.Triscari@amwater.com
E-mail: erin.fure@amwater.com

David P. Zambito, Esq. (PA ID 80017)
Jonathan P. Nase, Esq. (PA ID 44003)
William A. Lesser, Esq. (PA ID 332951)
Cozen O'Connor
17 North Second Street, Suite 1401
Harrisburg, PA 17101
Telephone: (717) 703-5892
E-mail: dzambito@cozen.com
E-mail: jnase@cozen.com
E-mail: wlesser@cozen.com

Counsel for *Pennsylvania-American Water Company*


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