

# Defining an Affirmative Public Benefit: Where Does *Cicero* Leave Fair Market Value Acquisitions of Municipally Owned Utilities?

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## ABSTRACT

People take water and wastewater service for granted because pipes are hidden underground, and treatment plants are seldom an important feature of communities. However, awareness of these resources—fundamental for life and public health—is certain when the monthly utility bill arrives. For many Pennsylvanian consumers, these bills continue increasing. Since 2016, the Pennsylvania Public Utility Commission (the “Commission”) will approve a private utility’s purchase of a municipal utility and allow recovery of the entire fair market value of the acquired utility through customer rates upon a finding of an “affirmative public benefit.” In weighing the advantages and disadvantages of acquisitions, the Commission has rarely determined that an acquisition did not provide a public benefit, even when large revenue deficiencies manifested.

In 2022, the Commission approved the acquisition of the East Whiteland Township wastewater system after finding an affirmative public benefit. However, the Commonwealth Court reversed the acquisition’s approval in *Cicero v. Pennsylvania Public Utility Commission*, holding that the Commission misapplied the law. *Cicero* changed how the Commission must analyze the facts in public benefit determinations. After *Cicero*, the Commission still approved the acquisition of the Butler Area Sewer Authority by erroneously identifying a public benefit in the transaction.

*Cicero* and the acquisition of the Butler sewer system highlight the glaring need for changes to the law. Municipal system acquisitions should not come at enormous costs to customers across the state. Therefore, the

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Pennsylvania legislature should either (1) create a customer veto power and a rate base inclusion cap to limit the harms of the current regime or (2) fully repeal section 1329 and investigate alternatives to narrowly tailor the law toward its defined objectives.

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## I. INTRODUCTION

Behind faucets, showers, and toilets are water treatment facilities, pipes, and wastewater treatment facilities.<sup>1</sup> This infrastructure delivers clean water to homes, schools, and workplaces and subsequently carries away waste, offering services crucial to life and public health.<sup>2</sup> Public utilities of varying sizes and structures operate these systems, owned by investor-owned companies and government entities.<sup>3</sup>

In 2016, the Pennsylvania legislature enacted Act 12, which included section 1329 of the Public Utility Code (hereinafter the “Code”).<sup>4</sup> Section 1329 incentivized acquisitions of private municipal water and wastewater systems by allowing purchasers to recover an acquired utility’s fair market value through utility rates.<sup>5</sup> Following Act 12, private companies and municipal water and wastewater systems capitalized on Act 12’s incentives and rapidly entered into agreements to sell the municipal utilities to the private companies.<sup>6</sup> The purchases turned government-owned utilities, providing essential resources, into privately-owned for-profit ventures.<sup>7</sup>

The Commission regulates purchases of municipal systems by private utilities.<sup>8</sup> The Commission conducts a mandated analysis to determine whether to approve purchases under Act 12,<sup>9</sup> and consistently finds that previous acquisitions provide the affirmative public benefit

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1. See NAT’L INST. OF STANDARDS AND TECH., DISASTER RESILIENCY FRAMEWORK, at 3–13 (2015), <https://perma.cc/HY7W-V53C>.

2. See *id.* at 1.

3. See *Water/Wastewater*, PA. PUB. UTIL. COMM’N, <https://perma.cc/2NXT-NYT3> (last visited Oct. 6, 2023).

4. See 2016 Pa. Laws 76, 76–78 (creating 66 PA. CONS. STAT. § 1329); see also 66 PA. CONS. STAT. § 1329 (2023).

5. See *infra* Section II.A.C.

6. See *Hearing on House Bills 1862, 1863, 1864, and 1865 amending Sections 1327 and 1329 of the Public Utility Code Before the Comm. on Consumer Prot., Tech., and Util.*, 2023 Leg. Sess. at 2 (Pa. 2023) [hereinafter Cicero Statement] (statement of Consumer Advocate Patrick M. Cicero).

7. See Ed. Bd., *As Pa. Municipalities Sell Water Systems to For-Profit Companies, Consumers Are Left Paying The Price*, THE PHILA. INQUIRER (Aug. 18, 2022, 5:02 AM), [hereinafter Inquirer Editorial] <https://perma.cc/CA6M-8GYZ>.

8. See 66 PA. CONS. STAT. § 1329 (2023).

9. See *id.* § 1103 (2023); see also *City of York v. Pa. Pub. Util. Comm’n*, 295 A.2d 825, 828 (Pa. 1972).

necessary for approval.<sup>10</sup> However, despite the Commission's findings, consumers have faced rising costs related to new ownership.<sup>11</sup>

Considering the financial impact on customers, the Commission's acquisition-friendly precedent when conducting section 1329 analyses has faced its first major disruption through the Commonwealth Court's decision in *Cicero v. Pennsylvania Public Utility Commission*.<sup>12</sup> This Comment analyzes the *Cicero* decision to discern subsequent effects on section 1329 acquisitions.<sup>13</sup> This Comment then recommends legislative changes to remedy the remaining inefficiencies under section 1329.<sup>14</sup>

Part II of this Comment discusses the background of section 1329 acquisitions.<sup>15</sup> First, Part II describes the general principles in public utility regulation, including ratemaking.<sup>16</sup> Second, Part II discusses acquisitions of municipal systems in Pennsylvania prior to section 1329, the goals of section 1329, and the acquisitions that followed section 1329's enactment.<sup>17</sup> Third, Part II discusses fair market value acquisitions in Illinois and New Jersey.<sup>18</sup> Finally, Part II introduces the Commonwealth Court's *Cicero* decision followed by the Commission's first section 1329 decision post-*Cicero*.<sup>19</sup>

In Part III, this Comment assesses *Cicero*'s impact on application of section 1103's mandated affirmative public benefit analysis.<sup>20</sup> After determining how the analysis has changed, Part III then analyzes the Commission's first decision on a section 1329 acquisition following *Cicero*.<sup>21</sup> Finally, Part III recommends three legislative changes that would provide greater protections for customers, tailor the law to the long-term goals of Pennsylvania, and decrease the negative impacts seen under section 1329.<sup>22</sup>

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10. See tit. 66, § 1103; Stephen Caruso, *How a Recent Court Ruling Could Put the Brakes on Water and Sewer Privatization in Pennsylvania*, WHYY (Aug. 11, 2023), <https://perma.cc/89YU-JX44> (describing how the Commission has established six years of precedent in favor of approving acquisitions).

11. See *Inquirer Editorial*, *supra* note 7.

12. See *Cicero v. Pa. Pub. Util. Comm'n*, *reh'g denied*, 300 A.3d 1106, 1120 (Pa. Commw. Ct. 2023); see also *infra* Section II.E.

13. See *infra* Section III.A.

14. See *infra* Sections III.B–C.

15. See *infra* Part II.

16. See *infra* Section II.A.

17. See *infra* Section II.B–C.

18. See *infra* Section II.D.

19. See *infra* Sections II.E–F.

20. See *infra* Section III.A.

21. See *infra* Section III.B.

22. See *infra* Section III.C.

## II. BACKGROUND

The Pennsylvania legislature enacted Section 1329 of the Code in 2016.<sup>23</sup> Since then, large investor-owned public utilities have purchased more than 20 municipal water and wastewater systems throughout Pennsylvania.<sup>24</sup> Acquisitions under section 1329 have increased costs for customers of both the acquired system and the purchasing utility.<sup>25</sup> Stakeholders have attempted to challenge acquisitions arguing that the increases in costs to customers outweigh any benefits.<sup>26</sup> Nevertheless, the Commission has generally continued approving acquisition applications after determining that the benefits outweigh the costs of rate increases.<sup>27</sup>

In *Cicero*, the Pennsylvania Commonwealth Court addressed whether the Commission erred in approving the acquisition of the East Whiteland Township wastewater system (hereinafter “East Whiteland”) by Aqua Pennsylvania Wastewater, Inc. (hereinafter “Aqua”).<sup>28</sup> The Commonwealth Court concluded that the Commission erred in determining that the benefits of the acquisition outweighed the acknowledged harms.<sup>29</sup> The decision in *Cicero* introduced uncertainty regarding whether the Commission will continue to routinely find that an acquisition yields benefits that outweigh its harms.<sup>30</sup>

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23. See 66 PA. CONS. STAT. § 1329 (2023) (incentivizing purchase of municipal systems by allowing a recovery of the fair market value purchase price); see also 2016 Pa. Laws 76, 76–78.

24. See *Cicero Statement*, supra note 6, at 2; see also Caruso, supra note 10; *Hearing on Section 1329 of the Public Utility Code Before the Subcomm. on Pub. Util. and the Subcomm. on Gov’t and Fin. Oversight*, 2021 Leg. Sess. Appendix A (Pa. 2021) [hereinafter McCloskey Statement] (statement of former Acting Consumer Advoc. Tanya J. McCloskey).

25. See *Cicero Statement*, supra note 6, at 5–8 (explaining that significant portions of rate increase requests result from fair market value acquisitions).

26. See, e.g., Application of Aqua Pa. Wastewater for Approval of its Acquisition of the Wastewater System Assets of East Whiteland Township, No. A-2021-3026132, 2022 WL 3138913, at \*11–12 (Pa. P.U.C. 2022); see also, e.g., Application of Aqua Pa. Wastewater for Approval of its Acquisition of the Wastewater System Assets of New Garden Township, No. A-2016-2580061, 2017 WL 4552494, at \*3 (Pa. P.U.C. 2017).

27. See *McCloskey Statement*, supra note 24, at Appendix A; see also *Inquirer Editorial*, supra note 7 (describing acquisitions that were approved by the Commission even though they resulted in large customer rate increases).

28. See *Cicero v. Pa. Pub. Util. Comm’n*, reh’g denied, 300 A.3d 1106, 1109–10 (Pa. Commw. Ct. 2023).

29. See *id.* at 1120.

30. See Whitney Snyder, *Commonwealth Court Confirms Affirmative Public Benefits Standard Still Has Teeth in Fair Market Value Acquisitions (Reversing PA PUC Approval of Aqua Acquisition of East Whiteland Township)*, HMS LEGAL BLOG (July 31, 2023), <https://perma.cc/9PQP-7E9G>.

A. *Overview of Public Utility Regulation in Pennsylvania*

A public utility is any “business enterprise that performs an essential public service and that is subject to governmental regulation.”<sup>31</sup> Public utilities generally provide electric, gas, water, and wastewater services.<sup>32</sup> The government regulates certain public utilities for two reasons: (1) the essential nature of the services and (2) the economic and social benefits achieved by allowing the entity to act as a monopoly.<sup>33</sup> In 1978, the General Assembly enacted Act 116.<sup>34</sup> Act 116 established the Code as the primary source of the Commission’s power.<sup>35</sup>

The Code outlines the rules and regulations public utilities must follow when providing service to consumers in Pennsylvania.<sup>36</sup> The Code also empowers the Commission to execute and enforce the Code and supervise and regulate all public utilities.<sup>37</sup> The Code further defines what entities are considered “public utilit[ies,]” which are subject to the Code and the Commission’s enforcement and authority.<sup>38</sup> The Code’s definition of a public utility includes entities engaged in “[d]iverting, developing, pumping, impounding, distributing, or furnishing water” and “collect[ing], treat[ing], or dispos[ing]” of wastewater.<sup>39</sup> However, the Code excludes from regulation “[a]ny person or corporation, not otherwise a public utility, who or which furnishes service only to himself or itself.”<sup>40</sup> Consequently, municipal water and wastewater systems are not subject to the Code or the Commission for customers within their geographic boundaries.<sup>41</sup> Because municipal systems are not subject to the Code, they are not required to follow the specific ratemaking rules that the Commission sets out.<sup>42</sup>

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31. *Public Utility*, BLACK’S LAW DICTIONARY (11<sup>th</sup> ed. 2019).

32. See JAMES H. CAWLEY & NORMAN J. KENNARD, A GUIDE TO UTILITY RATEMAKING 2–3 (Pa. Pub. Util. Comm’n, 2018).

33. See *id.* at 1.

34. See PA. PUB. UTIL. COMM’N, A HISTORY OF THE PENNSYLVANIA PUBLIC UTILITY COMMISSION 6 (2012) [hereinafter PUC HISTORY]; Act 116 of July 1, 1978, 1978 Pa. Laws 598, 598–686 (creating the current Pennsylvania Public Utility Code).

35. See PA. PUB. UTIL. COMM’N., *supra* note 34 at 6.

36. See 66 PA. CONS. STAT. §§ 101–3316 (2023).

37. See *id.* § 501(a)–(b).

38. See *id.* § 102.

39. *Id.*

40. *Id.*

41. See Pa. Pub. Util. Comm’n, *supra* note 34 (stating that the Commission has jurisdiction over customers of municipal systems only when they reside outside of the municipal corporation’s boundaries); see also 66 PA. CONS. STAT. § 1301(b) (2023).

42. See 66 PA. CONS. STAT. §§ 102 (2023).

### 1. Overview of Utility Ratemaking

One of the most important functions of the Commission is its power to set utility rates.<sup>43</sup> The Commission sets rates by determining what rates are “just and reasonable.”<sup>44</sup> Courts make just and reasonable determinations from the perspective of (1) customers and (2) the utility and its shareholders.<sup>45</sup> Ultimately, the Commission has adopted the general ratemaking equation:

$$RR = E + r(V - D)$$

$$(V - D) = RB$$

in which *RR* is the Revenue Requirement,<sup>46</sup> or the amount the utility collects in rates; *E* is the Expenses,<sup>47</sup> *r* is the Rate of Return on Utility Property;<sup>48</sup> *V* is the Original Cost of Property when first devoted to the public service;<sup>49</sup> *D* is the Accrued Depreciation on Utility Property;<sup>50</sup> and *RB* and *(V-D)* make up what is known as the Rate Base.<sup>51</sup>

The ratemaking equation accomplishes the goals of the Code and Commission by (1) recovering all operating expenses, ensuring the company can operate and provide adequate service,<sup>52</sup> and by (2) providing a return on utility property, or rate base, to compensate investors and attract capital.<sup>53</sup> The Code requires a return on utility rate base in Pennsylvania,<sup>54</sup> echoing the protections provided under the United States Supreme Court’s interpretation of the Fifth and Fourteenth

43. See 66 PA. CONS. STAT. § 102 (2023) (defining a rate as “[e]very . . . charge . . . or other compensation whatsoever of any public utility, . . . made, demanded or received for any service within this part”).

44. 66 PA. CONS. STAT. § 1301(a) (2023); see also Cawley & Kennard, *supra* note 32, at 37; Fed. Power Comm’n v. Hope Nat. Gas Co., 320 U.S. 591, 603–5 (1944) (applying a just and reasonable analysis).

45. See Cawley & Kennard, *supra* note 32, at 81.

46. See *id.* at 102 (“The revenue requirement represents the total value that a utility needs to collect through the rates charged to the public to cover its cost of service.”).

47. See *id.* at 106–15 (listing expenses and costs that are “chargeable to ratepayers”).

48. See *id.* at 127 (“The fair rate of return is the compensation to investors expressed as a percentage and applied to the rate base.”); see also *id.* at 115 (defining “Utility Property” as property that is “prudently constructed, necessary and operational”).

49. See *id.* at 115 (explaining that the original cost is the cost of Utility Property when “first devoted to the public service”).

50. See *id.*; see also 66 PA. CONS. STAT. § 1703 (2023) (stating the rules for depreciation).

51. See Cawley & Kennard, *supra* note 32, at 102–37; see also 66 PA. CONS. STAT. § 1311(b) (2023).

52. See Cawley & Kennard, *supra* note 32, at 102.

53. See Fed. Power Comm’n v. Hope Nat. Gas Co., 320 U.S. 591, 605 (1944); see also Cawley & Kennard, *supra* note 32, at 127.

54. See 66 PA. CONS. STAT. § 1311(a) (2023).

Amendments.<sup>55</sup> Ratemakers consider both debt and equity costs to determine the rate of return.<sup>56</sup> Commission analysts determine debt costs by using witness testimony from all parties to a ratemaking decision and by examining the historical cost of debt and preferred stock.<sup>57</sup> The Commission also analyzes witness testimony to determine the cost of equity; witness testimony estimates return on equity by analyzing investor behavior and expectations.<sup>58</sup> An investor-owned utility must provide a return for its investors. Therefore, the ratemaking process results in the rates of investor-owned utilities differing from the rates of municipally owned systems.

## 2. Ratemaking and Municipally Owned Systems

Municipal water and wastewater systems have lower revenue requirements than similarly sized investor-owned public utilities.<sup>59</sup> First, municipal systems do not require a return on equity capital because they do not have private investors.<sup>60</sup> Second, municipal systems generally have lower borrowing costs when compared to investor-owned utilities. This is due to the fact that municipal systems borrow money through low-cost municipal revenue bonds, while investor-owned utilities take loans and issue corporate bonds at higher prices.<sup>61</sup> In short, municipal systems have no equity costs and lower debt costs when compared to investor-owned utilities.<sup>62</sup> Lower equity costs create lower revenue requirements and lower rates for customers when applied to the ratemaking equation.<sup>63</sup>

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55. See *Bluefield Waterworks & Improvement Co. v. Pub. Serv. Comm'n of W. Va.*, 262 U.S. 679, 690 (1923) ("Rates which are not sufficient to yield a reasonable return on the value of the property used in public service at the time it is being so used to render the service are unjust, unreasonable, and confiscatory . . . violat[ing] . . . the Fourteenth Amendment of the Constitution."); see also U.S. CONST. amend. XIV, § 1 ("[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."); U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

56. See *Hope*, 320 U.S. at 603.

57. See Cawley & Kennard, *supra* note 32, at 37, 64, 129–30.

58. See *id.*; see also *Hope*, 320 U.S. at 603 ("[T]he return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.").

59. See *Cicero Statement*, *supra* note 6, at 4.

60. See *Inquirer Editorial*, *supra* note 7.

61. See *id.*; see also *Cicero Statement*, *supra* note 6, at 4 n.1; *McCloskey Statement*, *supra* note 24, at 2 n.1 ("Municipalities . . . do not pay income taxes and can usually issue bonds at a lower interest rate than for profit companies. As a result . . . most municipalities . . . have lower rates than investor-owned utilities.").

62. See *McCloskey Statement*, *supra* note 24, at 2; see also *Inquirer Editorial*, *supra* note 7.

63. See *McCloskey Statement*, *supra* note 24, at 2; see also *Inquirer Editorial*, *supra* note 7; *supra* Section II.A.



Consequently, when an investor-owned utility purchases a municipal system, that system becomes utility property, from which investors will expect a rate of return. This process creates an increase in the revenue requirement and rates.<sup>64</sup>

*B. Utility Acquisitions Before 66 Pa. Cons. Stat. § 1329*

Before section 1329, the Commission, investor-owned public utilities, and municipally owned systems believed that the law governing utility acquisitions discouraged acquisitions and failed to achieve the policy goals of the Commission.

1. Calculation of Rate Base Before Section 1329 Arguably Discouraged Acquisitions

Before the enactment of Act 12 in 2016, unless the Commission considered a system “troubled,” no section of the Code specifically addressed the rate base of acquired municipal water and sewer systems.<sup>65</sup> As a result, the rules governing the valuation of property under section 1311 guided acquisitions before Act 12.<sup>66</sup>

The Commission, purchasers, and sellers considered section 1311 to be inefficient, and argued that the rules discouraged investor-owned utilities from acquiring municipal systems.<sup>67</sup> From a buyer’s perspective, section 1311 discouraged paying more than the net original cost for a system because the excess would not be included in rate base.<sup>68</sup> Moreover, the depreciated value of a seller’s municipal system is often very low because municipal systems fund and depreciate their systems differently.<sup>69</sup> When taken together, under section 1311, sellers wished to sell their utility systems at prices higher than what was recoverable under the Code, and buyers refused to purchase the systems at a price higher than what was recoverable.<sup>70</sup> Thus, Section 1311 arguably discouraged acquisitions.<sup>71</sup>

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64. See 66 PA. CONS. STAT. § 1311(a) (2023).

65. See *Tentative Supplemental Implementation Order for Section 1329 of the Public Utility Code*, No. M-2016-2543193, 2018 WL 4636917, at \*2 (2018); see also 66 PA. CONS. STAT. § 1327 (2023).

66. See *Tentative Supplemental Implementation Order*, 2018 WL 4636917, at \*2; see also 66 Pa. Cons. Stat. § 1311(b) (2023); *supra* notes 14–20 and accompanying text; *McCloskey Statement*, *supra* note 24, at 3 (describing the “net original cost method” as “original cost less accumulated depreciation”).

67. See *Tentative Supplemental Implementation Order*, 2018 WL 4636917, at \*3.

68. See tit. 66 § 1311(b).

69. See *Tentative Supplemental Implementation Order*, 2018 WL 4636917, at \*3–4.

70. See *id.* at \*4.

71. See 52 PA. CODE. § 69.711 (2023); see also Final Policy Statement on Acquisitions of Water and Wastewater Systems, No. M-00051926, 2006 WL 2432008, at \*1 (Pa. P.U.C. 2006).

## 2. Discouraging Acquisitions Contradicted Commission Policy Goals

Under section 1311, efficiently acquiring water and wastewater systems in Pennsylvania was difficult. The Commission incentivizes the acquisition of water and wastewater systems, to “promot[e] . . . system viability and regionalization.”<sup>72</sup> The Commission first set this policy goal in 1996 after identifying problems associated with water and wastewater systems throughout Pennsylvania.<sup>73</sup> This policy goal led the Commission to create section 69.711 of the Pennsylvania Administrative Code, incentivizing acquisitions and mergers.<sup>74</sup> Ultimately, section 69.711 failed to incentivize acquisitions because it did not alleviate the perceived flaws in the acquisition process.<sup>75</sup> As a result, in 2016, the General Assembly enacted Act 12 hoping to incentivize and streamline acquisitions.<sup>76</sup>

### C. *Utility Acquisitions After 66 Pa. Cons. Stat. § 1329*

In passing Act 12 of 2016, the Pennsylvania Legislature enacted section 1329 of the Code, which outlined a new streamlined process for acquiring municipal systems by investor-owned utilities.<sup>77</sup> Under section 1329, the parties to an acquisition must meet certain requirements.<sup>78</sup> If these requirements are met, then purchasers may include in rate base the “lesser of the purchase price negotiated by the acquiring public utility . . . or the fair market value of the selling utility.”<sup>79</sup> Unlike prior legislation, Section 1329 encourages the sale of municipal systems to investor-owned utilities because the utilities can recover the full cost of the new assets and the municipalities can solicit and receive the much larger fair market value.<sup>80</sup>

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72. 52 PA. CODE. § 69.711 (2023); *see also* 26 Pa. Bull. 1380, 1381 (Mar. 30, 1996) (defining regionalization as the “consolidation of two or more water systems as a mechanism to promote viability”).

73. *See* 26 Pa. Bull. 1380, 1381 (Mar. 30, 1996) (“[T]he Commission identified the most critical problem associated with small water companies[,] . . . service that does not meet regulatory standards.”).

74. *See id.* (stating that the Commission has endorsed regionalization but the pace of the acquisitions prior to section 69.711 is slower than what is needed).

75. *See Tentative Supplemental Implementation Order*, 2018 WL 4636917, at \*3.

76. *See id.*; *see also Final Implementation Order for Section 1329 of the Public Utility Code*, No. M-2016-2543193, 2018 WL 6581577, at \*1 (2018).

77. *See* 2016 Pa. Laws 76, 76–78.

78. *See* 66 PA. CONS. STAT. § 1329(d) (2023).

79. *Id.* § 1329(c) (2023).

80. *See id.* (allowing the entire fair market value of a municipal system to be included in rate base).

While Section 1329 has promoted the acquisition of municipal systems,<sup>81</sup> section 1329 acquisitions have created significantly higher rate bases and revenue requirements per customer than what sellers and buyers had faced before the acquisitions.<sup>82</sup> The rate base per customer for the two largest investor-owned water and wastewater utilities, Pennsylvania American Water and Aqua Pennsylvania, increased steadily from 2016 to 2020—in large part due to section 1329 acquisitions.<sup>83</sup> Moreover, the Commission, purchasers, and selling utility systems know of revenue shortfalls far in advance of the acquisition’s approval.<sup>84</sup> In one acquisition, stakeholders estimated that a 105% revenue increase would be needed to cover the shortfall.<sup>85</sup> In total, fair market value acquisitions of municipal water and wastewater systems added an estimated \$68 million in additional annual charges to customers in Pennsylvania.<sup>86</sup>

Section 1329 acquisitions come with costs to acquired customers, but they also provide quantifiable, unquantifiable, and aspirational benefits.<sup>87</sup> First, a sale to a larger, well-capitalized investor-owned public utility can facilitate necessary infrastructure improvements in troubled municipal systems.<sup>88</sup> The McKeesport wastewater system acquisition is an example

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81. See *Inquirer Editorial*, *supra* note 7. See generally *Tentative Supplemental Implementation Order*, 2018 WL 4636917, at \*2–5 (explaining that the streamlining of the acquisitions process, the ability for the seller to receive the fair market value of the system, and the ability of the buyer to include the fair market value in its rate base mitigates the risks of acquisitions prior to section 1329).

82. See *Cicero Statement*, *supra* note 6, at 2–4; see also *McCloskey Statement*, *supra* note 24, at 3–9.

83. See *Cicero Statement*, *supra* note 6, at 2–4; see also *Inquirer Editorial*, *supra* note 7 (“[P]urchased municipal water systems were hit with the following percentage rate hikes based on households using 4,000 gallons a month: Limerick Township up 98%; New Garden up 90%; East Norriton up 73%; Cheltenham up 69%; and East Bradford up 47%.”).

84. See *Tentative Supplemental Implementation Order for Section 1329 of the Public Utility Code*, No. M-2016-2543193, 2018 WL 4636917, at \*6–7 (2018) (explaining that the Commission requires the parties to a transaction to submit a completed “Application Filing Checklist” at the beginning of the six-month consideration period and the checklist must include a notice to affected customers describing the anticipated effect on rates).

85. See ALJ’s Recommended Decision, Application of Aqua Pennsylvania Wastewater, Inc., for the Wastewater System Assets of Limerick Township, Docket No. A-2017-2605434, at \*43 (Sept. 18, 2017) (recommended decision of the ALJ) (outlining Aqua’s witness statement that future rate increases are desired to avoid shifting costs to existing Aqua customers).

86. See Caruso, *supra* note 10.

87. See *McCloskey v. Pa. Pub. Util. Comm’n*, 195 A.3d 1055, 1065 (Pa. Commw. Ct. 2018).

88. See *Implementation Order for Section 1329 of the Public Utility Code*, No. M-2016-2543193, 2018 WL 4636917, at \*3 (2018); see also *McCloskey Statement*, *supra* note 24, at 9; *McCloskey*, 195 A.3d at 1065 (“As per [Popowsky v. Pa. Pub. Utility Comm’n], these aspirational statements are substantial evidence to support the notion that there is a public benefit for the merger.”); *Popowsky v. Pa. Pub. Utility Comm’n*, 937 A.2d 1040, 1057 (Pa. 2007) (holding that “the Commission is not required to secure legally binding commitments or to quantify benefits”).

of necessary infrastructure improvements for a troubled municipality.<sup>89</sup> Following the system's acquisition, American Water invested \$34 million dollars in system upgrades over the following four years.<sup>90</sup>

Second, the acquisition of municipal systems by investor-owned public utilities brings those systems and their customers under the regulatory oversight of the Commission.<sup>91</sup> Municipal systems are not regulated by the Commission.<sup>92</sup> Municipal system regulations, which exist to protect customers, are contestably inferior to Commission regulations.<sup>93</sup> Previously, the Pennsylvania Legislature employed Commission oversight in response to the discovery of troubled systems<sup>94</sup> as a method to ensure compliance with service and environmental regulations.<sup>95</sup> As a result, stakeholders often argue that Commission oversight is a benefit of section 1329 acquisitions.<sup>96</sup>

Additionally, the Commission considers aspirational benefits when determining whether to approve an acquisition.<sup>97</sup> As a result, parties supporting acquisitions often provide aspirational benefits as evidence supporting section 1329 acquisitions. First, parties seeking acquisition approval have argued successfully that large investor-owned utilities

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89. See KATHRYN KLINE, NAT'L REGUL. RSCH. INST., *A REVIEW OF STATE FAIR MARKET VALUE ACQUISITIONS POLICIES FOR WATER AND WASTEWATER SYSTEMS* 30 (Regina L. Davis, 2021). *But see Cicero Statement*, *supra* note 6, at 2.

90. See Kline, *supra* note 89, at 30.

91. See 66 PA. CONS. STAT. § 102 (2023) (defining a "public utility," which includes municipal systems acquired in fair market value acquisitions).

92. See *id.*; see also *supra* Section II.A.

93. See Mingjie Gan, Comment, *Municipal Boundaries: A Barrier Between Customers and Adequate, Uniform, and Affordable Utility Services*, 120 PENN ST. L. REV. 923, 929–31 (2016) (explaining that municipalities have broad discretion, and municipal customers have less causes of action and less customer assistance programs).

94. See Kline, *supra* note 89, at 12–15 (describing the specific challenges faced by water and wastewater systems, explaining how many municipal systems are unable to keep up with maintenance, and referring to these systems as "troubled systems"); see also *McCloskey Statement*, *supra* note 24, at 2, 9, 11.

95. See Natasha Lindstrom, *Gov. Wolf to Sign Bill Placing Pittsburgh's Water System Under PUC Oversight*, TRIB LIVE (Nov. 20, 2017), <https://perma.cc/9BUB-PCJH> (outlining the Pennsylvania Legislature's decision to bring Pittsburgh Water and Sewer Authority ("PWSA") under the Commission's authority after discovering large issues with the PWSA system, including numerous violations of environmental regulations and failure to service lines containing lead).

96. See ALJ's Recommended Decision, Application of Pennsylvania-American Water Company for the Municipal Authority of the City of McKeesport's Assets, Docket No. A-2017-2606103, at \*33 (Sept. 29, 2017); see also ALJ's Recommended Decision, Application of Aqua Pennsylvania Wastewater for Acquisition of the Wastewater System Assets of East Norriton Township, Docket No. A-2019-3009052, at \*22–26 (Mar. 10, 2020).

97. See *McCloskey v. Pa. Pub. Util. Comm'n*, 195 A.3d 1055, 1065 (Pa. Commw. Ct. 2018) (stating that legally binding commitments are not required, and aspirational statements can be substantial benefits).

provide greater managerial expertise and access to capital.<sup>98</sup> Access to capital allows system operators to provide adequate, efficient, safe, and reasonable service to customers.<sup>99</sup> Additionally, acquisitions of municipal entities may allow large investor-owned utilities to spread operation and management costs over a large customer base, generating economies of scale.<sup>100</sup> Finally, the Commission consistently recognizes the acquisition itself as an aspirational benefit because acquisitions support the longstanding policy goal of regionalization and consolidation of water systems in Pennsylvania.<sup>101</sup>

Ultimately, pursuant to sections 1102 and 1103 of the Code, the Commission only approves a section 1329 acquisition if the benefits outweigh the costs.<sup>102</sup> Section 1102 requires public utilities to receive a certificate of public convenience from the Commission before they can “offer, render, furnish or supply . . . service.”<sup>103</sup> As a result, an investor-owned public utility must receive a certificate of public convenience from the Commission before it may operate an acquired municipal system.<sup>104</sup>

Further, the Commission will only grant a certificate of public convenience if the acquisition complies with section 1103 of the Code.<sup>105</sup> Section 1103 states that the Commission shall grant a certificate of public convenience if the certificate is “necessary or proper for the service, accommodation, convenience, or safety of the public.”<sup>106</sup> The Supreme Court of Pennsylvania interpreted the section 1103 requirement in *City of York v. Pennsylvania Public Utility Commission*.<sup>107</sup> There the court held that the Commission should grant a certificate of public convenience if the

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98. See ALJ’s Recommended Decision, Application of Aqua Pennsylvania Wastewater, Inc., for the Wastewater System Assets of Limerick Township, Docket No. A-2017-2605434, at \*41 (Sept. 18, 2017); see also Application of Aqua Pa. Wastewater for Approval of its Acquisition of the Wastewater System Assets of East Whiteland Township, No. A-2021-3026132, 2022 WL 3138913, at \*9–15 (Pa. P.U.C. 2022); Kline, *supra* note 89, at 13.

99. See *McCloskey*, 194 A.3d at 1066; see also 66 PA. CONS. STAT. § 315(c) (2023) (placing the burden of proof on utilities to establish that they provide adequate, efficient, safe, and reasonable service to customers).

100. See *id.* at 1060; see also Kline, *supra* note 89, at 4; *Economy of Scale*, MERRIAM-WEBSTER, <https://perma.cc/4NKT-DQFG> (last visited Oct. 13, 2023) (defining economies of scale as the reductions in the cost of production of a good or service as the size of the enterprise increases).

101. See 52 PA. CODE. § 69.711 (2023); see also Final Policy Statement on Acquisitions of Water and Wastewater Systems, No. M-00051926, 2006 WL 2432008, at \*1 (Pa. P.U.C. 2006).

102. See 66 PA. CONS. STAT. §§ 1102–03 (2023).

103. *Id.* § 1102 (2023).

104. See *id.*

105. See *id.* § 1103 (2023).

106. *Id.* (“The commission, in granting such certificate, may impose such conditions as it may deem to be just and reasonable.”).

107. See *City of York v. Pa. Pub. Util. Comm’n*, 295 A.2d 825, 828 (Pa. 1972).

Commission finds “affirmatively that public benefit will result.”<sup>108</sup> The Commission uses a multi-factor balancing test, which includes the impact on rates, when it determines whether an acquisition has affirmative public benefits.<sup>109</sup>

Section 1329 focuses on the procedures necessary to incorporate the fair market value into the rate base following a potential acquisition.<sup>110</sup> As a result, stakeholders who challenge a section 1329 acquisition often argue that the acquisition does not comply with sections 1102 and 1103.<sup>111</sup> The Commission has rarely agreed with these stakeholder challenges, resulting in the approval of most section 1329 acquisitions.<sup>112</sup>

#### *D. Fair Market Value Acquisitions in Other States*

Currently, 12 states have policies that allow for public utility acquisitions that include fair market value in the rate base.<sup>113</sup> The characteristics of these policies vary from state to state, but all have similarities.<sup>114</sup> While a state-by-state analysis of all 12 policies exceeds the scope of this Comment, two states have policies worth highlighting. First, Illinois has a layer of protection for a purchaser’s customers while keeping the same structure and permissiveness as Pennsylvania.<sup>115</sup> Conversely, New Jersey has a very strict system, giving the selling utility’s customers many strong protections and the ability to stop transactions altogether.<sup>116</sup>

##### 1. Illinois

In 2013, Illinois enacted section 9-210.5 of their code.<sup>117</sup> Section 9-210.5 allows for the lesser of the purchase price and the fair market value

108. *Id.*; see also *Popowsky v. Pa. Pub. Utility Comm’n*, 937 A.2d 1040, 1057 (Pa. 2007) (declaring that a reviewing court must determine whether a merger supplies affirmative public benefits using a preponderance of the evidence standard).

109. See tit. 66 § 1102; see also *McCloskey v. Pa. Pub. Util. Comm’n*, 195 A.3d 1055, 1067 (2018); *Application of Aqua Pennsylvania Wastewater for Approval of the Acquisition of the Wastewater Assets of Willistown Township*, No. A-2022-3027268, 2022 WL 3027180, at \*34–45 (Pa. P.U.C. 2022) (weighing the impact of rates against all other factors).

110. See tit. 66 § 1329.

111. See *Application of Aqua Pa. Wastewater for Approval of its Acquisition of the Wastewater System Assets of East Whiteland Township*, No. A-2021-3026132, 2022 WL 3138913, at \*11–12 (Pa. P.U.C. 2022); see also *Application of Aqua Pa. Wastewater for Approval of its Acquisition of the Wastewater System Assets of New Garden Township*, No. A-2016-2580061, 2017 WL 4552494, at \*3 (Pa. P.U.C. 2017).

112. See *McCloskey Statement*, *supra* note 24, at Appendix A; see also *Kline*, *supra* note 89, at 60, 112.; *Cicero Statement*, *supra* note 6, at 2 (explaining that 21 acquisitions have been approved by the Commission).

113. See *Kline*, *supra* note 89, at 12, 41–50.

114. See *id.* at 41–50.

115. See *infra* Section II.D.1.

116. See *infra* Section II.D.2.

117. See 2013 Ill. Laws 3646, 3646–52 (codified at 220 ILL. COMP. STAT. 5/9-210.5).

of the acquired utility to be the ratemaking rate base.<sup>118</sup> The Illinois provision differs from Pennsylvania's in two major ways.<sup>119</sup> First, Illinois set the maximum size for acquired municipal systems at 6,000 customers.<sup>120</sup> Second, the Illinois provision states that acquisitions affecting base rates by less than 2.5% for a single acquisition or 5% for all acquisitions will automatically be deemed reasonable.<sup>121</sup> Considering the scope of the ratemaking process,<sup>122</sup> the Illinois provisions provide greater protections for customers of the purchasing investor-owned utility by providing an, albeit generous, limit to the size of acquired systems.<sup>123</sup>

## 2. New Jersey

In 2015, New Jersey enacted the Water Infrastructure Protection Act.<sup>124</sup> This act, like Pennsylvania and Illinois's, grants purchasers the ability to incorporate the negotiated sale price into the rate base post-acquisition.<sup>125</sup> However, New Jersey's Act diverges greatly from other states in its purpose, requirements, and procedures.<sup>126</sup>

The New Jersey legislature declared that the law's purpose is to ensure the protection of water quality within the state.<sup>127</sup> To meet this goal, the state created provisions limiting a municipal system's ability to sell and an investor-owned utility's ability to buy.<sup>128</sup> First, the act only allows for the sale of a water or wastewater system when "emergent conditions exist."<sup>129</sup> Both an engineer and municipal representatives must determine whether such an emergent condition exists.<sup>130</sup> Second, following the

118. *See* 220 ILL. COMP. STAT. 5/9-210.5(d) (2023).

119. *Compare id. with* 66 PA. CONS. STAT. § 1329(c) (2023).

120. *See* 220 ILL. COMP. STAT. 5/9-210.5(a) (2023) (defining a water or sewer utility as a "public utility that regularly provides water or sewer service to 6,000 or fewer customer connections").

121. *See id.* at 5/9-210.5(d) (explaining that "reasonable" is defined under 220 ILL. COMP. STAT. 5/7-204 (2023)).

122. *See supra* Section II.A.

123. *See supra* Section II.A. (explaining that the larger the customer base of the acquired municipal system, the greater the impact on the revenue requirement due to the change in rate base and, ultimately, on the rates).

124. *See* Water Infrastructure Protection Act, ch. 18, 2015 N.J. Laws 80, 80–89 (codified at N.J. STAT. ANN. § 58:30); *see also* N.J. STAT. ANN. § 58:30 (West 2023).

125. *See* N.J. STAT. ANN. § 58:30-7(2) (West 2023).

126. *See* N.J. STAT. ANN. § 58:30.

127. *See id.* § 58:30-2(a).

128. *See id.* § 58:30 (codifying the Water Infrastructure Protection Act).

129. *See id.* § 58:30-4.

130. *See id.* § 58:30-5(a)–(b). As stated in the statute, emergent conditions include: (1) [t]he system is located in an area . . . of critical water supply concern; (2) [t]he owner of the system is a significant noncomplier . . . (3) [t]here is a present deficiency or violation of maximum contaminant levels . . . (4) [t]here is a demonstrated lack of historical investment, repair, or sustainable maintenance . . . (5) [t]he system owner lacks the financial, technical, or managerial capacity to adequately address any of the foregoing on

certification of emergent conditions, a referendum by members of the municipal system can still stop the sale.<sup>131</sup> Finally, a two-thirds majority vote of the governing body is required throughout the process.<sup>132</sup>

### *E. The Commonwealth Court Decision in Cicero*

Having considered the history of fair market value acquisitions in Pennsylvania and the mechanics of fair market value acquisitions in other states, this Comment now examines the Commonwealth Court's decision in *Cicero*.

#### 1. Procedural History and Factual Background

On January 8, 2021, Aqua and East Whiteland entered into an agreement to sell Aqua the “rights, assets and properties of the Township’s wastewater system for \$54,930,000.”<sup>133</sup> Aqua and East Whiteland used section 1329’s procedure.<sup>134</sup> Aqua intended to include the fair market value of the system in its rate base following the acquisition.<sup>135</sup> Like other section 1329 acquisitions,<sup>136</sup> the Commission and Commonwealth court found that the sale price would cause a revenue deficiency.<sup>137</sup> The Commission calculated a revenue deficiency of 132.93% per acquired customer under ratemaking principles.<sup>138</sup>

The Administrative Law Judge’s (“ALJ’s”) Recommended Decision denied the parties’ application, concluding that the proposed acquisition failed to “establish that any benefit to be realized from the proposed transaction would outweigh the harms.”<sup>139</sup> Following the Recommended

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a sustainable basis or own and operate the system in a way that supports economic activity in the municipality on a sustainable basis.

*Id.*

131. *See id.* § 58:30-5(g).

132. *See id.* § 58:30-5, 58:30-6, 58:30-7, 58:30-8; *see also id.* § 58:30-3 (declaring “governing body” to mean the same as defined in N.J. STAT. ANN. § 58:27-19 through N.J. STAT. ANN. § 58:27-27); *id.* § 58:27-21. As defined in the statute, governing body is the: [B]oard of chosen freeholders in the case of the county; the board of chosen freeholders and the county executive, the county supervisor or the county manager, as appropriate, in the case of a county organized pursuant to the provisions of the “Optional County Charter Law,” P.L.1972, c. 154 (C.40:41A-1 et seq.); the commission, council, board or body, by whatever name it may be known, having charge of the finances of the municipality, in the case of a municipality; and the decision-making body of an authority, joint meeting or commission.

*Id.*

133. *Cicero v. Pa. Pub. Util. Comm’n*, 300 A.3d 1106, 1110 (Pa. Commw. Ct. 2023).

134. *See id.*

135. *See id.*

136. *See supra* Section II.C.

137. *See Cicero*, 300 A.3d at 1112.

138. *See id.* (finding a 66.47% deficiency if the cost was split between the acquired customers and current Aqua customers).

139. *Id.* at 1113.



Decision, Aqua and East Whiteland filed exceptions challenging the ALJ's determination that there were no affirmative public benefits.<sup>140</sup> Aqua and East Whiteland's exceptions argued that the ALJ did not "correctly apply *City of York* and [*Popowsky v. Pennsylvania Public Utility Commission*]." <sup>141</sup> Ultimately, the Commission granted the exceptions and approved the application.<sup>142</sup>

The Commission overturned the ALJ's decision.<sup>143</sup> The Commission determined that affirmative public benefits, as assessed through the section 1102 balancing test, outweighed the rate impacts.<sup>144</sup> Several factors influenced the decision,<sup>145</sup> with the Commission placing significant emphasis on Aqua's fiscal and technical fitness, along with aspirational statements like the Commission's policy of promoting consolidation and regionalization.<sup>146</sup> Following the Commission's order,<sup>147</sup> the Consumer Advocate of Pennsylvania, Patrick M. Cicero (hereinafter "OCA"),<sup>148</sup> petitioned the Commonwealth Court for review.<sup>149</sup> The OCA made two arguments challenging the Commission's decision: (1) that "the Commission erred in finding that Aqua met its burden of proving . . . substantial affirmative public benefits . . . that outweighed the harms," and (2) "that the Commission's findings of an affirmative public benefit are not supported by substantial evidence."<sup>150</sup>

## 2. The Commonwealth Court Decision

Upon review, the Commonwealth Court held that the "Commission erred and/or abused its discretion in concluding that Aqua established substantial affirmative public benefits that outweighed the acknowledged

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140. *See id.*

141. *Id.*; *see also* *City of York v. Pa. Pub. Util. Comm'n*, 295 A.2d 825, 828 (Pa. 1972) ("[A] certificate of public convenience approving a merger is . . . to be granted [if] . . . the Commission is able to find affirmatively that public benefit will result from the merger."); *Popowsky v. Pa. Pub. Utility Comm'n*, 937 A.2d 1040, 1057 (Pa. 2007) (declaring that a reviewing court must determine whether a merger supplies affirmative public benefits using a preponderance of the evidence standard).

142. *See Cicero*, 300 A.3d at 1114.

143. *See id.*

144. *See id.* at 1114–15; *see also* *McCloskey v. Pa. Pub. Util. Comm'n*, 195 A.3d 1055, 1067 (Pa. Commw. Ct. 2018).

145. *See Cicero*, 300 A.3d at 1114 n.8.

146. *See id.* at 1114–15.

147. *See* Application of Aqua Pa. Wastewater for Approval of its Acquisition of the Wastewater System Assets of East Whiteland Township, No. A-2021-3026132, 2022 WL 3138913, at \*76 (Pa. P.U.C. 2022).

148. PENNSYLVANIA OFFICE OF CONSUMER ADVOCATE, <https://perma.cc/K3XC-683N> (last visited Oct. 15, 2023) ("The Pennsylvania Office of Consumer Advocate was established by the General Assembly in 1976 to represent the consumers of Pennsylvania in matters involving their utility service.").

149. *See Cicero*, 300 A.3d at 1109.

150. *Id.* at 1115.

harms of Aqua's acquisition."<sup>151</sup> The court first concluded that Aqua's fitness as a utility was "separate from the determination that the transaction w[ould] result in affirmative public benefits that outweigh the harms."<sup>152</sup> The court affirmed that Aqua's fitness did factor into the Commission's decision to approve the transaction.<sup>153</sup> However, because East Whiteland is also a fit utility, the court did not consider Aqua's fitness when determining whether there was an affirmative public benefit.<sup>154</sup> The court concluded that, if these determinations were not separate, then the "utility's fitness . . . could subsume the affirmative public benefits test."<sup>155</sup>

The court then applied the affirmative public benefits test, weighing the benefits and costs of the acquisition.<sup>156</sup> The court concluded that "enhanced customer service," was not a benefit because East Whiteland "already provides customer service 24/7/364."<sup>157</sup> Second, the court concluded that Aqua's "committed . . . capital improvements" did not constitute a benefit because East Whiteland was "capable and ha[d] the funds on hand, to complete the . . . improvements" itself.<sup>158</sup> Finally, the court concluded that the funds received by East Whiteland were not a benefit because customers would bear the cost of the funds received.<sup>159</sup> Weighing the acquisition's proposed benefits, the court concluded that under the "net benefits assessment . . . there [we]re no benefits that differ substantially from the benefits already being provided."<sup>160</sup> The court further stated that the benefits claimed did not arise from the "actual transaction" but from the "acquiring utility's fitness," and when considered with the "known harms that will result . . . there are insufficient net benefits."<sup>161</sup>

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151. *Id.* at 1120.

152. *Id.* at 1118.

153. *See id.*

154. *See id.*

155. *Id.* at 1118–19 (stating that, while Aqua's fitness could provide a substantial benefit, it did not here because East Whiteland "is already providing and is capable of providing the same or similar benefits.").

156. *See id.* at 1119–20.

157. *Id.* at 1119.

158. *Id.*

159. *See Cicero*, 300 A.3d at 1119.; *see also supra* Section II.A.1 (explaining that rate base is recovered from customers through rates); *supra* Section II.C (explaining that a municipal system can be sold at fair market value, with the municipality receiving the proceeds, and the entire sale price can be included in rate base).

160. *Id.* at 1119 ("[The Commission] [h]olding that a transaction will result in substantial affirmative public benefits because it will provide the same services as already being provided is not a benefit, let alone a substantial affirmative public one as required by statute and our caselaw.").

161. *Id.*; *see also McCloskey v. Pa. Pub. Util. Comm'n*, 195 A.3d 1055, 1058 (Pa. Commw. Ct. 2018) ("To obtain a Certificate, the acquiring public utility has the burden, by preponderance of the evidence, to establish that it is technically, legally and financially fit to provide the proposed service.").

The court then analyzed whether aspirational statements were always substantial enough to provide affirmative public benefits.<sup>162</sup> Aspirational statements can provide affirmative public benefits even without entering into a binding commitment.<sup>163</sup> However, the court in *Cicero* stated that aspirational statements will not “always constitute . . . benefits substantial enough to outweigh known harms.”<sup>164</sup> Courts must weigh benefits arising from aspirational statements, like access to capital financing and achievement of Commission policy goals, against the known harms.<sup>165</sup>

After weighing all the proposed benefits against the known harms of the acquisition, and considering the service already provided by East Whiteland, the Pennsylvania Commonwealth Court held that the harms outweighed any benefit proposed by Aqua.<sup>166</sup> Therefore, the Commonwealth Court reversed the Commission’s approval of the acquisition.<sup>167</sup> The Commonwealth Court’s decision in *Cicero* is binding precedent on any future Commission acquisition determinations.<sup>168</sup>

#### F. *The Commission’s First Section 1329 Ruling Following Cicero*

In October of 2022, Pennsylvania-American Water Company (hereinafter “PAWC”) and the Butler Area Sewer Authority (hereinafter “BASA”) entered into an agreement in which BASA would sell its wastewater system to PAWC.<sup>169</sup> The petitioners agreed to a settlement that would approve the acquisition on August 14, 2023.<sup>170</sup> On September 14, 2023, the ALJ recommended that the Commission deny the application.<sup>171</sup> The ALJ found that PAWC did not establish that the transaction provided

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162. See *Cicero*, 300 A.3d at 1120.

163. See *id.* at 1115, 1120 (analyzing the proposed aspirational statements such as Aqua’s “expertise and ability to raise and deploy capital and to spread costs over a larger customer base” and regionalization); see also *McCloskey*, 195 A.3d at 1067.

164. *Cicero*, 300 A.3d at 1120.

165. See *id.*

166. See *id.*

167. See *id.*

168. See 42 PA. CONS. STAT. § 763 (2023) (granting jurisdiction over all appeals from government agencies to the Commonwealth Court).

169. See Application of Pennsylvania-American Water Company for Approval of the Acquisition by Pennsylvania-American Water Company of the Wastewater Collection and Treatment System Owned by the Butler Area Sewer Authority, No. A-2022-3037047, 2023 Pa. PUC LEXIS 300, at \*8 (Pa. P.U.C. 2023).

170. See *id.* at \*1. The petitioners included PAWC, BASA, the OCA, and other advocates with no holdouts noted, see *id.*, but the OCA disagreed with PAWC and BASA regarding certain assertions of law. See *id.* at \*38–39, \*40. The petitioners entered into the agreement two weeks after the Commonwealth Court issued its decision in *Cicero*. See *Cicero*, 300 A.3d at 1106.

171. See Application of PAWC to Acquire BASA, 2023 Pa. PUC LEXIS 300, at \*5. The ALJ that recommended that the application should be denied is Judge Guhl, see *id.* at \*1, who also recommended denial of the application in East Whiteland. See *Cicero*, 300 A.3d at 1113.

an affirmative public benefit outweighing the harm of a potential 94.4% rate increase.<sup>172</sup> On November 9, 2023, the Commission modified the ALJ's Recommended Decision and approved the application and settlement.<sup>173</sup>

The Commission accepted the settlement because the Recommended Decision “erred in concluding that the potential rate impacts of the acquisition alone outweigh all the . . . benefits.”<sup>174</sup> The benefits mentioned by the Commission included a cap on a rate increase in the first year,<sup>175</sup> PAWC's customer assistance program,<sup>176</sup> a 0.8% reduction in the amount placed into the rate base,<sup>177</sup> PAWC's promise to increase the income threshold at which a customer is eligible for hardship grants,<sup>178</sup> PAWC's contributions to its hardship grant program, and a “payment arrangement plan for commercial customers.”<sup>179</sup>

Additionally, the Commission acknowledged that the BASA system was aging,<sup>180</sup> and that it was under a Corrective Action Plan (“CAP”) with the Pennsylvania Department of Environmental Protection to restore compliance.<sup>181</sup> The Commission also concurred with PAWC's claim that the substantial and “necessary capital projects” would require an \$80 million rate increase, even without an acquisition.<sup>182</sup> Further, the Commission stated that bringing both the system and its future rates under Commission oversight would be a benefit.<sup>183</sup> In considering these benefits

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172. See *Application of PAWC to Acquire BASA*, 2023 Pa. PUC LEXIS 300, at \*56; see also ALJ's Recommended Decision, *Application of Pennsylvania-American Water Company for the Acquisition of Butler Area Sewer Authority's Wastewater System Assets*, Docket No. A-2022-3037047, at \*67 (Sept. 14, 2023).

173. See *Application of PAWC to Acquire BASA*, 2023 Pa. PUC LEXIS 300, at \*1.

174. See *id.* at \*55–56.

175. See *id.* (stating that PAWC has agreed to limit their rate increase to 1.4 times the current rates).

176. See *Customer Assistance Programs*, PA. AM. WATER, <https://perma.cc/XTB7-WAQU> (last visited Jan. 4, 2024) (describing PAWC's system of grants and discounts for low-income customers).

177. See *Application of PAWC to Acquire BASA*, 2023 Pa. PUC LEXIS 300 at \*55 (explaining that PAWC is only including \$228 million of the \$230 million purchase price).

178. See ALJ's Recommended Decision, *Application of Pennsylvania-American Water Company for the Acquisition of Butler Area Sewer Authority's Wastewater System Assets*, Docket No. A-2022-3037047, at \*27 (Sept. 14, 2023) (describing PAWC's plan to increase the eligibility income for hardship grants from 200% to 250% of the Federal Poverty Guideline).

179. See *Application of PAWC to Acquire BASA*, 2023 Pa. PUC LEXIS 300, at \*55 (listing benefits of the acquisition, the Commission also stated that benefits directly to BASA, including the influx of cash to Butler, also support the finding of an affirmative public benefit).

180. See *Application of PAWC to Acquire BASA*, 2023 PA. PUC LEXIS 300, at \*31.

181. See *id.*; see also 25 PA. CODE § 94 (regulating municipal wasteloid management).

182. See *Application of PAWC to Acquire BASA*, 2023 PA. PUC LEXIS 300, at \*56.

183. See *id.*; see also *supra* Section II.A.1.

and costs, the Commission held that PAWC met its burden and established an affirmative public benefit of the acquisition.

In the aftermath of *Cicero*, the Commission showed that the affirmative public benefits test still has the teeth to stop an acquisition under section 1329.<sup>184</sup> However, the Commission's finding of affirmative public benefits in the PAWC acquisition of BASA may signal that the Commission intends to pursue an alternative course of action in response to the decision in *Cicero*. The state of the law requires an analysis to determine *Cicero*'s impact on section 1329 acquisitions, assess the Commission's compliance with *Cicero* in the BASA acquisition, and identify legislative changes that could resolve inconsistencies and pave the way for a more coherent and efficient path moving forward.

### III. ANALYSIS

In Pennsylvania, investor-owned utilities have an enormous incentive to continue acquiring municipal systems under section 1329.<sup>185</sup> However, following *Cicero*, questions remain: what changes have occurred to the process, will these changes have a positive effect, and does the system require more fundamental changes?

First, this Section discusses the effect that *Cicero* had on the application of the affirmative public benefits test.<sup>186</sup> Second, this Section analyzes the Commission's application of the affirmative public benefits test in a recent decision concerning a section 1329 acquisition.<sup>187</sup> Finally, this Section suggests legislative changes to correct fundamental issues present in section 1329's interaction with the affirmative public benefits test.<sup>188</sup>

#### A. *The Affirmative Public Benefits Test in Fair Market Value Acquisitions After Cicero*

Following *Cicero*, the Commission must apply the affirmative public benefits test for fair market value acquisitions in a manner consistent with the Commonwealth Court's application of the test in *Cicero*.<sup>189</sup> First, before including the purchaser's service in weighing the benefits and harms of a transaction, the Commission must determine whether a

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184. See *infra* Section III.A.; see also Snyder, *supra* note 30.

185. See *supra* Section II.A. (explaining return on equity principles and showing that shareholders' return increases as rate base increases,  $RR = E + r(RB)$ ).

186. See *infra* Section III.A.

187. See *infra* Section III.B.

188. See *infra* Section III.C.

189. See 42 PA. CONS. STAT. § 763 (2023) (granting the Commonwealth Court jurisdiction over appeals from final orders of government agencies).

purchaser's service is a benefit to the seller's customers.<sup>190</sup> To determine benefits from service, the Commission must: (1) compare the purchaser's services against the seller's services, and (2) calculate whether those services "differ substantially."<sup>191</sup> Any benefits that do not differ substantially are benefits that "arise as a result of the . . . [purchaser's] fitness" and must be ignored for the purposes of the affirmative public benefits balancing test.<sup>192</sup>

Second, the Commission must no longer consider the windfall of funds to the selling municipality as a benefit.<sup>193</sup> Third, the Commission may still weigh aspirational benefits in the affirmative public benefits test, but these benefits cannot presumptively outweigh the associated harms.<sup>194</sup> Accordingly, the Commission must exclude benefits already provided by the selling municipality and benefits that are also costs borne by customers.<sup>195</sup> With that, when weighing costs and benefits, the Commission may not rubber-stamp every application based on aspirational benefits.<sup>196</sup>

After identifying any affirmative public benefits, the Commission must assess whether those benefits outweigh the costs of the transaction.<sup>197</sup> In *Cicero*, the proposed transaction would have created a high revenue requirement and an equally high increase in customer rates.<sup>198</sup> While the increase in rates was the sole harmful impact analyzed in *Cicero*, the harmful impact alone sufficiently outweighed the absence of benefits.<sup>199</sup> Consequently, significant rate increases are decisive in determining the viability of acquisitions if they fail to provide substantial benefits.<sup>200</sup>

The increased emphasis on rates will lower the number of acquisitions that satisfy the affirmative public benefits test's standard. Aspirational benefits, such as managerial expertise, regionalization, and consolidation, may always be present in municipal system acquisitions by large investor-owned utilities.<sup>201</sup> However, if the selling municipal systems offer similar utility services as the purchasing utilities, then the

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190. See *Cicero v. Pa. Pub. Util. Comm'n*, 300 A.3d 1106, 1118–19 (Pa. Commw. Ct. 2023).

191. *Id.* at 1119.

192. *Id.*

193. See *id.*

194. See *id.*

195. See *id.*

196. See *id.* at 1119–20.

197. See *id.* at 1116; see also *Popowsky v. Pa. Pub. Util. Comm'n*, 937 A.2d 1040, 1055–56 (Pa. 2007).

198. See *Cicero*, 300 A.3d at 1112.

199. See *id.* at 1116, 1119–20.

200. See *id.* at 1120.

201. See *id.* (ruling that aspirational benefits alone are not enough to establish affirmative public benefits).

aspirational benefits are unlikely to outweigh the costs.<sup>202</sup> Therefore, when the selling and purchasing utilities provide similar services, the Commission should approve the acquisition only if there are substantial issues that are not captured under a different Code provision.<sup>203</sup> Examples of substantial issues may include a lack of essential services or the need for a significant, yet unaffordable infrastructure investment.<sup>204</sup>

The affirmative public benefits test outlined in *City of York, Popowsky*, and *McCloskey v. Pennsylvania Public Utility Commission* grants the Commission considerable authority to decide whether the often unquantifiable benefits of a transaction outweigh the predominantly quantifiable harms.<sup>205</sup> As a result, harmful section 1329 acquisitions may still obtain approval even after *Cicero*.<sup>206</sup> This result is possible because of the effect privatization has on utility rates.<sup>207</sup> Privatization takes a publicly-owned water or wastewater system, sets its rate base at the current fair market value, and adds a profit margin to that rate base.<sup>208</sup> Even when an acquisition meets the affirmative public benefit standard, it can still

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202. *See id.*

203. *See* 66 PA. CONS. STAT. § 1327 (2023) (allowing all rate base to be included if the acquired municipal system is not providing safe, adequate, efficient, or reasonable service); *see also id.* § 529 (granting the Commission the power to order the acquisition of small water and wastewater utilities with major issues).

204. *See* Molly Bilinski, *\$600M Needed to Fix Aging Water, Sewer Systems in Allentown and its Suburbs*, LEHIGHVALLEYNEWS (Nov. 8, 2023, 12:00 PM), <https://perma.cc/3QBB-CEXZ>; *see also* Jake Blumgart, *The Next Flint*, SLATE (Jan. 28, 2016, 11:28 AM), <https://perma.cc/FK4V-4BRR>; Peter Hall, *Pa. House Panel Revisits Utility Privatization Law as Consumers Face Soaring Water and Sewer Bills*, PENNSYLVANIA CAPITAL-STAR (Dec. 12, 2023, 6:12 PM), <https://perma.cc/TZ8C-24NR>.

205. *See supra* Section II.C.; *see also Application of PAWC to Acquire BASA*, 2023 Pa. PUC LEXIS 300, at \*55 (determining that a 94.4% revenue deficiency is outweighed by listed benefits).

206. *See Application of PAWC to Acquire BASA*, 2023 Pa. PUC LEXIS 300, at \*2 (Pa. P.U.C. 2023) (approving an application with a revenue deficiency of over 94% even after the ALJ found that the acquisition did not provide an affirmative public benefit). *See generally Popowsky v. Pa. Pub. Util. Comm'n*, 937 A.2d 1040, 1061 (Pa. 2007) (“[T]here was ample evidence of benefit to mass-market customers and the general public, as developed above and as credited by the PUC.”); *Cicero*, 300 A.3d at 1118 (“The affirmative public benefit standard does not require that every utility customer benefit from the proposed transaction.”).

207. *See* X. Zhang et al., *Water Pricing and Affordability in the US: Public vs. Private Ownership*, 24 WATER POLICY 500, 508 (2022) (finding that privatization alone in Pennsylvania is one of the major sources of rising costs); *see also* Alex Brown, *In Small Pennsylvania Towns, City Water Systems are Being Privatized—and Residents pay the Price*, FAST COMPANY (Nov. 11, 2023), <https://perma.cc/T33Z-XG8P>; *McCloskey Statement, supra* note 24, at 7–8; *Cicero Statement, supra* note 6, at 3 (showing that \$85 million more each year is collected in the rates of water and wastewater customers as a result of only the fair market value portion 1329 acquisitions).

208. *See supra* Section II.C.

result in increased rates for the purchaser's customers due to the high rate base per acquired customer and the profit incentive of the purchaser.<sup>209</sup>

The mechanisms of utility privatization have generated a stacking effect.<sup>210</sup> The large number of private acquisitions significantly magnifies the overall harm of section 1329.<sup>211</sup> Further, the long-term cumulative rate effects of 1329 acquisitions are not considered in the affirmative public benefits test.<sup>212</sup> Consequently, the Pennsylvania Legislature should change the current law and better tailor the powers of the Commission to protect customers and meet long-term goals.<sup>213</sup>

*B. The Commission's Analysis in the Acquisition of BASA by PAWC Supports the Need for Legislative Change*

The Commission approved the acquisition of BASA by PAWC, despite evidence that the acquisition would create a 94.4% and 7% revenue deficiency to BASA and PAWC customers, respectively.<sup>214</sup> Comparing the PAWC acquisition of BASA to the Aqua acquisition of East Whiteland, the BASA acquisition appears to provide more benefits.<sup>215</sup> However, after applying the affirmative public benefits test in light of *Cicero*, the BASA acquisition still does not provide any affirmative public benefits.

To start, the benefits the Commission highlights focus on combatting rate increases.<sup>216</sup> First, PAWC has agreed temporarily to limit the increase in rates of BASA customers to 1.4 times the current BASA rate.<sup>217</sup> While the limit may reduce rate shock, it will likely not limit long-term rate increases and leaves a revenue deficiency to be recovered from other areas within the PAWC system.<sup>218</sup>

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209. See *Cicero Statement*, *supra* note 6, at 2–4; *McCloskey Statement*, *supra* note 24, at 7–8.

210. See *Cicero Statement*, *supra* note 6, at 2 (showing 20 different acquisitions with varying rate bases resulted in \$1 billion more in rate base and half of the rate base is directly attributed to the inclusion of fair market value in rate base).

211. See *id.*

212. See *Application of PAWC to Acquire BASA*, 2023 Pa. PUC LEXIS 300, at \*56.

213. See *infra* Section II.C.

214. See ALJ's Recommended Decision, *Application of Pennsylvania-American Water Company for the Acquisition of Butler Area Sewer Authority's Wastewater System Assets*, Docket No. A-2022-3037047, at \*42, \*44 (Sept. 14, 2023).

215. See *Application of PAWC to Acquire BASA*, 2023 Pa. PUC LEXIS 300, at \*55; see also *Cicero v. Pa. Pub. Util. Comm'n*, 300 A.3d 1106, 1118–20 (Pa. Commw. Ct. 2023).

216. See *Application of PAWC to Acquire BASA*, 2023 Pa. PUC LEXIS 300, at \*55 (determining that benefits include a limit on the first rate increase, a slight reduction in purchase price to be included in rate base, and increased eligibility for customer assistance programs).

217. See *id.*

218. See *supra* Section II.C (discussing the rate increases seen by customers of both the sellers and buyers following transactions); see also *OCA Filings*, PA. OFF. OF



Second, BASA does not have a customer assistance program,<sup>219</sup> so access to a customer assistance program under PAWC ownership would benefit low-income customers.<sup>220</sup> However, the program would only benefit customers with incomes at or below 150% of the federal poverty income.<sup>221</sup> Additionally, the customer assistance program will offer many low-income customers no real relief, as qualifying customers will likely not see meaningful differences in their bills following the acquisition.<sup>222</sup>

Finally, PAWC agreed to reduce the amount of the purchase price to be included in the rate base by \$2 million.<sup>223</sup> However, this reduction amounts to less than 1% of the total purchase price.<sup>224</sup> Thus, the reduction in rate base is so small compared to the purchase price that it is insignificant.<sup>225</sup>

Additionally, during its affirmative public benefits analysis, the Commission misclassified two items as benefits.<sup>226</sup> First, the Commission stated that the funds available to the selling utility were a benefit of the transaction, which constitutes an error following *Cicero*.<sup>227</sup> Second, the \$75.8 million in capital upgrades and maintenance to occur under PAWC's capital plan, while significant, should not have been included in the affirmative public benefits test because no evidence demonstrated that BASA could not provide those updates themselves.<sup>228</sup>

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CONSUMER ADVOC., <https://perma.cc/62PC-XXG6> (last visited Jan. 7, 2024) (showing that PAWC has filed applications to increase rates in 2023, 2022, 2018, 2017, and 2016, indicating the temporary nature of the limit as future rate increases will likely be requested); ALJ's Recommended Decision, Application of PAWC to Acquire BASA, at \*62 (Sept. 14, 2023) (stating that the revenue deficiency will be recovered from other PAWC ratepayers, especially because there is a temporary cap on BASA rates).

219. See ALJ's Recommended Decision, Application of PAWC to Acquire BASA, at \*41 (Sept. 14, 2023).

220. See *id.* at 45.

221. See *H20 Help to Others Program*, PA. AM. WATER, [hereinafter PAWC, H2O Help to Others Program], <https://perma.cc/YAT3-7VSF> (last visited Jan. 7, 2024).

222. See *Your Water and Wastewater Rates*, PA. AM. WATER, <https://perma.cc/X4R8-AV7H> (last visited Jan. 7, 2024). PAWC Rate Zone 1 charges \$106 per month. See *id.* The discounts available under the PAWC customer assistance program range from 30%-80%. See PENNSYLVANIA AMERICAN WATER, *supra* note 215. But current BASA rates are \$45.50 per month. See *Service Charges and Fees*, BASA, <https://perma.cc/Y59L-JG6M> (last visited Aug. 21, 2024).

223. See *Application of PAWC to Acquire BASA*, 2023 Pa. PUC LEXIS 300, at \*55.

224. See *id.*

225. See ALJ's Recommended Decision, Application of PAWC to Acquire BASA, at \*65 (Sept. 14, 2023).

226. See *Application of PAWC to Acquire BASA*, 2023 Pa. PUC LEXIS 300, at \*55.

227. See *id.*; see also *Cicero v. Pa. Pub. Util. Comm'n*, 300 A.3d 1106, 1119 (Pa. Commw. Ct. 2023) ("Although Township would receive funds from the sale . . . those funds are available because the System's customers, and potentially the [purchasers] customers, will bear the burden of the costs of that acquisition.").

228. See *Application of PAWC to Acquire BASA*, 2023 Pa. PUC LEXIS 300, at \*55; see also *Cicero*, 300 A.3d at 1119 ("Nor is it a benefit to provide for upgrades that Township is equally capable of providing."); ALJ's Recommended Decision, Application

Ultimately, this Comment's analysis of the Commission's BASA decision finds that the acquisition fails to provide an affirmative public benefit.<sup>229</sup> The BASA acquisition underscores the need for the Pennsylvania Legislature to address a crucial issue: the criteria for approving fair market value acquisitions are overly broad, subjective, and unquantifiable, and these acquisitions are causing unconsidered long-term harms.<sup>230</sup> Legislative changes are essential to effectively and clearly remedy the present inefficiencies under section 1329.<sup>231</sup>

### C. Suggested Legislative Changes

This Comment recommends two options for legislative change that would limit the pervasive harms arising from rate increases in section 1329 acquisitions. The recommended options are (1) a customer veto power combined with a rate base inclusion cap,<sup>232</sup> or (2) a full repeal of section 1329 and investigation.<sup>233</sup>

#### 1. Customer Veto Power and a Rate Base Inclusion Cap

Under the first option, the legislature should first pass a law giving customers of selling municipal utilities the power to veto an acquisition, similar to the provision under the New Jersey Water Infrastructure Protection Act.<sup>234</sup> Selling utility customers experience the highest rate increases in individual transactions,<sup>235</sup> making those customers most likely to reject an acquisition that does not provide significant benefits.<sup>236</sup> Consequently, purchasers would need to target acquisitions that align with Commission goals and deliver substantial customer benefits.<sup>237</sup> Ultimately, a customer referendum could slow the pace of acquisitions by increasing the selectivity of the acquiring utility. A similar law, HB626, has already been proposed,<sup>238</sup> requiring a majority customer vote in favor

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of PAWC to Acquire BASA, at \*65 (Sept. 14, 2023) ("BASA has been and is continuing to provide sufficient service to its customers and has made continued progress with its DEP Corrective Action Plan.").

229. See *infra* Section IV.

230. See *Cicero Statement*, *supra* note 6, at 2.

231. See *infra* Section III.C.

232. See *infra* Section III.C.1.

233. See *infra* Section III.C.2.

234. See N.J. Stat. Ann. § 58:30-5 (West 2023); see also *supra* Section II.D.3.

235. See *supra* Section II.C.

236. See Zoë Read, *Salem, New Jersey Residents Vote in Favor of Water Privatization*, WHY (Nov. 8, 2023), <https://perma.cc/ZV5H-8XPS> (describing a transaction in which customers found significant benefits that would occur as a result of the transaction, including more resources to fight a housing crisis, even though rate increases were expected to occur).

237. See *McCloskey Statement*, *supra* note 24, at 10–11; see also *supra* Section III.A.

238. See H.B. 626, Gen. Assemb., Sess. of 2023 (Pa. 2023).

of an acquisition before the Commission may approve an acquisition.<sup>239</sup> Nevertheless, veto power would add an additional layer of protection for consumers by targeting the harms specific to section 1329 acquisitions.

Additionally, the legislature should pass a law that caps the purchase price above the system's net original cost to be included in rate base.<sup>240</sup> A customer referendum would protect selling customers, but it would not directly protect the customers of the purchaser.<sup>241</sup> However, the harms of section 1329 acquisitions often affect the customers of purchasing utilities as well.<sup>242</sup> Similar to the Illinois regulations,<sup>243</sup> a cap on the purchase price above net original cost would protect the customers of the purchasing utility.<sup>244</sup> However, unlike the Illinois regulations, this cap would create a ceiling on the potential increases resulting from an acquisition.<sup>245</sup> This ceiling would also provide an additional direct protection to the customers of the selling utility.<sup>246</sup>

A bill that would achieve this goal currently sits before the Pennsylvania House Committee on Consumer Protection, Technology[,] and Utilities.<sup>247</sup> House Bill 1865 (hereinafter "HB1865") would allow the purchasing utility to include in rate base the lesser of the purchase price, the fair market value of the selling utility, and "%125 of the depreciated original cost."<sup>248</sup> HB1865, or a similar law, would provide rate protections from the runaway increases in rate base seen since section 1329's enactment.<sup>249</sup>

However, limiting base rate inclusion still requires selling utility customers to pay for both their utility service and the new privatization cost of compensating investors following acquisition.<sup>250</sup> While customers

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239. *See id.*

240. *See supra* Section II.B.1.

241. *See McCloskey Statement, supra* note 24, at 10–11.

242. *See Cicero Statement, supra* note 6, at 2.

243. *See* 220 ILL. COMP. STAT. 5/9-210.5 (2023) (limiting the size of systems acquired to those with no more than 6,000 customers); *supra* Section II.A.1 (outlining the ratemaking process). Under the ratemaking equation, less customers typically means lower expenses and revenue requirements, which limits the effect on rates of any particular acquisition. *See supra* Section II.A.1.

244. *See supra* Section II.A.1. Limiting the purchase price to be included in rate base would limit the revenue requirement of all the customers of the purchasing utility. *See id.*

245. *See id.*

246. *See id.* While a difference in rates between the purchasing and selling utility may still result in early rate shock, the cap on rate base inclusion would limit the long-term effects on rates by decreasing the revenue requirement. *See id.*

247. *See* H.B. 1865, Gen. Assemb., Sess. of 2023 (Pa. 2023).

248. *Id.*

249. *See Cicero Statement, supra* note 6, at 2 (stating that section 1329 acquisitions have increased the rate base of utilities more than \$1 billion and \$538 million of that increase is above the net original cost).

250. *See supra* Section II.A.1–2; *see also* ALJ's Recommended Decision, Application of Pennsylvania-American Water Company for the Acquisition of Butler Area

may exercise their veto power to avoid privatization costs, it is not a guarantee that customers of selling utilities will always use their veto power.<sup>251</sup> Therefore, continued rate increases that negatively affect some customers are still possible over time, even with a customer veto power and a rate base inclusion cap.<sup>252</sup> Consequently, a better alternative may be to repeal section 1329 entirely.<sup>253</sup>

## 2. Full Repeal of Section 1329 and Investigation of Alternatives

Under the second option, the legislature should consider a full repeal of section 1329 and investigate alternative methods to achieve the Commission's policy goals.<sup>254</sup> The Commission has long stated that regionalization, consolidation of utilities, and infrastructure investment are important goals.<sup>255</sup> However, these goals are not efficiently achieved by section 1329.<sup>256</sup> Following repeal, the legislature should perform an exhaustive investigation of water and wastewater utilities because a repeal would result in a return to the pre-section-1329 procedures, which were considered ineffective in achieving the Commission's goals.<sup>257</sup>

A potential replacement for section 1329 could include the expansion of section 1327 to cover more utilities. Section 1327 of the Code incentivizes acquisitions of systems in desperate need of infrastructure investment by creating a rebuttable presumption that a purchase price above net original cost is reasonable.<sup>258</sup> Expansion of section 1327 to include larger selling utilities would help facilitate acquisitions.<sup>259</sup> While

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Sewer Authority's Wastewater System Assets, Docket No. A-2022-3037047, at \*65 (Sept. 14, 2023).

251. See Read, *supra* note 236.

252. See generally H.B. 1864, Gen. Assemb., Sess. of 2023 (Pa. 2023) (proposing to slow the inclusion of rate base by gradually incorporating any rate base over net original cost over a three-year period).

253. See Cicero Statement, *supra* note 6, at 7–8; see also McCloskey Statement, *supra* note 24, at 10.

254. See Cicero Statement, *supra* note 6, at 7–8. A similar option was proposed by the OCA. See *id.*

255. See Final Policy Statement on Acquisitions of Water and Wastewater Systems, No. M-00051926, 2006 WL 2432008, at \*1, \*18 (Pa. P.U.C. 2006).

256. See Brown, *supra* note 207 (“Many public water advocates acknowledge that sell-offs can help . . . when municipalities [cannot] afford the maintenance costs. But in Pennsylvania . . . many of the systems . . . are in perfectly fine shape.”); see also Cicero Statement, *supra* note 6, at 2 (“In our view, none of these approved acquisitions have been troubled or non-viable systems.”); *id.* at 4 (“We are not anti-privatization [or] . . . against well thought out consolidation or regionalization . . . what we oppose is privatization for its own sake.”).

257. See *supra* Section II.B.

258. See 66 PA. CONS. STAT. § 1327(a)(2023).

259. See *id.* § 1327(a)(2) (limiting acquisition to utilities with less than 3,300 customers or to utilities that are “nonviable”).

expanding section 1327 is just one potential approach to replacing section 1329, a repeal and thorough investigation can lead to legislation tailored to achieve well-defined objectives, thus offering a clear path forward.<sup>260</sup>

Ultimately, Commission goals should not come at enormous costs to ratepayers. This sentiment rings especially true for public utilities because the services purchased are necessities, the acquired systems often already provide adequate service,<sup>261</sup> and customers rarely have alternative options.<sup>262</sup> A customer veto power and a rate base inclusion cap would limit the increase in rates and maintain avenues to meet Commission goals.<sup>263</sup> Alternatively, a complete repeal of section 1329 would allow the legislature to thoroughly assess water and wastewater utility service in Pennsylvania while limiting current harms.<sup>264</sup> The legislature could then design a procedure that aligns with the Commission's goals while reducing the negative impacts observed under section 1329. With implementation of either a customer veto power and a rate base inclusion cap or a complete repeal of section 1329, legislators can prioritize solutions that both uphold Commission goals and alleviate the negative impacts of acquisitions under section 1329.<sup>265</sup>

### 3. Current Appeal to the Supreme Court

The Commission, East Whiteland, and Aqua filed petitions for allowance of appeal with the Pennsylvania Supreme Court, which the court granted.<sup>266</sup> As a result, the Commonwealth Court decision may be modified or overturned.<sup>267</sup>

## IV. CONCLUSION

Water and wastewater utility service are necessities in modern society. Water and wastewater services are also sources of revenue for investor-owned public utilities, and those utilities have been targeting municipally owned utilities to grow their companies.<sup>268</sup> The Commission

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260. See *Cicero Statement*, *supra* note 6, at 8; see also *McCloskey Statement*, *supra* note 24, at 10.

261. See *Brown*, *supra* note 207.

262. See *Cawley & Kennard*, *supra* note 32, at 3–4.

263. See *supra* Section II.A.

264. See *Cicero Statement*, *supra* note 6, at 7–8; see also *McCloskey Statement*, *supra* note 24, at 10.

265. See *Cicero Statement*, *supra* note 6, at 7–8; see also *McCloskey Statement*, *supra* note 24, at 10.

266. See *Cicero v. Pa. Pub. Util. Comm'n*, No. 568 MAL 2023, 569 MAL 2023, 570 MAL 2023, 2024 WL 2988362, slip op. at 1–2 (Pa. 2024)(granting Petitions for Allowance of Appeal).

267. See 42 PA. CONS. STAT. § 501 (granting supreme judicial power in Pennsylvania to the Supreme Court).

268. See *supra* Section II.C.

has consistently approved acquisitions of municipal systems after conducting the analyses required by the Code, and as a result, rates have risen for the necessary services these utilities provide.<sup>269</sup> In *Cicero*, the Commonwealth Court found that the Commission improperly applied the test to determine if the acquisition provided an affirmative public benefit, narrowing how the Commission should apply the affirmative public benefits test.<sup>270</sup> However, despite the court's decision in *Cicero*, the Commission still improperly found an affirmative public benefit of an acquisition, indicating that only legislative change may remedy the negative impacts of the current law.<sup>271</sup>

The Pennsylvania Legislature should either pass current legislation that limits the harms of fair market value acquisitions moving forward or create replacement legislation tailored toward the needs of the Commonwealth.<sup>272</sup> Enactment of laws that create a customer veto power and a rate base inclusion cap would provide strong protections for customers of both sellers and purchasers while still allowing the current regime to remain in place.<sup>273</sup> Alternatively, a full repeal of section 1329 and investigation of alternatives would give the legislature the opportunity to tailor the law to meet the goals the legislature establishes.<sup>274</sup> Access to reliable water and wastewater services is crucial, and utility acquisitions can help maintain service to customers.<sup>275</sup> However, to ensure continued affordability, legislators must take action to curb the escalating costs associated with municipal system acquisitions by investor-owned public utilities.<sup>276</sup>

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269. *See supra* Part II.

270. *See supra* Section II.E.

271. *See supra* Section II.F; Section III.A.

272. *See supra* Section III.C.

273. *See supra* Section III.C.1.

274. *See supra* Section III.C.2.

275. *See supra* Section II.B.

276. *See supra* Part III.C.