Commissioners Present:

Robert F. Powelson, Chairman, Statement
John F. Coleman, Jr., Vice Chairman
Wayne E. Gardner
James H. Cawley
Pamela A. Witmer

Investigation Instituted into Whether the
Commission Should Order a Capable Public I-2009-2109324
Utility to Acquire Clean Treatment Sewage
Company Pursuant to 66 Pa. C.S. § 529

OPINION AND ORDER
# Table of Contents

I. History .................................................................................................................... 1  
II. Discussion ................................................................................................................ 5  
   A. Legal Standards ................................................................................................... 5  
   B. Joint Stipulation ................................................................................................. 7  
   C. Section 529(a)(6) of the Code ............................................................................. 17  
      1. Positions of the Parties .................................................................................. 17  
      2. ALJ’s Recommendation .............................................................................. 22  
      3. Exceptions ...................................................................................................... 22  
      4. Disposition ..................................................................................................... 26  
   D. Eminent Domain .................................................................................................. 30  
      1. ALJ’s Recommendation .............................................................................. 30  
      2. Exceptions ...................................................................................................... 31  
      3. Disposition ..................................................................................................... 33  
   E. PAWC’s Submission of a Plan for Improvements ............................................. 34  
   F. Section 1501 of the Code .................................................................................... 36  
      1. ALJ’s Recommendation .............................................................................. 36  
      2. Exceptions ...................................................................................................... 36  
      3. Disposition ..................................................................................................... 38  
   G. Sewage Overflows and the Service Connection Moratorium ............................ 39  
      1. ALJ’s Recommendation .............................................................................. 39  
      2. Exceptions ...................................................................................................... 40  
      3. Disposition ..................................................................................................... 41  
   H. Appointment of a Receiver .................................................................................. 42  
      1. Exceptions ...................................................................................................... 42  
      2. Disposition ..................................................................................................... 44  
   I. Refunds to Availability Customers ..................................................................... 45  
      1. Positions of the Parties .................................................................................. 46  
      2. Disposition ..................................................................................................... 47  
   J. Motion of CTSC Re Security for New Capital Financing .................................... 50  
      1. Positions of the Parties .................................................................................. 50  
      2. Disposition ..................................................................................................... 53  
III. Conclusion ........................................................................................................... 54
BY THE COMMISSION:


Also before the Commission are the Motion of Clean Treatment Sewage Company Re Security for New Capital Financing (Motion Re Security), filed by CTSC on January 21, 2012, the OCA’s Answer in Opposition to the Motion, filed on February 14, 2012, and Delaware Township’s Objection to the Motion, also filed on February 14, 2012.

I. History

Clean Treatment Sewage Company is a public utility that provides wastewater service to approximately 373 usage residential customers in Marcel Lake Estates, Delaware Township, Pike County, Pennsylvania. It also has about 367 availability customers who own lots in the Marcel Lake Estates development and require wastewater service in order to build on their property.

This proceeding was initiated in Sutter v. Clean Treatment Sewage Company, Docket No. C-20078197 (Order entered May 15, 2009), in which the Commission directed the following: “That an investigation shall be instituted into whether the Commission should order a capable public utility to acquire Clean Treatment
The investigation was assigned to ALJ Jandebeur on or about September 27, 2011, and a notice of prehearing conference was issued to various parties as required by Section 529(h) of the Public Utility Code (Code), 66 Pa. C.S. § 529(h). R.D. at 1-2. Four prehearing conferences were held in this matter.

The first prehearing conference was held on October 7, 2011. Counsel for I&E, the OCA, CTSC, PAWC, and Aqua Pennsylvania, Inc. (Aqua) attended the prehearing conference. The purpose of the conference was to discuss a letter dated September 23, 2011, that CTSC had submitted to the Pennsylvania Department of Environmental Protection (DEP), expressing its intent to cease operations as of December 31, 2011. For that reason, the Parties were asked to meet among themselves and determine which of the Section 529 requirements could be stipulated to, having been addressed in earlier litigation, thus, obviating the need for additional litigation.

A second prehearing status conference was held on October 21, 2011. During that prehearing conference, the Parties discussed whether they had reached a consensus regarding joint stipulations. The OCA and the CTSC had drafted separate stipulations, and negotiations were ongoing. The Parties also discussed how to involve interested citizens. Id. at 2. After discussion with the Parties, the ALJ concluded that the best way to involve citizens that wished to participate was to remove all of the citizens from the party list and require that they file a Petition to Intervene if they wished to formally become a party. The requirement to file a Petition to Intervene was included in Interim Order #2. The deadline for Petitions to Intervene was October 28, 2011. Id. at 3.

1 The Sutter proceeding is under appeal at Commonwealth Court Docket No. 1146 C.D. 2009. The appeal has been stayed pending Commission action.

2 There is nothing in the record to indicate that CTSC has in fact ceased its operations.
Pursuant to Section 529(h) of the Code, 66 Pa. C.S. § 529(h), by Order dated October 13, 2011, the ALJ required CTSC to provide notice to its customers of the initiation of proceedings under Section 529 of the Code in the same manner a public utility is required to notify its customers of proposed general rate increases. CTSC provided such notice to its customers on October 18, 2011. Id.

A third prehearing status conference was held on November 2, 2011, to discuss the status of the joint stipulations. The Parties noted that they were closer to a resolution, but they needed more information regarding the impact of the acquisition on rates and that they needed to finish coordinating all of the attachments to the joint stipulations. Id.

At the fourth and final status conference, held on November 8, 2011, the Parties submitted a Joint Stipulation Addressing the Requirements of Section 529(a) of the Public Utility Code (Joint Stipulation). Id. Among other issues, the Parties addressed the scope of testimony for the two days of evidentiary hearings scheduled for November 15 and 16, 2011. The Parties agreed on testimony pertaining to rate impact, 66 Pa. C.S. § 529(a)(6), and expenditures for improvements, 66 Pa. C.S. § 529(c)(3). The Parties objected to testimony regarding the purchase price and testimony related to refunds of availability fees. Both objections were overruled. Id. at 4.

Twenty citizens filed Petitions to Intervene, which were granted by the ALJ. Direct written testimony was received from CTSC, OCA, Aqua, and PAWC. Id.

The hearing convened as scheduled on November 15, 2011. The second day of hearing was not needed and was cancelled. The Joint Stipulation offered by the Parties was admitted into the record. Four of the twenty Intervenors testified at the

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3 The parties to the Joint Stipulation are CTSC, I&E, OCA, PAWC, Aqua and Delaware Township.
hearing, as did DEP witness Kate Crowley. Cross-examination on the written Direct Testimony and on the testimony of the four Intervenors was conducted by the Parties. Additionally, the ALJ took judicial notice of the records of the Sutter proceeding at Docket No. C-20078197 and the CTSC Rate Proceeding at Docket No. R-2009-2121928.4 Id.

The record closed on Friday, December 9, 2011, with receipt of the Parties’ briefs. During the writing of the ALJ’s Recommended Decision, an issue was raised regarding whether Rule 1701(a) of the Rules of Appellate Procedure barred Commission action. Id. Accordingly, the ALJ issued a second Briefing Order on January 10, 2012. The record was reopened on January 24, 2012 to accept the briefs and was re-closed on January 24, 2012. Id. at 5.

On January 25, 2012, CTSC, pursuant to 52 Pa. Code § 5.103, filed its Motion Re Security. Through this Motion, CTSC is seeking an order from the Commission directing that new capital financing provided by the CTSC parent company will be given first security in, and first repayment priority from, the sale proceeds of the CTSC wastewater system. On February 14, 2012, the OCA filed an Answer in Opposition to the Motion, and Delaware Township filed an Objection to the Motion.

The ALJ’s Recommended Decision was issued on January 31, 2012. As previously stated, PAWC filed Exceptions on February 8, 2012, and CTSC and the OCA filed Exceptions on February 10, 2012. CTSC, the OCA, and I&E filed Replies to Exceptions on February 17, 2012.

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4 This matter is under appeal at Commonwealth Court Docket No. 938 C.D. 2010 and has been stayed pending Commission action.
II. Discussion

ALJ Jandebeur made fifteen Findings of Fact and reached nine Conclusions of Law. R.D. at 5-6, 20-21. The Findings of Fact and Conclusions of Law are incorporated herein by reference and are adopted without comment unless they are either expressly or by necessary implication rejected or modified by this Opinion and Order.

Before addressing the Exceptions, we note that any issue or Exception that we do not specifically address shall be deemed to have been duly considered and will be denied without further discussion. It is well settled that we are not required to consider, expressly or at length, each contention or argument raised by the parties. Consolidated Rail Corp. v. Pa. PUC, 625 A.2d 741 (Pa. Cmwlth. 1993); see also, generally, University of Pennsylvania v. Pa. PUC, 485 A.2d 1217 (Pa. Cmwlth. 1984).

A. Legal Standards

In this proceeding, I&E has the burden of establishing a prima facie case that the acquisition of CTSC is in the public interest and is in compliance with Section 529 of the Code. 66 Pa. C.S. § 529(i). If I&E carries that burden, CTSC has the burden of proving its ability to render adequate, efficient, safe and reasonable service at just and reasonable rates, and PAWC has the burden of proving its financial, managerial, or technical inability to acquire and operate CTSC’s system. Id.

Pursuant to Section 529(a) of the Code, 66 Pa. C.S. § 529(a), we are empowered to order a capable public utility to acquire a small water or sewer utility if, after notice and an opportunity to be heard, we determine:

5 While this provision refers to the Law Bureau having the burden of proof, and not I&E, the Commission reorganized this function of the Law Bureau into the new I&E by Order entered August 11, 2011, at Docket No. M-2008-2071852.
(1) that the small water or sewer utility is in violation of statutory or regulatory standards, including, but not limited to, the act of June 22, 1937 (P.L. 1987, No. 394), known as The Clean Streams Law, the act of January 24, 1966 (1965 P.L. 1535, No. 537), known as the Pennsylvania Sewage Facilities Act, and the act of May 1, 1984 (P.L. 206, No. 43), known as the Pennsylvania Safe Drinking Water Act, and the regulations adopted thereunder, which affect the safety, adequacy, efficiency or reasonableness of the service provided by the small water or sewer utility;

(2) that the small water or sewer utility has failed to comply, within a reasonable period of time, with any order of the Department of Environmental Resources or the commission concerning the safety, adequacy, efficiency or reasonableness of service, including, but not limited to, the availability of water, the potability of water, the palatability of water or the provision of water at adequate volume and pressure;

(3) that the small water or sewer utility cannot reasonably be expected to furnish and maintain adequate, efficient, safe and reasonable service and facilities in the future;

(4) that alternatives to acquisition have been considered in accordance with subsection (b) and have been determined by the commission to be impractical or not economically feasible;

(5) that the acquiring capable public utility is financially, managerially and technically capable of acquiring and operating the small water or sewer utility in compliance with applicable statutory and regulatory standards; and

(6) that the rates charged by the acquiring capable public utility to its preacquisition customers will not increase unreasonably because of the acquisition.

66 Pa. C.S. § 529(a)(1)-(6). The determinations of Section 529(a) appear in the conjunctive. Thus, we must determine that each of the six standards is met before ordering PAWC to acquire CTSC.
In making a determination under Section 529(a), we are to consider the following factors:

(1) The financial, managerial and technical ability of the small water or sewer utility.

(2) The financial, managerial and technical ability of all proximate public utilities providing the same type of service.

(3) The expenditures which may be necessary to make improvements to the small water or sewer utility to assure compliance with applicable statutory and regulatory standards concerning the adequacy, efficiency, safety or reasonableness of utility service.

(4) The expansion of the franchise area of the acquiring capable public utility so as to include the service area of the small water or sewer utility to be acquired.

(5) The opinion and advice, if any, of the Department of Environmental Resources as to what steps may be necessary to assure compliance with applicable statutory or regulatory standards concerning the adequacy, efficiency, safety or reasonableness of utility service.

(6) Any other matters which may be relevant.

66 Pa. C.S. § 529(c)(1)-(6).

B. Joint Stipulation

The Parties submitted a Joint Stipulation that addressed the requirements set forth in Section 529(a) of the Code, 66 Pa. C.S. § 529(a). The Joint Stipulation provided the following:

A. Section 529 (a)(1) – Section 529 (a)(1) provides that the Commission must determine that the utility
is in violation of statutory or regulatory standards, including, but not limited to, the act of June 22, 1937 (P.L. 1987, No. 394), known as The Clean Streams Law, the act of January 24, 1966 (1965 P.L. 1535, No. 537), known as the Pennsylvania Sewage Facilities Act, and the act of May 1, 1984 (P.L. 206, No. 43), known as the Pennsylvania Safe Drinking Water Act, and the regulations adopted thereunder, which affect the safety, adequacy, efficiency or reasonableness of the service provided by the small utility.

1. In its Order entered May 15, 2009, in Sutter et al. v. Clean Treatment Sewage Co. (“Sutter”), Docket No. C-200[7]8197, the Commission concluded that Section 1501 of the Public Utility Code, 66 Pa. C.S. § 1501, makes the public utility responsible for providing reasonably continuous service to its customers. Citing the moratorium preventing additional hookups to the CTSC wastewater system, the Commission directed CTSC to stop charging customers for stand-by service (totaling approximately $150,000 on an annual basis). Sutter Order at 15-17 (May 15, 2009).

CTSC’s appeal of Sutter is pending before the Commonwealth Court at No. 1146 C.D. 2009. The moratorium, which began in February 2005, is based upon the number of connections originally allowed by the Pennsylvania Department of Environmental Protection (“DEP”). The moratorium remains in effect.

2. In its Order entered May 15, 2009, in Sutter, the Commission also held that Complainants and OCA had established an unrebutted prima facie case that CTSC violated Section 1501 of the Public Utility Code, 66 Pa. C.S. § 1501, due to overflows from both manholes and sludge tanks and its failure to make necessary repairs, alterations or improvements to comply with Section 1501. Sutter at 18-20 (May 15, 2009). As noted above, CTSC’s appeal of Sutter is pending before the Commonwealth Court at No. 1146 C.D. 2009.

3. Following the decision of the Commission in Sutter, CTSC submitted a base rate proceeding to the Commission in June 2009 seeking to offset the diminished earnings CTSC is experiencing as a result of the elimination of the stand-by service charge revenue. Citing Section 526 of
the Public Utility Code, 66 Pa. C.S. § 526, the Commission
denied CTSC’s proposed rate increase.  *Pa. P.U.C. v. Clean
Treatment Sewage Co.* ("CTSC Rate Proceeding"), Docket
No. R-2009-212192[8], Order (Apr. 22, 2010).  CTSC’s
appeal of the *CTSC Rate Proceeding* is pending before the
Commonwealth Court at No. 938 C.D. 2010.

4. Although the Commission denied CTSC’s 2009
rate filing, the Commission “encourage[d] CTSC to return to
the Commission with another rate request that includes a
well-reasoned plan for improving its system and lifting the
moratorium on new connections to its system.”  *CTSC Rate
Proceeding*, Order at 21.

5. CTSC is not in violation of the Clean Streams
Law, the Pennsylvania Sewage Facilities Act or the
Pennsylvania Safe Drinking Water Act.  CTSC has not had a
notice of violation from DEP since March 2006.  CTSC
response to OCA Set I-6 . . .; *See CTSC Rate Proceeding*,
Evidentiary Hearing of Jan. 6, 2010, N.T. at 41-46 (Testimony
of Kate Crowley, DEP Water Program Manager for
Northeastern Pennsylvania).

6. DEP Inspection Reports, in addition, describe
the CTSC wastewater treatment plant as “well maintained and
operated.”  CTSC response to OCA Set I-7 . . .; *See also
CTSC Rate Proceeding*, Evidentiary Hearing of Jan. 6, 2010,
N.T. at 9-40 (Testimony of Sandra Insalaco, DEP Water
Quality Specialist).  The DEP Inspection Reports address the
condition of the treatment plant and do not address the
collection system, including lift stations, which is subject to
infiltration and inflow.

B.  **Section 529 (a)(2)** – Section 529 (a)(2)
provides that the Commission must determine that the utility
has failed to comply, within a reasonable period of time, with
any order of the DEP or the Commission concerning safety,
adequacy, efficiency or reasonableness of service.

7. As noted, the current moratorium has been in
place since February 2005.  Since 2004, CTSC has submitted
four Planning Modules to Delaware Township.  None of the
Modules was approved by the Township and the Township
did not forward any of the Modules to DEP.\textsuperscript{1} CTSC has not filed any appeals to the Township denials of the Planning Modules.

8. Following the conclusion of the \textit{CTSC Rate Proceeding} in April 2010, CTSC renewed its efforts to lift the moratorium on new connections to its system as suggested by the Commission in its Order in the \textit{CTSC Rate Proceeding}. The moratorium, however, remains in effect as explained further in the following paragraphs.

\hspace{1em} a. In July 2010, CTSC met with DEP to discuss steps for the possible lifting of the moratorium.\textsuperscript{2} The attendees to the July 2010 meeting discussed an evaluation of the CTSC Treatment Plant to determine if the Plant could accommodate additional wastewater connections which then could lead to lifting the service connection moratorium.\textsuperscript{3}

\hspace{1em} b. Following the meeting with DEP, CTSC prepared a Marcel Lakes Wastewater Treatment Plant Capacity Evaluation ("Evaluation") of its wastewater treatment plant which determined that additional capacity was available at the plant for up to 60 new connections. CTSC submitted the Evaluation to DEP in September 2010.

\hspace{1em} c. By letter dated November 1, 2010 to CTSC, DEP concurred that CTSC’s existing wastewater treatment plant can handle up to approximately an additional 60 equivalent dwelling units. The November 1 letter also expresses the DEP’s belief that it is imperative that CTSC continue to implement a program to identify and eliminate sources of excessive infiltration and inflow in the sewer system. . . .

\hspace{1em} d. The DEP letter of November 1, 2010 identified the next step to be Delaware Township’s submission of sewage facilities planning modules to authorize additional connections and suggested that CTSC contact the Township to discuss the procedures for putting a package together. CTSC wrote to the Township on November 16, 2010 and prepared a Planning Module for Land Development consistent with the Evaluation; said Planning Module was later submitted to Delaware Township in April 2011. . . .
e. In June 2011, the Township denied the Planning Module, citing the analysis of its consulting engineer, Entech Engineering, Inc. In a letter dated June 23, 2011, the Township explained that, while Entech respected DEP’s opinion, Entech believes additional analysis needs to be done. Delaware Township Letter of June 23, 2011 . . . . CTSC did not appeal the Township’s denial.


10. CTSC stated that there have been no new plant additions placed into service for the period January 1, 2009, to the present. See CTSC response to OCA Set II-1. 4

C. Section 529 (a)(3) – Section 529 (a)(3) provides that the Commission must determine that the utility cannot reasonably be expected to furnish and maintain adequate, efficient, safe and reasonable service and facilities in the future.

11. CTSC has no funding available to continue its efforts to resolve the service connection moratorium to the satisfaction of Delaware Township or to make capital improvements to the system.

a. CTSC operates at a loss and has done so since 2001. CTSC Annual Reports filed with the Commission.

b. According to its Annual Report for the year ended December 31, 2010, CTSC’s losses were ($311,625) in 2010.

c. According to its Annual Report for the year ended December 31, 2009, CTSC’s losses were ($300,629) in 2009.
d. According to its Annual Report for the year ended December 31, 2008, CTSC’s losses were ($191,872) in 2008.

e. According to its Annual Report for the year ended December 31, 2007, CTSC’s losses were ($96,252) in 2007.

f. CTSC has been prohibited from charging an availability fee to its 367 availability customers since the Commission’s decision in Sutter in May 2009 which reduced its annual revenue by approximately $150,000. See Sutter, Order at 28.

g. In 2008, CTSC estimated that it would cost at least $4.6 million to replace CTSC’s gravity sewer collection system and to address infiltration and inflow issues. See Sutter, Evidentiary Hearing of Feb. 20, 2008, N.T. 793-94 (Testimony of Stephen Marcino); See also CTSC Rate Proceeding, Order at 14, n.5.5

12. By letter to Delaware Township dated July 22, 2011, with copies to DEP and the OCA, CTSC advised that, in light of the Township’s decision not to approve and advance the most recent Planning Module, it will not have operating funds available after December 31, 2011 and that steps should be taken, as soon as possible for either Township ownership and maintenance of the wastewater system as directed by DEP or acquisition by another utility under Commission rules and regulations. . . .

13. By subsequent letter to DEP dated September 23, 2011, with copies to the Township and the OCA, CTSC again advised that it “will not have the funds available to continue operations relative to its wastewater treatment, conveyance and collection facilities past December 31, 2011” and asked DEP for input in regard to engaging Delaware Township under Act 537 for potential municipal ownership and asking DEP for a meeting to discuss the next steps and action to implement a plan. . . .

D. Section 529 (a)(4) – Section 529 (a)(4) provides that the Commission must determine that
alternatives to acquisition have been considered in accordance with subsection (b) [of section 529] and have been determined by the Commission to be impractical or not economically feasible.

14. CTSC has pursued the transfer of its system to a capable utility since approximately July 2009. See CTSC Application for General Continuance at ¶ 7, filed at Clean Treatment Sewage Co. v. Pa. P.U.C., 1146 C.D. 2009 (July 23, 2009).

15. CTSC contacted entities it considered to be “capable public utilities” and provided access to its facilities. PAWC toured the facilities.

16. Aqua declined to make an offer to acquire the system, due to the proximity of PAWC’s water systems and the possible synergies that may exist with a PAWC acquisition of the CTSC assets. PAWC has not made an offer but has stated that it intends to make a decision as to whether it will make an offer in October 2011. See CTSC letter to DEP dated Sept. 23, 2011.

17. In an effort to develop a plan to lift the moratorium, CTSC met with DEP about possibly re-rating the CTSC wastewater treatment plant to accommodate new service connections with Delaware Township ultimately denying the CTSC Planning Module all as aforesaid.

18. DEP has power under 35 P.S. § 691.203 to pursue acquisition of CTSC by Delaware Township. CTSC has asked DEP for that agency’s input in regard to engaging Delaware Township for potential municipal ownership of the system and for a meeting with DEP to pursue that alternative.

19. The stipulating parties are not aware of any small public utility in the vicinity of CTSC’s service territory with which to merge that is financially and/or managerially capable of resolving the moratorium and improving the collection system.

20. The reorganization of CTSC under new management, the entry into an operating agreement with
another utility or service company, or the appointment of a receiver will not resolve the moratorium and improve the collection system.

21. The stipulating parties have not determined any alternative to acquisition that would be practical or economically feasible.

E. **Section 529 (a)(5)** – Section 529 (a)(5) provides that the Commission must determine that the acquiring capable utility is financially, managerially and technically capable of acquiring and operating the small utility in compliance with applicable statutory and regulatory standards.

22. According to tariffs approved by this Commission, Pennsylvania-American Water Company (PAWC) owns and operates the following wastewater divisions: Coatesville, Pocono, Northeast, Claysville, and Clarion.


25. According to its Annual Report for the year ended December 31, 2010, PAWC’s (wastewater) net income was in excess of $2.75 million.

26. The DEP’s Southeast Regional Office indicated to the Commission that no problems or complaints regarding PAWC’s service have been identified in their records. See, e.g., *West Caln Twp.*, Order at 3.
27. PAWC is current with its annual and quarterly reports as well as the Security Planning and Readiness report filing requirements of the Commission. There are no outstanding fines or assessments. See, e.g., *West Caln Twp.*, Order at 4.


29. PAWC currently provides metered water service to CTSC’s customers. See CTSC Rate Proceeding, Direct Testimony of Marilyn J. Kraus at 12 (admitted Jan. 7, 2010).

30. As shown by tariffs approved by this Commission, Aqua’s wastewater division is Little Washington Wastewater Company (LWWC).


33. According to its Annual Report for the year ended December 31, 2010, LWWC’s net income for 2010 was over $415,000.

34. LWWC is current with its annual and quarterly reports as well as the Security Planning and Readiness report
filing requirements of the Commission. There are no outstanding fines or assessments.

F. **Section 529 (a)(6)** – Section 529 (a)(6) provides that the Commission must determine that the rates charged by the acquiring capable utility to its pre-acquisition customers will not increase unreasonably because of the acquisition.

35. Attached [to the Stipulation] are schedules outlining PAWC’s and LWWC’s current sewage rates. . . .

1 The basis for the Township’s denial of the 2006 and 2008 planning modules is addressed in correspondence from the Township made part of the record in the *Sutter* and *CTSC Rate Proceeding* cases. *See Sutter*, Luciano Exhs. 4, 5 (entered Feb. 19, 2008). The Township’s position on the 2011 submission is addressed in its Letter of June 23, 2011.

2 Attendees to the meeting included Kate Crowley, DEP Water Program Manager for Northeastern Pennsylvania, and other representatives of DEP, Mr. Linde and representatives of CTSC, the OCA and its consulting engineer, Terry L. Fought, P.E., and representatives of Delaware Township, including Township Supervisor Ileana Hernandez.

3 Mr. Fought, the OCA’s engineering consultant, had testified during the *CTSC Rate Proceeding* that the CTSC Treatment Plant could be “re-rated” to allow for additional service connections. *CTSC Rate Proceeding* OCA St. No. 2-S at 17-19.

4 CTSC stated that it has performed maintenance on the wastewater system (including I&I maintenance) for the period January 1, 2009 to the present. *See CTSC response to OCA Set II-9.*

5 In response to discovery in this proceeding, PAWC has estimated capital expenditures of approximately $6.5 million to replace CTSC’s gravity collection system with low pressure sewer ($6 million) and improvements to CTSC’s treatment plant ($500,000). *See PAWC response to OCA Set I-1 (amended) and OCA Set II-1.*
Stipulations are governed by Section 5.234 of our Regulations, 52 Pa. Code § 5.234, which provides the following, in pertinent part:

§ 5.234. Presentation and effect of stipulations.

(a) Parties may stipulate to relevant matters of fact or the authenticity of relevant documents. The stipulations may be received in evidence at a hearing, and when so received shall be binding on the parties to the stipulation with respect to the matters therein stipulated.

* * *

(c) The Commission may disregard in whole or in part a stipulation of facts under this section but may grant further hearing if requested by a party to the stipulation within 15 days after issuance of a Commission order disregarding the stipulation of fact.

In this case, the Joint Stipulation contains facts that pertain to the requirements set forth in Section 529(a) of the Code. In reviewing the Joint Stipulation, we have thoroughly considered all of the Section 529(a) requirements and agree with the ALJ that Section 529(a)(1)-(5) have been satisfied. See R.D. at 17. We have also determined, as will be discussed in more detail herein, that Section 529(a)(6) has been satisfied. In reviewing the record, we have considered the relevant factors listed in Section 529(c) of the Code in making our determination. Accordingly, for all of these reasons, we find that it is appropriate to accept the Joint Stipulation.

C. Section 529(a)(6) of the Code

1. Positions of the Parties

In its Brief, I&E stated that, because PAWC and CTSC were not able to agree on an acquisition price, possible rate increase discussions were premature. It noted,
however, that the Joint Stipulation provided schedules outlining PAWC’s and Aqua’s current sewage rates. I&E Brief at 8. I&E also stated that it would not oppose an agreement to table the acquisition price effect on rates until the acquiring company requested rate recovery. *Id.* at 9.

In its Brief, CTSC averred that the resolution of Section 529(a)(6) cannot be tabled until a later time because it is clear that each of the requirements in Section 529(a)(1)-(6) must be met in order for the Commission to direct a capable public utility to acquire a small water or sewer utility. CTSC Brief at 14. CTSC stated that the Section 529(a)(6) criteria had been met in this case and that the rates charged by PAWC to its preacquisition customers would not increase unreasonably due to the acquisition. According to CTSC, the $6.5 million investment that PAWC projected for the CTSC wastewater system may not be a helpful amount for rate purposes, because the analysis upon which the projected amount was based was not designed to lift the moratorium. *Id.* at 21-22; Tr. at 145-146, 171, 184. It noted that a substantial capital investment may be needed to lift the moratorium, but that investment is unknown based on the record. It stated that whatever investment is determined to be necessary would be identified within the plan for improvements required by Section 529(j) of the Code. CTSC Brief at 22.

Additionally, CTSC stated that there were several ways in which the rates to PAWC’s preacquisition customers would not increase at all or would not increase unreasonably if PAWC acquired CTSC. *Id.* at 22. First, it averred that PAWC could retain all of the Marcel Lake Estates customers as a separate tariff division after acquisition. CTSC stated that, in doing so, PAWC could also reinstate the availability charge. It opined that including the availability customers in the customer mix would double the base over which to spread increased system costs. Second, it averred that the Marcel Lake Estates community could be merged and consolidated with other PAWC divisions for ratemaking purposes. *Id.* at 23. Third, CTSC stated that costs could be deferred for recovery until a later time. Lastly, it averred that the Commission could treat
this as a special circumstance and allow wastewater improvement costs to be recovered through PAWC rates for water service as was being considered by House Bill 1294.6

*Id.* at 24.

Further, CTSC stated that Section 529(a)(6) only requires a finding that the rates charged to PAWC’s preacquisition customers will not increase unreasonably. It asserted that it is clear that PAWC has the capital to undertake the acquisition and has a much larger customer base than CTSC. According to CTSC, this larger customer base justified the conclusion that the rates of PAWC’s preacquisition customers would not increase unreasonably due to the acquisition. *Id.*

PAWC submitted that there was no statutory basis to table the issue of the acquisition price effect on rates. PAWC stated that, if the Commission failed to consider the acquisition price prior to ordering the acquisition, this would prejudice the outcome because the option of not ordering the acquisition would no longer be available. In a subsequent ratemaking proceeding, the Commission would be forced to consider the acquisition price, and to the extent that it was determined unreasonable, the Commission would have to decide whether to pass the cost on to the ratepayers or to require the utility to absorb the cost. PAWC averred that it was not the intent of Section 529 to create this kind of hardship for utilities or their customers. PAWC Brief at 5. PAWC stated that Section 529 requires the Commission to know the acquisition price and have the benefit of that information before making a determination on whether to order an acquisition. *Id.* at 6.

PAWC also averred that the requirements of Section 529(a)(6) had not been met. According to PAWC, evidence had been presented to suggest that the cost of necessary improvements alone would raise rates for preacquisition customers so significantly as to be unreasonable. It noted that, pursuant to Section 529(c)(3) of the

6 This bill was subsequently enacted into law. Act 11 of 2012.
Code, the Commission is directed to consider expenditures that may be necessary to make improvements to assure compliance with applicable statutory and regulatory standards. Id. at 7. It stated that it offered testimony that its estimate of improvement costs would be about $6.5 million, not including an associated increase in operating costs or any upgrades that may be necessary to accommodate the future use of current availability customers. Id.; PAWC St. 1 at 4; Tr. at 185. PAWC further stated that these improvements, along with estimated operating expenses, would quadruple the rates of the current CTSC customers.

PAWC submitted that, although it has been suggested that it could reduce the rate impact by spreading the impact to availability customers in Marcel Lake Estates, such an approach would be inconsistent with PAWC’s ongoing efforts to eliminate availability customers within its other sewer service divisions. PAWC Brief at 7; Tr. at 171-172. It stated that, in any case, the moratorium on construction was still in place and prevented it from charging availability fees. Additionally, PAWC stated that any attempts to consolidate systems and spread the costs to its customers in nearby wastewater divisions would result in a doubling of those preacquisition customers’ rates. PAWC Brief at 7; PAWC St. 1 at 5; Tr. at 175. It noted that the Northeast Region of its wastewater operation’s 2010 rate case provides for a stay-out for filing of the next rate case until March 31, 2016. PAWC Brief at 7-8. PAWC submitted that its Claysville and Coatesville Divisions both have stay-out provisions, and new rates cannot go into effect before January 1, 2017. It also submitted that its Clarion Division stay-out provision does not expire until March 31, 2013. Id. at 8. Further, it stated that, even if the Commission approved a separate tariff pursuant to Section 529(f) of the Code so that costs were temporarily borne by the current CTSC customers, this would not be a permanent solution, and the costs of acquisition would eventually impact the rates of the preacquisition customers. Id. at 8-9.
Moreover, PAWC stated that the acquisition price could also have an additional, direct, and potentially significant effect on the rates of PAWC’s preacquisition customers and, as such, must be considered by the Commission before ordering the acquisition of CTSC. It averred that, pursuant to Section 529(e) of the Code, the small sewer utility and the acquiring capable public utility are expected to agree on the acquisition price, subject to the Commission’s determination of reasonableness. *Id.* at 9.

It opined that the Commission’s Statement of Policy regarding Small Nonviable Water and Wastewater Systems at 52 Pa. Code § 69.711(f) provides that the reasonableness of the acquisition price of a sewer system depends on a consideration of numerous factors. *Id.* at 9-10. PAWC asserted that the Commission cannot satisfy Section 529(a)(6) of the Code without first having considered the reasonableness of the acquisition price pursuant to the Policy Statement.

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7 Section 69.711(f) of the Policy Statement provides the following:

*Purchase price of the water and wastewater system.* The factors relevant to the reasonableness of the purchase price of the acquired water and wastewater system include:

1. Promotion of long-term viability.
2. Promotion of regionalization.
3. Usage per customer.
5. Cost of improvements.
6. Age of the infrastructure.
7. Return on equity.
8. Existing rates.
9. Purchase price per customer.
2. ALJ’s Recommendation

The ALJ determined that, because Section 1301 of the Code, 66 Pa. C.S. § 1301, protects all customers from unjust or unreasonable rates, the acquisition price could be tabled without prejudice until the acquiring company filed its base rate case. In reaching her conclusion, the ALJ stated that Section 529(a)(6) of the Code requires a determination that the rates to “preacquisition customers will not increase unreasonably,” but it is not meant to stall a necessary acquisition of an incapable company by a capable company. She reasoned that the language of Section 1301 of the Code makes it clear that whatever PAWC chooses to do after the acquisition, its rates shall be just and reasonable. The ALJ noted that PAWC can pursue a number of avenues to ensure that its preacquisition customers are not unreasonably impacted, including keeping the CTSC customers as a separate division, as doing so would have zero impact on its preacquisition customers. The ALJ found that the most important way to ensure that PAWC’s preacquisition customers are not unreasonably impacted is the mandate under Section 1301 of the Code that rates to the preacquisition customers will not increase unreasonably. R.D. at 17.

3. Exceptions

In its Exceptions, PAWC avers that the Recommended Decision fails to make a specific determination regarding Section 529(a)(6) of the Code, 66 Pa. C.S. § 529(a)(6). It states that consideration of the acquisition price effect on rates cannot be tabled or delayed until the initiation of ratemaking proceedings because the failure to satisfy Section 529(a)(6) would undermine the Commission’s legal authority to have ordered the acquisition in the first place. PAWC Exc. at 4. PAWC believes that the

8 In pertinent part, Section 1301 provides the following: “Every rate made, demanded, or received by any public utility, or by any two or more public utilities jointly, shall be just and reasonable, and in conformity with regulations or orders of the commission.”
Recommended Decision’s reliance on Section 1301 of the Code to circumvent Section 529(a)(6) of the Code, 66 Pa. C.S. § 529(a)(6), is improper because it renders Section 529(a)(6) superfluous in contravention of the rules of statutory construction. PAWC Exc. at 11. It states that, under the Recommended Decision’s interpretation, regardless of whether or not the Parties agree to an acquisition price, the determination required by Section 529(a)(6) would never be necessary before ordering an acquisition because the Commission could instead opt to address the question during subsequent ratemaking proceedings. PAWC also asserts that the Commission cannot substitute its judgment at a future ratemaking proceeding for a determination that is required to be made in the present as a condition of ordering a forced acquisition. *Id.* at 12.

PAWC additionally avers that the Recommended Decision misconstrues the legal standards under Sections 1301 and 529(a)(6) as being interchangeable. *Id.* It states that the two standards are intended to apply in different situations and balance disparate interests. According to PAWC, Section 1301 requires the Commission to consider the voluntary investments of a utility and its related business decisions to ensure they are prudently made and benefit the public. It states that the determination of what is just and reasonable is intended to balance the interests of investors and consumers. On the other hand, PAWC states that Section 529(a)(6) requires the Commission to consider whether the cost associated with ordering a utility to acquire a failing system will cause the utility’s current ratepayers to pay an unreasonable amount. It avers that the purpose of Section 529(a)(6) is to determine whether the costs of acquiring a failing system can be equitably socialized. *Id.* at 13.

The OCA disagrees with the ALJ’s conclusion that it is not necessary to address Section 529(a)(6) until the acquiring company files a base rate case based on her determination that Section 1301 of the Code will ensure that the rates to preacquisition customers will not increase unreasonably. The OCA states that this conclusion, if accepted, would mean that (1) Section 529(a)(6) is unnecessary and meaningless because
the rate increase for preacquisition customers could never be unreasonable for purposes of Section 529(a)(6) so long as it is later permitted in a rate proceeding, and (2) that Section 1301 is the only protection for preacquisition customers against unreasonable rate increases resulting from an acquisition. OCA Exc. at 3. The OCA avers that this interpretation is inconsistent with the rules of statutory interpretation, which presume that the General Assembly intended all of the provisions of Section 529 to have effect. Id. (citing 1 Pa. C.S. § 1922(2)).

The OCA believes that it is necessary to consider the impact of the purchase price on rates within the context of the Section 529 proceeding in order to give subsection (a)(6) full force and effect. The OCA states that this procedure does not mean that the Commission is prevented from ordering an acquisition when the parties do not agree on an acquisition price. Rather, after the Commission issues an order directing the acquiring utility to follow the eminent domain process, the Commission must consider the purchase price determined in the eminent domain proceeding to determine how the acquisition can be achieved without unreasonably increasing the rates for preacquisition customers. Id. at 4.9

Further, the OCA notes that subsection (a)(6) is just one of several matters that have not yet been addressed, and must be addressed, within this Section 529 proceeding. Id. It avers that the Commission is required to consider the acquiring utility’s plan and timeframe for improvements and the capital and operation and

9 We note, however, that in its Replies to Exceptions, the OCA reaches the conclusion that an eminent domain order under Section 529(e) of the Code cannot be reconciled with Section 529(a)(6) of the Code in the manner that the OCA initially proposed. The OCA bases its conclusion on PAWC’s discussion of the eminent domain process in its Exceptions and PAWC’s statement that the statutory eminent domain process would require PAWC to take title to CTSC’s property before the final acquisition price is established. As will be discussed in more detail herein, the OCA believes that, if the Commission appoints a receiver under Section 529(g) of the Code, such a process would allow the Commission to address Section 529(a)(6) after the purchase price is known. R.Exc. at 9.
maintenance expenditures necessary to make such improvements. *Id.* (citing 66 Pa. C.S. § 529(c)(3), (j)). The OCA also avers that the Commission must consider the expansion of the service territory of the acquiring public utility in order to include the service area of the small sewer utility to be acquired and whether the Commission will permit a separate tariff for the acquired customers. *Id.* (citing 66 Pa. C.S. § 529(c)(4), (f)). It states that all of these items must be addressed by the Commission as part of this Section 529 proceeding. It further notes that the Commission has previously directed that refunds of availability fees be addressed within the context of this Section 529 investigation. *Id.* (citing Sutter, supra, at 26). For these reasons, the OCA does not support tabling consideration of the purchase price until a future rate proceeding. However, the OCA supports tabling Section 529(a)(6) until the purchase price is determined, either through an agreement or through an eminent domain proceeding, and believes that the record in this case should remain open for evidence on the remaining statutory requirements and the refund issue. *Id.* at 4, 5.

In its Replies to Exceptions, CTSC states that it disagrees with OCA’s view that the determination required by Section 529(a)(6) should be tabled until an acquisition price is determined. CTSC submits that the Commission must address Section 529(a)(6) now, along with the other requirements in Section 529(a)(1)-(5). It avers that Section 529(a) does not permit tabling any of the criteria set forth therein. CTSC R.Exc. at 2.

CTSC also disagrees with PAWC’s argument that the Recommended Decision failed to properly apply the requirements of Section 529(a)(6), as CTSC believes that the Recommended Decision has sufficiently addressed the requirements of Section 529(a)(6). *Id.* at 4. CTSC avers that there are several different mechanisms the Commission can consider to support a determination that PAWC’s preacquisition customers will not be unreasonably burdened by the acquisition. It states that PAWC can create a separate tariff division for Marcel Lake Estates pursuant to Section 529(f) of the
Code, 66 Pa. C.S. § 529(f).\textsuperscript{10} \textit{Id.} at 2, 5. It further believes that the assurance under Section 1301 of the Code, 66 Pa. C.S. § 1301, that the rates to the preacquisition customers of PAWC will be just and reasonable, along with a number of other avenues that are available to address the impact on preacquisition customers, fulfills the requirements of Section 529(a)(6). \textit{Id.} at 3, 6.

4. Disposition

Based on our review of this issue, we have determined that we must make a determination under Section 529(a)(6) of the Code before we can order PAWC to acquire CTSC. Because the standards of Section 529(a)(1)-(6) appear in the conjunctive, we must determine that each of the six standards has been met. As such, we cannot table our decision regarding Section 529(a)(6) until the acquiring capable public utility requests rate recovery or until the acquisition has been accomplished through the eminent domain process.

We have additionally determined that it is not necessary for PAWC and CTSC to reach an agreement on the acquisition price in order for us to make a determination under Section 529(a)(6). In ascertaining the legislative intent of the General Assembly, clear and unambiguous words are controlling. \textit{See}, 1 Pa. C.S. § 1921(b). The clear and unambiguous language in Section 529(a)(6) requires us to determine “that the rates charged by the acquiring capable public utility to its preacquisition customers will not increase unreasonably because of the acquisition.” Thus, we must determine that the rates of PAWC’s existing customers will not increase unreasonably due to its acquisition of CTSC; however, we are not required to know what the acquisition price is prior to making such a determination. In fact, the acquisition

\textsuperscript{10} Pursuant to Section 529(f), “[t]he commission may, in its discretion and for a reasonable period of time after the date of acquisition, allow the acquiring capable public utility to charge and collect rates from the customers of the acquired small water or sewer utility pursuant to a separate tariff.”
price is not even listed in Section 529(c) among the factors to be considered in making
our determination regarding whether to order PAWC to acquire CTSC.

We also note the rule of statutory construction that the provisions of a
statute are to be construed in *pari materia*. 1 Pa. C.S. § 1932(b). Section 529(e) provides
that, in a case such as this, where the parties cannot agree on an acquisition price, the
commission “shall issue an order directing the acquiring capable public utility to acquire
the small water or sewer utility by following the procedure prescribed for exercising the
power of eminent domain,” pursuant to the Eminent Domain Code. This order, however,
can only be issued after we conclude that the requirements of Section 529(a) have been
met. In other words, Section 529(e) demonstrates a legislative intent that the purchase
price need not be known for us to find, pursuant to Section 529(a)(6), that the rates
charged by the acquiring utility to its preacquisition customers will not increase
unreasonably because of the acquisition.

PAWC has not submitted any plan for financing the acquisition of CTSC,
nor has it submitted any proposed post-acquisition rate structure. Nevertheless, based on
the record in this case, we find that there is sufficient information to determine that the
rates to PAWC’s preacquisition customers will not increase unreasonably due to
PAWC’s acquisition of CTSC. Initially, we note that the acquisition of CTSC will not
have an immediate impact on PAWC’s existing ratepayers because any resulting rate
increases will not take effect immediately, or all at once. For instance, according to
Section 529(j), any reasonably incurred costs that PAWC invests for each improvement it
makes to CTSC’s system can only be recovered in rates after the improvement becomes
“used and useful in the public service.” Additionally, as will be discussed in more detail
herein, since we are directing PAWC to acquire CTSC through the eminent domain
process, PAWC will not be able to recover the costs of the acquisition until the eminent
domain process is completed, which could be some time after the acquisition is ordered.
We note, in this regard, that Section 529(a)(6) does not require us to find that PAWC’s
preacquisition customers will not experience a rate increase as a result of the acquisition. Rather, Section 529(a)(6) requires us to find that PAWC’s preacquisition customers will not experience an unreasonable rate increase as a result of the acquisition.

While PAWC may incur substantial costs in acquiring CTSC, there are numerous ways that the impact of those costs on its preacquisition ratepayers can be mitigated, as the OCA and CTSC have discussed in detail. We will not direct PAWC regarding how it should handle any future rate increases to its preacquisition customers, nor is our discussion here intended to approve any particular approach that PAWC might submit to this Commission in the future. Nevertheless, we believe that there are several ways that PAWC could prevent unreasonable rate increases to its preacquisition customers stemming from its acquisition of CTSC. Most notably, pursuant to the recently enacted Act 11, codified in Section 1311(c) of the Code, 66 Pa. C.S. § 1311(c), the Commission may allow PAWC to spread its costs among its entire water and wastewater customer base. In the testimony of Rod P. Nevirarskas, submitted on behalf of PAWC, Mr. Nevirarskas stated that Act 11 would provide a mitigating effect on the rate increases to PAWC’s preacquisition customers, as follows:

In the case of PAWC, since there are so many water customers (approximately 638,000) and so few wastewater customers (approximately 17,100) the investment attributable to wastewater that could be spread over the entire PAWC customer base would provide a huge mitigating effect in situations such as this. The increase to all customers based on the level of investment required for Clean Treatment Sewage Company would be negligible.

PAWC St. 1 at 5.

PAWC has other options, as suggested by the Parties, namely the OCA and CTSC. For instance, the Marcel Lake Estates community could be merged and consolidated with other PAWC divisions for ratemaking purposes. Marilyn J. Kraus
provided testimony, on behalf of the OCA, regarding calculations of the rate impacts on CTSC and current PAWC wastewater customers and examples of ratemaking scenarios related to a PAWC acquisition of the CTSC system. Ms. Kraus noted that PAWC indicated that, if acquired, CTSC would become part of its Pike or Monroe County wastewater operations, i.e., its Northeast Division. She stated that if the CTSC customers were included in the Northeast Division upon acquisition, assuming an across-the-board increase to the Northeast Division, including the CTSC customers, the rates would increase from $64.26 to $82.65 (a 28.62% increase), assuming a purchase price of zero. OCA St. 1 at 9. If the purchase price was equal to the net original cost, the rates would increase from $64.26 to $85.09 (a 32.41% increase). *Id.* at 9-10.

She also stated that this percentage increase would be reduced by a further consolidation of the PAWC wastewater divisions. For example, if PAWC’s Pocono Division was combined with the Northeast Division, the rate increase would be from $64.26 to $74.06 per month, as opposed to $82.65, if the purchase price was zero. Assuming the net original cost as the acquisition price, the rates would increase from $64.26 to $75.36 per month, instead of $85.09. *Id.* at 10. Furthermore, according to Ms. Kraus, if all of the PAWC wastewater operations were consolidated, the rate impact would be much less to the PAWC customers because there would be a larger customer base to share the costs. For instance, if PAWC’s Coatesville, Claysville, and Clarion Divisions were combined with the Northeast Division, including CTSC and the Pocono Division, the revenue requirement increase would be 4.31% if the purchase price were zero. Including the net original cost as the acquisition price, the revenue requirement increase would be 4.89%. *Id.* at 11. Although several of PAWC’s divisions are subject to stay out provisions until they may file their next rate case, as Ms. Kraus explains, there may be a number of possible ways to handle this issue, including a rate phase-in for CTSC customers or deferral of a portion of the increases. *Id.* at 12.
Accordingly, we find that there is sufficient evidence to conclude, under Section 529(a)(6), that the rates to PAWC’s preacquisition customers will not increase unreasonably due to PAWC’s acquisition of CTSC. While we do not support the ALJ’s heavy reliance on Section 1301 to reach her conclusion, we agree with her overall conclusion regarding Section 529(a)(6) and some of her reasoning. We agree that, even if the Parties are unable to agree on an acquisition price, Section 529(a)(6) is not intended to foreclose the Commission from ordering a capable company to acquire a small sewer company. Additionally, we agree that there are a number of avenues PAWC can pursue to ensure that its existing customers are not unreasonably impacted by rate increases resulting from the acquisition. See R.D. at 17. While we do not believe that a determination under Section 1301 of the Code can be substituted for our required determination under Section 529(a)(6), it is clear that, regardless of the manner in which PAWC chooses to implement a rate increase after its acquisition of CTSC, the Commission must first determine that the resulting rates are “just and reasonable” under Section 1301. Based on our analysis of this issue, we shall grant, in part, and deny, in part, PAWC’s Exceptions; grant, in part, and deny, in part, the OCA’s Exceptions; and modify the Recommended Decision.

D. Eminent Domain

1. ALJ’s Recommendation

In the Initial Decision, ALJ Jandebeur recommended that, due to the inability of CTSC and PAWC to agree on an acquisition price, the Commission should order PAWC to acquire CTSC through the eminent domain process set forth in 26 Pa. C.S. §§ 101, et seq. R.D. at 6, 18, 22.
2. Exceptions

According to PAWC, the Recommended Decision fatally fails to address the impact of the eminent domain process on the acquisition price and on PAWC’s preacquisition customers’ rates. PAWC states that, if the Commission requires PAWC to acquire CTSC through eminent domain, the statutory eminent domain process will result in PAWC owning CTSC’s system before the acquisition price is established, and it will not be possible to reverse a transaction that would unreasonably impact the rates of PAWC’s customers. It further avers that the eminent domain process is complex, time-consuming, and most likely will result in an award of damages to CTSC from PAWC that includes costs for items beyond the book value and depreciation elements that are generally allowable in a rate base proceeding. Id. at 5.

PAWC provides an extensive discussion of the eminent domain process. It states that, as part of the initial eminent domain process, it will be required to make an “estimated just compensation” payment to the court or the condemnee that it believes reflects the value of the property it is taking pursuant to Section 307 of the Eminent Domain Code, 26 Pa. C.S. § 307.\footnote{Section 307(a)(i) of the Eminent Domain Code provides the following:  
The condemnor, after the expiration of the time for filing preliminary objections by the condemnee to the declaration of taking, shall be entitled to possession or right of entry upon payment of or a written offer to pay to the condemnee the amount of just compensation as estimated by the condemnor.} Id. at 6. According to PAWC, around the same time that PAWC would make such a payment, it would also take title to CTSC’s property. As such, PAWC asserts that it would be in a situation where it irreversibly owns CTSC’s sewage system and has absorbed a cost that may not be recovered for a long period of time because the final amount to be paid by PAWC will not have been determined at that point. Id. at 7.
PAWC additionally states that, absent a settlement on the acquisition price, the acquisition price would be established through a lengthy litigation process. The eminent domain process begins with a board of viewers, but could involve a jury or bench trial in the court of common pleas and, possibly, an appeal to the Commonwealth Court and possibly the Pennsylvania Supreme Court. During the litigation, legal costs and interest may continue to accrue, adding to the final acquisition cost of CTSC by PAWC. Id. at 10. Based on its experience in prior condemnation proceedings, PAWC is of the opinion that the proceedings could last for years before it knows what its total costs would be for the acquisition of the sewer system and, thus, would be able to present those costs in a ratemaking proceeding. Id. at 11.

Finally, if the purchase price is established through a litigated eminent domain case, PAWC notes that fair market value and the price that PAWC would have to pay for CTSC’s system could be determined using legal methods of valuation that PAWC believes are far different from the Commission’s methods for determining cost recovery, rate base, and acquisition adjustments. Id. at 8-9 (citing 26 Pa. C.S. § 703).12

12 Pursuant to Section 703 of the Eminent Domain Code, fair market value is described as follows:

Fair market value shall be the price which would be agreed to by a willing and informed seller and buyer, taking into consideration but not limited to the following factors:

(1) The present use of the property and its value for that use.

(2) The highest and best reasonably available use of the property and its value for that use.

(3) The machinery, equipment and fixtures forming part of the real estate taken.

(4) Other factors as to which evidence may be offered as provided by Chapter 11 (relating to evidence).
In its Replies to Exceptions, I&E avers that the Commission should issue an order directing PAWC to acquire CTSC by eminent domain. I&E states that Section 529(e), 66 Pa. C.S. § 529(e), is specifically designed to address an impasse regarding the absence of an agreed-upon purchase price. It believes that, because PAWC intends to replace CTSC’s entire collection system, as reflected in PAWC’s nominal offer, the system has minimal value. I&E further asserts that, more importantly, based on the recently enacted Act 11, PAWC now has the ability to spread improvement costs among its entire water and wastewater customer base. Accordingly, I&E states that, following the conclusion of the eminent domain proceeding, the ALJ and the Commission should be able to determine that the rates of PAWC’s preacquisition customers will not increase unreasonably due to the acquisition.

In its Replies to Exceptions, CTSC states that the potential complexity of the eminent domain process that PAWC discusses is not a basis for concluding that the Recommended Decision misapplied Section 529. CTSC R.Exc. at 4. CTSC avers that, regardless of whether or not the eminent domain process is complex, it is the process that the General Assembly has required for determining the acquisition price when the small utility and the capable acquiring utility are unable to agree on an acquisition price. Id. at 5.

3. Disposition

Based on the express language of Section 529(e) of the Code, 66 Pa. C.S. § 529(e), we agree with I&E and CTSC that it is clear that the legislature intended the eminent domain process to be used in situations where the small sewer utility and capable acquiring utility are unable to agree on an acquisition price. Section 529(e) of the Code provides the following:

The price for the acquisition of the small water or sewer utility shall be determined by agreement between the small
water or sewer utility and the acquiring capable public utility,
subject to a determination by the commission that the price is
reasonable. If the small water or sewer utility and the
acquiring capable public utility are unable to agree on the
acquisition price or the commission disapproves the
acquisition price on which the utilities have agreed, the
commission shall issue an order directing the acquiring
capable public utility to acquire the small water or sewer
utility by following the procedure prescribed for exercising
the power of eminent domain pursuant to the act of June 22,
1964 (Sp.Sess., P.L. 84, No. 6), known as the Eminent
Domain Code.

Because CTSC and PAWC have not reached an agreement regarding the acquisition
price, we are required to issue an order directing PAWC to acquire CTSC through the
eminent domain process.

We understand PAWC’s concerns that the eminent domain process may be
complex, lengthy, and expensive. Nevertheless, these concerns do not change the express
language in the statute. We note, however, that the Parties have the option of continuing
to negotiate with each other toward reaching an acquisition price they both agree upon.
Even once the eminent domain proceedings have begun, the Parties may reach an
agreement at any time during the proceedings regarding all or any part of the damages
owed to the condemnee, CTSC. See 26 Pa. C.S. § 501. Accordingly, we find that the
ALJ reached the correct conclusion in the Recommended Decision, and we shall deny
PAWC’s Exceptions on this issue.

E. PAWC’s Submission of a Plan for Improvements

As we are directing PAWC to acquire CTSC, PAWC must submit a plan
for improvements (Plan) to us for approval consistent with Section 529(j) of the Code,
66 Pa. C.S. § 529(j). Section 529(j) provides the following:
Any capable public utility ordered by the commission to acquire a small water or sewer utility shall, prior to acquisition, submit to the commission for approval a plan, including a timetable, for bringing the small water or sewer utility into compliance with applicable statutory and regulatory standards. The capable public utility shall also provide a copy of the plan to the Department of Environmental Resources and such other State or local agency as the commission may direct. The commission shall give the Department of Environmental Resources adequate opportunity to comment on the plan and shall consider any comments submitted by the department in deciding whether or not to approve the plan. The reasonably and prudently incurred costs of each improvement shall be recoverable in rates only after that improvement becomes used and useful in the public service.

PAWC shall submit its Plan to us, and receive our approval of the Plan, prior to filing a declaration of taking with the court to begin the eminent domain process under Section 302 of the Eminent Domain Code, 26 Pa. C.S. § 302. PAWC must file its Plan with the Secretary’s Bureau at this Docket Number, and provide a copy to the Bureau of Technical Utility Services, DEP, and all Parties in this litigation, within sixty days from the entry date of this Opinion and Order. DEP and any Party may submit comments regarding the Plan within thirty days of receipt of the Plan.

We additionally direct that, within its Plan, PAWC shall submit information about the manner in which it intends to recover the costs of the improvements it will make to bring the CTSC system into compliance, which it currently estimates will be about $6.5 million in capital investment, as well as any other pertinent financial information, including whether PAWC will apply for a loan from the Pennsylvania Infrastructure Investment Authority (PENNVEST) to fund the improvements.
Furthermore, PAWC’s Plan should address whether or not PAWC plans to switch the Marcel Lake Estates customers from flat rates to metered rates.\(^{13}\)

**F. Section 1501 of the Code**

1. **ALJ’s Recommendation**

   The ALJ’s second Conclusion of Law states that CTSC is in violation of Section 1501 of the Code, 66 Pa. C.S. § 1501.

2. **Exceptions**

   CTSC excepts to Conclusion of Law No. 2 and states that similar Commission conclusions in the *Sutter* proceeding and the *CTSC Rate Proceeding* are on appeal to the Commonwealth Court. CTSC opines that, if the Commission deems it necessary to address Section 1501, that the language found in Finding of Fact No. 1, acknowledging the Commission’s prior conclusions in *Sutter* and the *CTSC Rate Proceeding* should be used. CTSC Exc. at 2. CTSC further submits that the Commission should also acknowledge, consistent with the Joint Stipulation, that the Commission’s conclusions in those proceedings are on appeal and pending before the Commonwealth Court. CTSC Exc. at 2-3. See R.D. at 8-9; Joint Stipulation, ¶¶ 1, 2 and 3. CTSC submits that factual acknowledgment of the Commission’s prior Section 1501 conclusion and CTSC’s pending appeals would support a Commission decision to move forward with this Section 529 proceeding. CTSC Exc. at 3.

\(^{13}\) In the *Sutter* Order at 25, we directed that the conversion of CTSC’s flat rates to metered rates for sewer service be reviewed within the context of this Section 529 investigation.
In reply, the OCA explains that, in the course of reaching her recommendation that I&E met its statutory burden of establishing a *prima facie* case that the acquisition of CTSC would be in the public interest, the ALJ concluded as a matter of law that CTSC was in violation of Section 1501 of the Code. OCA R.Exc. at 3; R.D. at 8-9, 20; Conclusion of Law No. 2. Additionally, the OCA states that the ALJ’s conclusion that CTSC continues to violate Section 1501 is supported by the evidence in this proceeding, independent of and without reliance on the Commission’s orders in *Sutter* and the *CTSC Rate Proceeding*. OCA R.Exc. at 4; OCA Brief at 5-7; R.D. at 20. The OCA submits that the complete evidentiary records from those proceedings have been made part of the evidentiary record in this Investigation Docket, Tr. at 121-124, along with the Joint Stipulation entered into the record at the evidentiary hearing on November 15, 2011. OCA R.Exc. at 4.

With regard to the service provided to customers, the OCA contends that the evidence shows that CTSC has made no capital improvements to its system since 2005 and, thus, there has been no capital invested that would address the conditions contributing to overflows at the sewage pumping stations.14 Regarding availability customers, CTSC still has no approved plan in place to lift the moratorium on new service connections and remains unable to provide service to availability customers. OCA R.Exc. at 4; Joint Stipulation at 4-6, ¶¶ 7-9. Accordingly, the OCA believes the evidence shows that nothing has changed since the close of the record in the *Sutter* and *CTSC Rate Proceeding* cases with regard to the quality of service received by CTSC’s customers. OCA R.Exc. at 4. Further, the OCA notes that it is not likely that CTSC will provide continued future service where the Company has asserted that, due to the Township’s denial of its April 2011 planning module and the Commission’s denial of its proposal to recoup from current customers the revenues it is prohibited from charging its

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14 Joint Stipulation at 7, ¶10; *CTSC Rate Proceeding*, OCA St. 1 at 14-15, OCA St. 2 at 4-5; *see also, Sutter*, Tr 2. at 711-14 (Fought); Gatto Exh. 2 at 3.
availability customers, CTSC does not have funds to continue operations in 2012. OCA R.Exc. at 4; Joint Stipulation at 8, ¶¶ 12, 13.

The OCA further submits that the Commission should reject CTSC’s request that it acknowledge, consistent with the Joint Stipulation, that the Commission’s conclusions in Sutter and the CTSC Rate Proceeding are on appeal before the Commonwealth Court. OCA R.Exc. at 4. The OCA states that the existence of the appeals is addressed throughout the record, is explicitly stated in the Recommended Decision and Joint Stipulation, and is a matter of public record. OCA R.Exc. at 4-5; R.D. at 2, n.4, and 4, n.6; Joint Stipulation at 3, 4; 1146 C.D. 2009; 938 C.D. 2010.

3. Disposition

As the Parties have discussed throughout this proceeding, we found in the Sutter proceeding that CTSC violated Section 1501 because the moratorium on new connections rendered it unable to provide reasonably continuous and uninterrupted service to its availability customers. Sutter at 14-15. We also found that CTSC violated Section 1501 due to overflows from its manholes and sludge tanks. Id. at 17. Subsequently, in the CTSC Rate Proceeding, we additionally found that CTSC had provided inadequate and unreasonable service to its customers and, therefore, it failed to meet the quality and quantity of service that would have justified a rate increase. CTSC Rate Proceeding at 21. These are valid and enforceable Commission Orders that have not yet been addressed on appeal.15

15 Rule 1701(b)(2) of the Pennsylvania Rules of Appellate Procedure, Pa. R.A.P. § 1701(b)(2), provides that, after an appeal is taken, the government unit may enforce any order entered in the matter that has not been superseded pursuant to Rule 1701. As our Orders have not been superseded within the meaning of Rule 1701, we may continue to rely upon and enforce them.
We find that our decisions in these cases, as well as the independent evidence here which indicates, among other things, that the moratorium is still in effect, as the Parties have addressed in their Joint Stipulation, provide ample support for a finding under Section 529(a)(1) without the need to make an independent conclusion in this proceeding that CTSC is in violation of Section 1501. We agree with CTSC that the language found in Finding of Fact No. 1, acknowledging the Commission’s prior conclusions in Sutter and the CTSC Rate Proceeding, as well as the language in the Joint Stipulation, is sufficient. We are concerned that making an independent finding relating to Section 1501 in this case may be inconsistent with Rule 1701(a) of the Rules of Appellate Procedure, Pa. R.A.P. § 1701. Accordingly, CTSC’s Exception on this issue is granted, and the Recommended Decision is modified with regard to Conclusion of Law No. 2.

G. Sewage Overflows and the Service Connection Moratorium

1. ALJ’s Recommendation

In the Initial Decision, the ALJ stated that CTSC was found to be in violation of Section 1501 of the Code as described in paragraphs one and two of the Joint Stipulation. She explained that CTSC has a history of sewage overflows into roadways which is neither safe, adequate, nor reasonable and, therefore, violates the safety and reasonableness of service to its customers required by Section 1501 of the Code. The ALJ also noted that CTSC has had a moratorium against new hookups since 2005, and certain Marcel Lake Estates customers cannot use their property because of the

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16 Rule 1701 provides as follows: “Except as otherwise prescribed by these rules, after an appeal is taken or review of a quasijudicial order is sought, the trial court or other government unit may no longer proceed further in the matter.” We are of the opinion, however, that any findings in this case relating to Section 529 are appropriate because Section 529 is not the subject of any of the appeals. See, Pa. R.A.P. § 1701(c).
moratorium. The ALJ concluded that, because CTSC has not provided reasonably continuous and uninterrupted service to its availability customers, Section 529(a)(1) was satisfied.

2. Exceptions

CTSC excepts to that part of the ALJ’s discussion of Section 529(a)(1) concerning sewage overflows and the service connection moratorium. CTSC Exc. at 3; R.D. at 9. CTSC disagrees with the ALJ’s statement that CTSC has a history of sewage overflows into roadways and submits that the statement is not supported by the record. CTSC Exc. at 3. CTSC asserts that sewage overflows into roadways would be a matter of concern to DEP and, as previously noted, CTSC has not had a notice of violation from DEP since March 2006. CTSC Exc. at 3; Joint Stipulation at ¶ 5. Further, as noted by CTSC, DEP testified that it was not aware of any major problems in the CTSC system, which CTSC believes supports it position. CTSC Exc. at 3; Tr. at 203-204. CTSC also opines that a characterization of the CTSC system as having a history of sewage overflows into roadways should not be part of the Commission’s Opinion and Order in this matter. CTSC Exc. at 3.

In reply, the OCA states that the ALJ’s statements and conclusions are fully supported by the record in this proceeding, which also encompasses the evidence provided during the last four years by customers and expert witnesses to the Commission. OCA R.Exc. at 5. The OCA also avers that testimony by the DEP witnesses called by CTSC in this and prior cases establishes that DEP’s primary enforcement responsibility is wastewater treatment plants, not collection systems. OCA R.Exc. at 6; Tr. at 203. Additionally, the DEP water quality specialist responsible for inspecting CTSC’s system has never inspected its collection system or pumping stations. OCA R.Exc. at 6; CTSC Rate Proceeding Tr. 2 at 29, 38, 45. Likewise, the DEP Water Program Manager,
Ms. Crowley, testified: “I can’t give you a lot of specifics. I don’t inspect the facility. And I’ll be quite honest with you. I’ve never even been to this facility.” OCA R.Exc. at 6; CTSC Rate Proceeding, Tr. 2 at 45.

According to the OCA, the evidence regarding CTSC’s history of sewage overflows is further demonstrated by PAWC’s assessment that, upon acquisition of the system, it would be required to upgrade the gravity collection system to prevent the overflow problems that were the precursors to this proceeding. OCA R.Exc. at 7; PAWC Exc. at 14, 15; PAWC Brief at 6-9; Tr. at 185. Specifically, PAWC recommended replacing the gravity collection system with a low-pressure sewer system to prevent overflows with an estimated cost of $6 million. OCA R.Exc. at 7; PAWC St. 1 at 4. Thus, the OCA contends that CTSC has failed to rebut the evidence supporting CTSC’s history of sewage overflows into roadways and, accordingly, the OCA submits that this Exception should be denied. OCA R.Exc. at 7.

3. Disposition

In reading the Recommended Decision in its full context, we believe that the ALJ was discussing the findings that we had previously made in the Sutter proceeding, as well as some of the evidence in this proceeding, to reach a conclusion under Section 529(a)(1). In this portion of the Recommended Decision, the ALJ did not reach any independent conclusions relating to Section 1501 or other issues that are on appeal. As such, we find her analysis appropriate. Accordingly, we shall deny this Exception.
H. Appointment of a Receiver

1. Exceptions

In its Exceptions, PAWC avers that the Commission should order an alternative remedy: the appointment of a receiver under Section 529(g). PAWC believes that, as a matter of fact and law, the requirement of Section 529(a)(6) that the acquisition not result in an unreasonable rate increase to preacquisition customers of the acquiring utility may preclude a non-negotiated acquisition of a wastewater system because of the relatively small scale of wastewater services provided by public utilities in Pennsylvania. PAWC Exc. at 15-16. PAWC states that the Recommended Decision fails to consider this issue, and PAWC urges the Commission to address the reality that the scale of Pennsylvania public utilities’ wastewater service customer bases may dictate a different approach to acquisitions under Section 529 than may be deemed reasonable for public water supply systems. Id. at 16.

Furthermore, PAWC states that, while ordering a system takeover through condemnation may be an unworkable solution in this particular context, the Commission has at its disposal a much more viable solution that may be readily implemented. PAWC notes that Section 529(g) empowers the Commission to forego the recommendation of ordering an acquisition by eminent domain and instead appoint a receiver to (1) manage the wastewater utility for the benefit of its existing customers and (2) supervise the sale of the system to a suitable purchaser. According to PAWC, the CTSC system requires continuity of operations and needs to end up in the hands of an entity that can acquire it for an ascertainable price that will not cause an unreasonable rate shock to customers. Id. Given the fatal flaws associated with an eminent domain proceeding, a much more reasonable solution exists in the appointment of a receiver. Id. at 16-17.
I&E’s position is that the ALJ's recommendation should be adopted by the Commission to the extent that it orders PAWC to acquire CTSC by eminent domain, and PAWC’s suggestion that the Commission appoint a receiver should be rejected. I&E R.Exc. at 2, 3.

CTSC does not agree with PAWC’s request that the Commission appoint a receiver for CTSC. CTSC does not characterize this as an Exception but, rather, as a request improperly presented for the first time at the Exception stage of the proceeding. As such, CTSC believes that the request to appoint a receiver should not be considered. CTSC explains that, substantively, the request is an attempt by PAWC to avoid the eminent domain process required by the clear and unambiguous language of Section 529(e). CTSC R.Exc. at 7.

CTSC further excepts to PAWC’s suggestion because the Commission has no authority under Section 529(g) to enable the receiver to sell a system to a suitable purchaser in lieu of implementing the eminent domain process. According to CTSC, the determination of the acquisition price can only occur pursuant to Section 529(e) and the Eminent Domain Code. CTSC believes that, by asking the Commission to sidestep Section 529(e), PAWC is attempting to create a process that is both contrary to the statute and unconstitutional. Id.

OCA’s position is that the impact of the acquisition price on customers’ rates must be considered within the Section 529 investigation. Based on its reading of PAWC’s Exceptions, the OCA now believes that it may not be possible to structure an eminent domain order that conditions final approval of the acquisition by the Commission after the Commission has addressed all of the outstanding requirements of Section 529. OCA R.Exc. at 9. Barring a negotiated purchase price, the OCA agrees with PAWC that the appointment of a receiver to conduct a sale of the system and to operate the system in the interim would be an efficient means of accomplishing the
acquisition. *Id.* (citing *Pa. PUC v. Fairview Water Co.*, 1997 Pa. PUC LEXIS 71 (March 13, 1997)).\(^{17}\) It is the OCA’s opinion that, if the Commission appoints a receiver with the authority to conduct the sale, the Commission should not appoint PAWC to be the receiver. For the sale to be transparent and at arm’s length, it is necessary that the receiver be unaffiliated with PAWC. *Id.* at 10.

2. **Disposition**

We agree with CTSC that PAWC’s request has been improperly presented for the first time at the Exceptions stage of this proceeding. The only brief mention of the appointment of a receiver in this proceeding, prior to the Exceptions stage, was when the Parties represented in the Joint Stipulation that the appointment of a receiver would not resolve the moratorium and improve the collection system. Joint Stipulation at ¶ 20. We do not find it necessary to address this receivership issue based on PAWC’s request, as the issue is unrelated to the Findings of Fact and Conclusions of Law in the Recommended Decision and has not been developed as part of the record before us. It is axiomatic that this Commission must base its decisions on the evidence of record, and we are prohibited from looking beyond the record for evidence not previously supplied to support a desired finding of fact and/or conclusion of law.

Even if PAWC had properly presented the issue for our review, we do not believe that the appointment of a receiver is appropriate under the circumstances in this case. Section 529(g) provides the following:

\(^{17}\) In *Fairview*, the Commission exercised its authority under Section 529(g) to re-appoint a receiver, engineer and accountant to close the sale of Fairview Water Company to PAWC. The receiver had initially been appointed by the Court of Common Pleas, pursuant to an order by the Commission that was entered prior to enactment of Section 529.
(g) Appointment of receiver.—The commission may, in its discretion, appoint a receiver to protect the interests of the customers of the small water or sewer utility. Any such appointment shall be by order of the commission, which order shall specify the duties and responsibilities of the receiver.

66 Pa. C.S. § 529(g). Based on our review of this issue, we agree with the Parties’ statement in the Joint Stipulation that the appointment of a receiver will not resolve the moratorium and improve the collection system. In light of the record in this proceeding and the Parties’ statements in the Joint Stipulation, PAWC is unquestionably a capable utility that can operate and improve CTSC’s system to the benefit of CTSC’s current customers. Accordingly, directing PAWC to acquire CTSC and to begin to bring the sewage system into compliance serves interests of CTSC’s customers better than appointing a receiver.

As we have previously addressed, the express language of Section 529 provides clear direction to the Commission that, if CTSC and PAWC are unable to agree on the acquisition price, then we shall issue an order directing PAWC to acquire CTSC by following the eminent domain process. We are of the opinion that the eminent domain process is the process the legislature has required and intended for us to use to resolve an impasse regarding the acquisition price under the exact circumstances in this case. Accordingly, we shall deny the Exceptions of PAWC on this issue.

I. Refunds to Availability Customers

In our Order in the Sutter proceeding, we required that the refund of availability fees be addressed further in this Section 529 investigation. Sutter, supra, at 24. Although the ALJ did not address this issue in her Recommended Decision, both CTSC and the OCA addressed refunds of availability fees in this case and in the Sutter proceeding, the record for which has been incorporated into the record in this case. For
these reasons, we have determined that there is sufficient evidence to address this issue herein.

1. Positions of the Parties

CTSC, through its witness, acknowledged that it has experienced an approximately $150,000 annual reduction in revenue due to the Commission’s denial of availability fee billings. CTSC’s witness also testified that the company does not have the financial ability to make refunds of availability fees already billed and collected from customers. CTSC St. 1 at 10. Further, as presented in the Joint Stipulation, CTSC has been operating at a loss since 2001. Moreover, according to CTSC, not all customers billed for the availability charge were readily paying the charge. Accordingly, CTSC recommended that the Commission reject any request for refunds. It stated that, otherwise, it would be forced to file additional appeals and/or seek immediate bankruptcy protection while at the same time continuing to proceed with the instant Section 529 proceeding. *Id.* at 11.

In its testimony, the OCA stated that the availability fees paid by CTSC’s customers should be refunded based on the Commission’s decision in the *Sutter* proceeding which directed CTSC to stop charging availability fees to its customers. The OCA averred that the refunds should cover the time period from March 2005, the period from which service has not been available to the customers, through May 2009, the time of the Commission Order in *Sutter* directing CTSC to cease billing these customers. OCA St. 1 at 12.

The OCA also discussed the amount of potential refunds, which it has calculated to be $661,743. The OCA explains that, for the first three months of the moratorium, the rate charged to CTSC’s 367 availability customers was $34.15 per month. For the remaining forty-eight months of the moratorium, the rate increased to
$35.43 per month. *Id.* at 13. Over the fifty-three month period, each customer would have been billed $1,803.09 ($34.15 x 3 months + $35.43 x 48 months = $1,803.09). Thus, this amount per customer, times 367 customers, supports the $661,743 availability fee revenue allowed to be billed by CTSC during the moratorium period. *Id.*

The Township’s position is that any disbursement of funds should represent refunds to those customers who paid the availability fee between February 2005 and May 2009. Township Objection to Motion at ¶ 17.

2. **Disposition**

Based on our review of the record, the applicable law, and the positions of the Parties, we believe it is appropriate to issue refunds to CTSC’s availability customers under the circumstances in this case. The money for the refunds shall come from the acquisition proceeds, rather than from CTSC’s current operating revenue.

Pursuant to Section 1312(a) of the Code, 66 Pa. C.S. § 1312(a), we have the authority to order CTSC to issue refunds to its availability customers if we determine that the rates charged by CTSC were unjust or unreasonable or in violation of any of our
In the *Sutter* proceeding, we found that CTSC violated Section 1501 as to its availability customers because of the moratorium on new connections that had been in effect for a prolonged period. We determined that CTSC had failed to provide reasonably continuous and uninterrupted service to its availability customers, and, as such, it was not reasonable for CTSC to collect a stand-by charge. *Sutter* at 15. Accordingly, in that case, we directed CTSC to stop charging customers for stand-by service. *Id.* at 16. Based on our determination in *Sutter* that it was unreasonable for CTSC to collect availability fees, we find that we have the authority to direct CTSC to distribute refunds to its availability customers under Section 1312(a) of the Code.

We are also of the opinion that directing CTSC to distribute refunds to its availability customers is consistent with our prior decisions. We have previously ordered refunds of availability fees charged during a moratorium on new hookups. *See, Luckie v.*

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18 Section 1312(a) states the following:

(a) **General rule.**—If, in any proceeding involving rates, the commission shall determine that any rate received by a public utility was unjust or unreasonable, or was in violation of any regulation or order of the commission, or was in excess of the applicable rate contained in an existing and effective tariff of such public utility, the commission shall have the power and authority to make an order requiring the public utility to refund the amount of any excess paid by any patron, in consequence of such unlawful collection, within four years prior to the date of the filing of the complaint, together with interest at the legal rate from the date of each such excessive payment. In making a determination under this section, the commission need not find that the rate complained of was extortionate or oppressive. Any order of the commission awarding a refund shall be made for and on behalf of all patrons subject to the same rate of the public utility. The commission shall state in any refund order the exact amount to be paid, the reasonable time within which payment shall be made, and shall make findings upon pertinent questions of fact.
Clean Treatment Sewage Co., Docket No. C-892706 (Order entered December 17, 1992) (finding that refunds were appropriate because “when tariffed services cannot be provided due to a regulatory ban, the utility should not be allowed to charge for that service.”). We find this case to be distinguishable from Hobba v. Riviera Utilities Water Co., 1992 Pa. PUC LEXIS 65 (June 18, 1992), in which we declined to order refunds for availability fees charged by the sewer company. In Hobba, we found that refunds were not appropriate because the temporary moratorium on sewer connections was not an unreasonable interruption of service as it lasted only for approximately six months, and none of the lot owners applied for a building permit during that time. Additionally, we found that, without the availability fees, the company would not have been able to cover its operating expenses, and the revenues from the availability fees provided the funds to accomplish the improvements needed to lift the moratorium.

In this case, the availability customers have been without service for an extended and significant period of time because the moratorium began in March 2005, and is still in effect. There is also no evidence in this case that CTSC has used the availability fee funds to make improvements to its system. As such, it does not appear that the CTSC customers received any lasting benefits from the availability fees they paid, whereas it appears that the customers in the Hobba case did receive some benefits through improvements to the company’s system. We also find it significant that the money for the refunds in this case will not come from the current operating revenue of CTSC, but, rather, will come from the acquisition proceeds. For all of these reasons, we will direct CTSC to issue refunds, without interest, to its availability customers.

Specifically, we direct that, within sixty days of the entry of this Opinion and Order, CTSC shall provide all Parties with a list of all its customers who were charged an availability fee after the date the moratorium took effect, and the amount that each customer actually paid in availability fees after the date the moratorium took effect. Within ninety days of the date of a final, unappealable order in the eminent domain
proceedings ordered herein, CTSC shall refund amounts actually paid by each availability customer after the moratorium took effect, to the extent that funds are available from the acquisition proceeds. If the purchase price of the system is less than the amount of refunds due to availability customers, the refund paid to each availability customer shall be reduced on a pro rata basis. Within thirty days after all refunds are paid, CTSC shall so advise the Commission by filing a notice with the Secretary’s Bureau, at this Docket Number.

J. Motion of CTSC Re Security for New Capital Financing

1. Positions of the Parties

In its Motion, CTSC is requesting an order from the Commission directing that new capital financing, provided by the CTSC parent company, will be given first security in, and first repayment priority from, wastewater system sales proceeds. Motion at 1 and 4. In support of its Motion, CTSC states that, since 2009, it has been operating without the revenues formerly charged for availability of service, it has been participating in the instant Section 529 proceeding, and it has tried on several occasions to have the service moratorium lifted. Id. at 4. Further, as presented in the Joint Stipulation, CTSC has operated at losses of $300,629 and $311,625, in 2009 and 2010 respectively. Id., n 1. CTSC believes that an affirmative Commission order regarding its Motion would be consistent with the Commission’s comments in the CTSC Rate Proceeding and would be fair, just and reasonable given the effort made by, and continuing to be made by CTSC, to serve usage customers, lift the moratorium and participate in the Section 529 proceeding. Motion at 4-5.

In its Answer in Opposition to the Motion (Answer), the OCA opposes CTSC’s request because, in its opinion, the Motion fails to meet the requirements of the Commission’s prior orders involving CTSC or the requirements of Chapter 19 (relating to
securities) and Chapter 21 (relating to affiliated interest agreements) of the Code. OCA Answer at 3. Specifically, the OCA denies that CTSC’s efforts to lift the service moratorium or its cooperation with the instant 529 proceeding are consistent with the Commission’s prior directives. The OCA also notes that CTSC has not been able to have the service moratorium lifted and has not developed a capital improvement plan, nor updated its system since 2005. *Id.* at 5.

The OCA additionally states that Section 2102(a) of the Code, 66 Pa. C.S. § 2102(a),¹⁹ requires that loan agreements between affiliated interests (*i.e.* CTSC and its parent company) be approved by the Commission. The OCA notes that such agreements

¹⁹ Section 2102(a) provides the following:

(a) **General rule.**—No contract or arrangement providing for the furnishing of management, supervisory, construction, engineering, accounting, legal, financial, or similar services, and no contract or arrangement for the purchase, sale, lease, or exchange of any property, right, or thing or for the furnishing of any service, property, right or thing other than those above enumerated, made or entered into after the effective date of this section between a public utility and any affiliated interest shall be valid or effective unless and until such contract or arrangement has received the written approval of the commission. If such contract is oral, a complete statement of the terms and conditions thereof shall be filed with the commission and subject to its approval.
must also be reduced to writing and submitted to the Commission pursuant to Section 2102(b) of the Code, 66 Pa. C.S. § 2102(b). The OCA asserts that CTSC has not identified within the Motion its parent company or the written terms of any loan agreements for which it requests Commission approval. Id. at 5. The OCA submits that the Commission cannot permit a secured loan on utility plant, as requested in CTSC’s Motion, when the borrower and the lender are the same person, the President and majority stockholder of both CTSC and CTSC’s parent company. Id. at 6. Furthermore, the OCA believes that, if the Motion is viewed as a request to create a security interest in new equity infusions, CTSC’s Motion must be denied because it fails to meet the

20 Section 2102(b) provides the following:

(b) Filing and action on contract.—It shall be the duty of every public utility to file with the commission a verified copy of any such contract or arrangement, or a verified summary as described in subsection (a) of any such unwritten contract or arrangement. All such contracts and arrangements, whether written or unwritten, entered into prior to the effective date of this section and required to be on file with the commission by prior act and in full force and effect at the effective date of this section shall be subject to the provisions of the sections regarding affiliated interests. The commission shall approve such contract or arrangement made or entered into after the effective date of this section only if it shall clearly appear and be established upon investigation that it is reasonable and consistent with the public interest. … No such contract or arrangement shall receive the commission's approval unless satisfactory proof is submitted to the commission of the cost to the affiliated interest of rendering the services or of furnishing the property or service described herein to the public utility. No proof shall be satisfactory within the meaning of the foregoing sentence unless it includes the original (or verified copies) of the relevant cost records and other relevant accounts of the affiliated interest, or such abstract thereof or summary taken therefrom as the commission may deem adequate, properly identified and duly authenticated. The commission may, where reasonable, approve or disapprove such contracts or arrangements without the submission of such cost records or accounts.
requirements for issuance of securities by public utilities. *Id.* at 7 (citing 66 Pa. C.S. §§ 1901, 1902).

Moreover, the OCA asserts that, regardless of whether the amounts are treated as debt or equity infusions, it appears that the Motion seeks to move CTSC’s parent company and its majority shareholder to the top of the priority list for any distributions from the acquisition of CTSC by PAWC. It also asserts that, in addition to being contrary to law, CTSC’s Motion should be denied in order to protect the availability customers’ interest in possible refunds that could be distributed from the acquisition proceeds. *Id.* at 7, 8.

The Township’s Objection to the Motion characterizes the Motion as CTSC’s request that its parent company’s equity in CTSC be treated as debt owed to the parent company. Township Objection at ¶ 16. The Township also considers CTSC’s Motion to be inequitable because, if granted, it would reimburse CTSC for the denied recovery of availability fees. The Township further states that any disbursement of funds should represent refunds to those customers who paid the availability fee between February 2005 and May 2009. *Id.* at ¶ 17.

2. Disposition

Based upon our review of the Motion, the OCA’s Answer, the Township’s Objection, and the record established in this proceeding, we shall deny the Motion. We begin by noting that, in 2005, the Commission approved an Affiliated Interest Agreement (AIA) between CTSC and its parent company, Consolidated Pocono Utilities, Inc. (Consolidated Utilities). This AIA authorizes Consolidated Utilities to provide CTSC with, *inter alia*, managerial, operational, financial, administrative, and such other services as may be required by CTSC in its day-to-day operations. *See* Docket No. G-00041073, Secretarial Letter dated February 14, 2005. This AIA incorporates the provision of
operational and financial assistance needed by CTSC since 2005, and on a going forward basis.

We also note that the Motion does not cite any statute or case law clearly stating our authority to grant a first security in, and first repayment priority from, wastewater system sales proceeds. None of the other Parties to this proceeding have cited any such statute or case law, either. Even if we have such authority, we are not inclined to exercise it in this case. We will not give CTSC’s parent company a greater claim to the system’s sale proceeds than those customers who were unlawfully charged an availability fee after the moratorium went into effect.

III. Conclusion

We have reviewed the record as developed in this proceeding, including the Joint Stipulation, the ALJ’s Recommended Decision, the Exceptions and Replies to Exceptions thereto, and the Motion and the responses thereto. Based upon our review, evaluation and analysis of the record evidence, we shall grant, in part, and deny, in part, the Exceptions of CTSC, PAWC, and the OCA, and modify the ALJ’s Recommended Decision, consistent with this Opinion and Order. We have determined that the requirements of Section 529(a) of the Code have been satisfied, and that is it appropriate, based on the express language of Section 529(e) of the Code, to direct PAWC to acquire CTSC through the eminent domain process. We have also found that, consistent with our prior decisions, CTSC shall be ordered to distribute refunds to its availability customers under the circumstances in this case. Moreover, we shall deny CTSC’s Motion for the reasons stated herein; THEREFORE,
IT IS ORDERED:

1. That the Exceptions of Clean Treatment Sewage Company, the Pennsylvania-American Water Company, and the Office of Consumer Advocate are granted, in part, and denied, in part, consistent with this Opinion and Order.

2. That the Recommended Decision of Administrative Law Judge Ember S. Jandebeur, issued on January 31, 2012, is modified, consistent with this Opinion and Order.

3. That the Joint Stipulation Addressing the Requirements of Section 529(a) of the Public Utility Code submitted by Clean Treatment Sewage Company, the Bureau of Investigation and Enforcement, the Office of Consumer Advocate, the Pennsylvania-American Water Company, Aqua Pennsylvania, Inc., and Delaware Township on November 8, 2011, is accepted.

4. That Pennsylvania-American Water Company shall file its Plan for Improvements, pursuant to 66 Pa. C.S. § 529(j), with the Commission’s Secretary, at this Docket Number, and provide a copy to the Commission’s Bureau of Technical Utility Services, the Pennsylvania Department of Environmental Protection and all Parties to this proceeding, within sixty days from the entry date of this Opinion and Order. The Plan for Improvements shall include information about the manner in which Pennsylvania-American Water Company intends to recover the costs of the improvements it will make to bring the wastewater system owned by Clean Treatment Sewage Company into compliance, any other pertinent financial information, and information regarding whether or not Pennsylvania-American Water Company plans to switch the Marcel Lake Estates customers from flat rates to metered rates, consistent with this Opinion and Order.
5. That the Pennsylvania Department of Environmental Protection, or any Party to this proceeding, may submit comments regarding the Plan for Improvements within thirty days of receipt of the Plan.

6. That, following the Commission’s approval of the Plan described in Paragraph 4 above, Pennsylvania-American Water Company shall acquire the wastewater system owned by the Clean Treatment Sewage Company through the eminent domain process set forth in 26 Pa. C.S. §§ 101, et seq.

7. That Pennsylvania-American Water Company shall notify the Commission when it takes title to the wastewater system currently owned by the Clean Treatment Sewage Company.

8. That, upon receipt of the notification described in Paragraph 7, the Secretary’s Bureau shall issue a Certificate of Public Convenience to Pennsylvania-American Water Company pursuant to Section 1102(a)(1) of the Public Utility Code, 66 Pa. C.S. § 1102(a)(1), evidencing Commission approval to offer or furnish wastewater service to the public in the Clean Treatment Sewage Company service territory.

9. That, within ninety days of the date that a final, unappealable order is entered in the eminent domain proceedings referenced in Paragraph 5 above, Clean Treatment Sewage Company shall refund, without interest, amounts actually paid by its availability customers after the moratorium took effect. Refunds shall be disbursed from the proceeds of the sale of the wastewater system, consistent with this Opinion and Order.

10. That, within thirty days after all refunds are paid, as required by Paragraph 9, Clean Treatment Sewage Company shall so advise the Commission by filing a notice with the Secretary’s Bureau at this Docket Number.
11. That, upon receipt of the notification described in Paragraph 10, the Secretary’s Bureau shall issue a Certificate of Public Convenience to Clean Treatment Sewage Company, pursuant to Section 1102(a)(2) of the Public Utility Code, 66 Pa. C.S. § 1102(a)(2), evidencing Commission approval to abandon all customers and wastewater service to the public within the Clean Treatment Sewage Company service territory.

12. That the Motion of Clean Treatment Sewage Company Re Security for New Capital Financing, filed on January, 25, 2012, is denied, consistent with this Opinion and Order.

13. That any directive, requirement, disposition or the like contained in the body of this Opinion and Order that is not the subject of an individual Ordering Paragraph shall have the full force and effect as if fully contained in this part.

14. That upon the issuance of the Certificate of Public Convenience to Clean Treatment Sewage Company, described in Paragraph 11 above, the Secretary’s Bureau shall mark this proceeding closed.

BY THE COMMISSION,

Rosemary Chiavetta
Secretary

(SEAL)

ORDER ADOPTED: May 24, 2012

ORDER ENTERED: May 25, 2012