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Memorandum

Date: October 12, 2017

Re: Analysis of Existing Agreements;
Governance Structures; and Applicable
Laws that may Affect Restructuring Options
for the City of Pittsburgh and the Pittsburgh
Water and Sewer Authority

Statement of the Question

What agreements between the City of Pittsburgh (the “City”), the Pittsburgh Water and Sewer Authority (“PWSA”) and the Allegheny County Sanitary Authority (“ALCOSAN”); relevant governance provisions; and applicable laws may play a role in addressing potential restructuring options for the City and PWSA for the purpose of providing improved water and wastewater services within the City?

Synopsis of the Response

The City created PWSA pursuant to the Municipality Authorities Act. As such, PWSA is independent from the City. That said, the City and PWSA provide water and sewer services to the residents of the City in collaboration with each other pursuant to two agreements – a Capital Lease Agreement and a Cooperation Agreement, and these agreements control their respective rights and obligations in connection with the provision of such services. In addition, as set forth below, provisions of the Municipality Authorities Act may affect the relationship between the City and PWSA, as well as restructuring options involving ALCOSAN. Furthermore, depending on the chosen restructuring option, other laws may apply, as discussed below. Finally, precedent transactions in the Commonwealth may provide further guidance.

Background

As we have conducted our assessment of the question, we have focused on relevant agreements, governance provisions, and applicable laws, including:

- The City Charter
- PWSA Articles of Incorporation and By-laws
- The 1984 Lease to the Authority, designating the City as agent for purposes of operation of the system
- The 1995 Capital Lease Agreement, terminating the 1984 lease and setting forth the current dynamic between the City and the PWSA
- The 1995 Cooperation Agreement that terminated City agency
- The 2011 “First Amendment” to the Cooperation Agreement
- The 1955 Agreement between the City and ALCOSAN, subsequently assigned to the PWSA
- The 2004 “First Amendment” to the 1955 Agreement
- A Memorandum of Understanding dated October 17, 1996
- A Management Agreement dated October 18, 1996
- The Municipality Authorities Act
- Act 11 and Act 12
- Pennsylvania Trusts Law and Nonprofit Corporation Law

Entities Involved

Three public entities play central roles in the business of providing water and wastewater services to the City’s people and its commercial and other interests: the City itself, the PWSA, and ALCOSAN.

The City

The City was incorporated in 1816, and became a home rule community in 1976. As such, its powers are set forth in its Charter, which was adopted in 1976. Under the Charter, the City has all home rule powers and may perform any function and exercise any power not denied by the Constitution of the Commonwealth, the laws of the Commonwealth or the Charter. Under the Charter, the executive, administrative and law enforcement powers of the City are vested in the Mayor. The Charter establishes a “strong mayor” form of government in which the Mayor controls and has wide powers of appointment over the units of the City government, and has the power to initiate and veto legislation and to propose the City’s operating and capital budgets, to which proposals the City’s legislative body, the City Council, must react within a definite time period.

PWSA

The City created PWSA in 1984 pursuant to provisions of the Municipality Authorities Act. According to PWSA’s Articles of Incorporation, the City formed the PWSA to “acquire, hold, construct, improve, maintain, operate, own and lease, either as lessor or lessee, projects of the following kind and character: sewers, sewer systems or parts thereof, waterworks, water supply works and water distribution systems.” According to PWSA’s by-laws, the “officers of the

Authority shall be a Chairman, Vice Chairman, Secretary, Treasurer, Assistant Secretary-Treasurer, to be elected by the Board of the Authority from the members of said Board. Any number of offices may be held by the same person.” Articles of Amendment to PWSA’s Articles of Incorporation were approved in 2008, to extend the term of the existence of the Authority to 2045.

The Board of PWSA consists of seven (7) members with no fewer than six (6) members appointed by the Mayor of the City and approved by City Council. The terms of office of the members commence on the date of appointment, and the members serve staggered five (5) year terms from the first Monday in January next succeeding the date of appointment or until appointment of a successor, whichever is later.

Under the Municipality Authorities Act, PWSA constitutes an independent agency that is not expressly subject to the control of an incorporating municipality. See Vernon Township Water Authority v. Vernon Township, 734 A.2d 935 (1999).

ALCOSAN

ALCOSAN, which, similar to PWSA, was created pursuant to the Municipality Authorities Act in 1946, provides wastewater treatment services to 83 communities including the City. ALCOSAN is governed by a seven-member Board of Directors, three of which are appointed by the Mayor of the City, three of which are appointed by the Allegheny County Chief Executive, and one joint appointment. The City and ALCOSAN entered into an agreement in 1955 (subsequently assigned to the PWSA in 1995, as discussed further below), pursuant to which the City and ALCOSAN agreed that ALCOSAN would be the sole and exclusive agency to provide sewage treatment and disposal services to the City.

Water and Sewer System

The Water System consists of a 117 million gallon per day treatment plant, approximately 1,000 miles of mains and service lines, more than 25,200 valves, 7,450 fire hydrants, 12 pumping stations, one membrane filtration plant, five reservoirs, and 12 storage tanks. The total storage capacity of the reservoirs and tanks is approximately 455 million gallons.

The Sewer System is comprised of approximately 1,200 miles of sewer lines and four wastewater-pumping stations that serve all of the City’s residents. The average age of the sewer lines is between 60 and 70 years old, with some portions reaching nearly 150 years in age. As discussed above, the Sewer System conveys wastewater generated within the City boundaries to ALCOSAN’s wastewater treatment facility for processing prior to discharge. The Sewer System also is utilized by 24 suburban municipalities pursuant to agreements with the City and/or the PWSA to convey their wastewater to the ALCOSAN treatment facility.

Agreements

In 1984, the City leased the Water and Sewer System to PWSA pursuant to a Lease and Management Agreement. Under this agreement, PWSA assumed responsibility for establishing and collecting user fees and charges and for maintaining and improving the Water and Sewer System. This agreement also provided that the Water and Sewer System would be operated and

maintained for PWSA by the City as PWSA's designated agent to perform such services, subject to the general supervision of PWSA.

In 1995, PWSA and the City terminated the Lease and Management Agreement and its agency relationship, and entered into a Capital Lease Agreement. The Capital Lease Agreement, which has a term of 30 years, provided for payments totaling approximately \$101 million, which payments were made to the City during the initial three years of the Capital Lease Agreement. This agreement further provides that in 2025, upon payment of one dollar, PWSA will acquire title to the Water and Sewer System.

In 1995, the City and PWSA also entered into a Cooperation Agreement, pursuant to which the City provides certain specified engineering, communications, vehicle maintenance, legal, information and financial services to PWSA on a fee for services basis and PWSA makes certain other payments to the City to reimburse it for costs and capital expenses incurred by the City in regard to the operation and maintenance of the Water and Sewer System. Under the terms of the Cooperation Agreement, City water department employees became employees of PWSA. As a result, PWSA assumed various personnel-related obligations from the City's water department. The amount of the annual payment currently under the Cooperation Agreement is \$7.15 million paid in quarterly payments. The City and PWSA entered into a "First Amendment to Cooperation Agreement" in 2011, pursuant to which they amended required services between them to reflect operating realities and pursuant to which they agreed to negotiate and enter into a fully amended Cooperation Agreement.

Finally, as mentioned above, the City and ALCOSAN entered into an agreement in 1955 (subsequently assigned to PWSA in 1995, pursuant to the 1995 Capital Lease Agreement), pursuant to which the City and ALCOSAN agreed that ALCOSAN would be the sole and exclusive agency to provide sewage treatment and disposal services to the City.

These agreements, and potentially pertinent provisions thereof, are discussed in further detail below:

The Capital Lease Agreement

Section 6(C) provides: "During the term of this Lease, Lessor covenants not to assign, sell, convey or transfer any right, title or interest in or to the Leased Property or create, incur, assume or suffer to exist, directly or indirectly, any lien, encumbrance or security interest of any kind on the Leased Property, other than the encumbrances set forth on Exhibit D hereto or other encumbrances existing as of the Effective Date that do not materially detract from the value or interfere with the present use of any of the Leased Property or otherwise materially impair its intended use." (emphasis added).

- Section 2(A) defines "Leased Property" as: "(i) the entire network of water and sewage transmission pipelines as detailed on the Lessee's engineering maps, all water storage facilities (collectively the 'System') and certain land and buildings (the 'Real Property'), both the System and the Real Property are more fully described on Exhibit A hereto, (ii) all fixtures relating to the Real Property, (iii) all equipment used in connection with or related to the operation of the System (the 'Equipment'), (iv) all water and sewage transmission pipelines dedicated by builders or developers subsequent to the Effective Date and all assets associated with or used in connection with such pipelines, (v) all spare

parts wherever located and used in connection with the operation of the Equipment, and (vi) all inventory used in connection with the operation of the Equipment; provided, however, that the Leased Property shall not include the assets set forth on Exhibit B hereto.”

To the extent a restructuring option entails a lease or sale of the Water and Sewer System, Section 6(C) likely will have to be addressed. Pursuant to Section 18(b)(i), however, this provision may be waived. Section 18(b)(i) provides: “(i) The Lessor or the Lessee may, by written notice to the other . . . (iii) waive compliance with any of the covenants of the other contained in this Lease; and (iv) waive or modify performance of any of the obligations of the other.”

With respect to any potential amendment of the agreement, Section 18(b)(ii) further provides, in pertinent part: “This Lease may be amended, modified or supplemented only by a written instrument executed by all the parties hereto.”

With respect to maintenance and repair obligations, Section 12 provides: “The Lessee shall at all times maintain the Leased Property in as good condition as it is in on the date hereof, ordinary wear and tear excepted. The Lessee shall take every other action necessary or appropriate for the preservation and safety of the Leased Property. The Lessee shall promptly make all alterations of every kind and nature, whether foreseen or unforeseen, which may be required to comply with the foregoing requirements of this Paragraph 12 or any authority having jurisdiction over the Lessee or the Leased Property.”

To the extent an internal improvement restructuring option is chosen, in order to bolster the City’s enforcement powers, this section should be amended, in accordance with Section 18(b)(ii) and in conjunction with an amendment to the Cooperation Agreement, as further discussed below, to provide the City with oversight responsibilities and powers to enforce heightened performance standards.

The Cooperation Agreement

This agreement, as discussed above, terminated the agency relationship between the City and the Authority, which had been established pursuant to the 1984 Lease and Management Agreement. Pursuant to the 1995 Cooperation Agreement, PWSA assumed “sole responsibility and prerogative for management and operation of the System and all risks attenuated thereto.” The Cooperation Agreement may be terminated by either party, upon ninety (90) days written notice, provided that the City must assume all liabilities and obligations of PWSA upon its initiation of termination.

The Cooperation Agreement further provides that “The City and the Authority shall cooperate with each other to the end that reasonable and adequate service shall be provided to customers of the system,” and that the “agreement may be amended in any respect by mutual written agreement of the parties.”

In the spirit of cooperation, as expressly set forth in the Cooperation Agreement, both the Capital Lease Agreement and the Cooperation Agreement should be amended to bolster the City’s oversight responsibilities and powers to enforce heightened performance standards to “the end that reasonable and adequate service shall be provided to customers of the system.”

The 1955 Agreement with ALCOSAN

The City, and subsequently PWSA, relies on ALCOSAN to provide wastewater treatment pursuant to this 1955 agreement, which was assigned to PWSA pursuant to Section 2(b) and Exhibit A of the 1995 Capital Lease Agreement. In 2004, the PWSA and ALCOSAN executed a first amendment to the 1955 agreement whereby PWSA elected to change the billing structure. Effective May 2004, PWSA began direct billing City residents for current and delinquent wastewater treatment charges and remitting to ALCOSAN the aggregate amount of service charges billed.

Section 7 of the 1955 Agreement provides: “The City covenants and agrees, that [ALCOSAN] shall be the sole and exclusive agency, during the entire life of this agreement, to provide sewage treatment and disposal services to the City or to such portion thereof as may be within the service area of the Sewage Disposal System and to all its water users therein who or which discharge sewage or wastes into the City’s sewerage system. The City hereby permits and authorizes [ALCOSAN] to impose upon and collect from all such water users the prevailing Project Z rates for sewage service, and covenants to perform all the acts and discharge all the duties and obligations imposed it by this agreement. The City further covenants that, it will not itself engage in the business of providing sewage treatment and disposal service to such water users, nor will it authorize or permit any other agency, public or private, to do so in competition with or in substitution for [ALCOSAN].” (emphasis added).

Section 9 of the 1955 Agreement provides: “The City covenants that during such time as sewage service rates or charges of [ALCOSAN] are in effect, the City will not impose upon any person, firm or corporation, or upon any property, any rental, rate or charge whatever for the use of or for the privilege of using any City sewer connected with the Sewage Disposal System, to the end that no person, firm or corporation shall be subject to both [ALCOSAN’s] sewage service rates or charges, as herein provided, and a City sewer rental, rate or charge of any kind whatever excepting general real estate taxes, sewer connection and street opening permit or license fees, and special assessments imposed according to law upon property benefited by the construction of additional sewers, and excepting charges imposed on other municipalities for the joint use, maintenance or repair of a City sewer or sewers.”

Section 18 of the 1955 Agreement addresses the term of the agreement, and provides: “This agreement shall become effective immediately, and shall remain in full force and effect until the date of expiration of the legal existence of [ALCOSAN] or until the expiration of one calendar year following the payment in full of all bonds, notes and other obligations of [ALCOSAN], original and refunding, issued by it to finance the construction, replacement, maintenance and operation of the Sewage Disposal System and the Upper Allegheny System and additions thereto, whichever date shall be later.”

The above provisions will have to be addressed in some fashion in the event some form of public-private partnership restructuring option is chosen.

Municipality Authorities Act

As discussed above, PWSA and ALCOSAN were created pursuant to the Municipality Authorities Act (the “Act”), and they derive their powers therefrom and are subject to governance provisions contained therein. Several provisions of the Act may affect the contemplated restructuring options.

Power to Sell or Lease Property

Section 5607 provides that municipal authorities, such as the PWSA and ALCOSAN, are authorized to:

“acquire, purchase, hold, lease as lessee and use any franchise, property, real, personal or mixed, tangible or intangible, or any interest therein necessary or desirable for carrying out the purposes of the authority, and to sell, lease as lessor, transfer and dispose of any property or interest therein at any time acquired by it.” 53 Pa.C.S. § 5607(d)(4) (emphasis added).

Construing identical language from a previous version of the Act, one court observed that the “plain and ordinary language of the Municipal Authorities Act specifically authorizes a municipal authority to convey any and all property without limitation . . . If the legislature intended to limit an authority’s power to convey its property it would not have used such expansive language.” County of Allegheny v. Moon Township Municipal Authority, 543 Pa. 326, 333 (1996) (emphasis added).

Moreover, Sections 5607(13) and (14) further provide that an Authority has the power:

“(13) To make contracts of every name and nature and to execute all instruments necessary or convenient for the carrying on of its business.

(14) Without limitation of the foregoing, to borrow money and accept grants from and to enter into contracts, leases or other transactions with any Federal agency, the Commonwealth or a municipality, school district, corporation or authority.”

Accordingly, it appears PWSA and ALCOSAN have the statutory power to sell or lease their respective interests in their assets to a private entity or another public entity, if one of those restructuring options is ultimately chosen.

ALCOSAN Lease or Acquisition

Furthermore, ALCOSAN would be statutorily authorized to acquire the Water and Sewer System assets pursuant to Section 5607, insofar as that section provides that a municipal authority may “acquire, purchase, hold, lease as lessee and use any franchise, property, real, personal or mixed, tangible or intangible, or any interest therein necessary or desirable for carrying out the purposes of the authority.”

In addition, Section 5613 of the Act expressly authorizes the transfer of existing facilities to an authority, providing, in pertinent part:

“Any municipality, school district or owner may sell, lease, lend, grant, convey, transfer or pay over to any authority with or without consideration any project or any part of it, any interest in real or personal property, any funds available for building construction or improvement purposes, including the proceeds of bonds previously or hereafter issued for building construction or improvement purposes, which may be used by the authority in the construction, improvement,

maintenance or operation of any project. Any municipality or school district may transfer, assign and set over to any authority any contracts which may have been awarded by the municipality or school district for the construction of projects not initiated or completed”

Municipal Takeover

A municipality that creates a municipal authority may unilaterally act to take over an authority project, without approval of an authority’s board. Section 5622(a) provides that:

“[i]f a project established under this chapter by a board appointed by a municipality is of a character which the municipality has power to establish, maintain or operate and the municipality desires to acquire the project, it may by appropriate resolution or ordinance adopted by the proper authorities signify its desire to do so, and the authorities shall convey by appropriate instrument the project to the municipality upon the assumption by the municipality of all the obligations incurred by the authorities with respect to that project.”

In Clearfield Borough v. Clearfield Borough Park Authority, 285 A.2d 532 (1971), the court addressed identical language from a previous version of the Act. In Clearfield, a borough passed a resolution expressing its desire to acquire an authority’s property and demanded conveyance of such property to the borough. The authority there at issue objected, arguing that it, too, was required to adopt a resolution approving the transfer of the project property before the municipality could acquire it. Addressing the issue, the court held that the conveyance to the municipality was proper without adoption of a resolution by the authority. The court noted that there was no requirement that the authority itself authorize the transfer of the subject property. Citing the previous version of the Act, the court observed that a municipality may, by ordinance, impose upon an authority the duty of executing the necessary documents for a transfer of all of the authority’s property to its creating municipality. See also Forward Township Sanitary Sewage Auth. v. Township of Forward, 654 A.2d 170 (1995) (citing Clearfield to hold same).

Termination of an Authority

The Act further outlines provisions for the termination of an authority. Section 5619 of the Act provides that when “an authority has finally paid and discharged all bonds, with interest due, which have been secured by a pledge of any of the revenues or receipts of a project, the authority may, subject to agreements concerning the operation or disposition of the project, convey the project to the municipality creating the authority” That section further provides that when an “authority has finally paid and discharged all bonds issued and outstanding and the interest due on them and settled all other outstanding claims against it, the authority may convey all its property to the municipality or municipalities”

Additional Legal landscape

Act 11 and Act 12

In connection with a potential sale of the Water and Sewer System, Act 11 and Act 12 may play a role. These acts, as further described below, have made acquiring water and wastewater assets much more attractive for private utilities in the Commonwealth.

Act 11

Act 11 of 2012 allows private investor-owned utilities that acquire sewer systems to spread the cost of capital improvements over their entire rate base in the Commonwealth of both water and sewer customers. The Act allows such utilities to petition the Public Utility Commission (“PUC”) for approval to implement a Distribution System Improvement Charge (“DSIC”). The DSIC must be designed to provide for “the timely recovery of the reasonable and prudent costs incurred to repair, improve or replace eligible property in order to ensure and maintain adequate, efficient, safe, reliable and reasonable services.” 66 Pa.C.S. § 1353 (a).

The petition must contain the following elements: (1) initial tariff; (2) testimony and exhibits to demonstrate that the DSIC will ensure the provision of adequate, efficient, safe, reliable and reasonable service; (3) long-term infrastructure plan; (4) certification that a base rate case has been filed within the past 5 years; and (5) any other information required by the PUC. Moreover, the petition must demonstrate that granting the petition and allowing the DSIC to be charged will accelerate the replacement of infrastructure.

Act 12

Act 12 allows for the rate base of a selling public entity to be incorporated into the rate base of the buyer during the buyer’s next base rate case or its initial tariff filing. The rate base to be incorporated will be the lesser of the purchase price or the fair market value of the seller. If the seller and buyer do not both agree to use the Act 12 valuation process, the buyer must continue to use the traditional depreciated original cost valuation process for ratemaking purposes. Act 12 is applicable only where the seller is a “water or wastewater company located in this Commonwealth, owned by a municipal corporation or authority that is being purchased ... as the result of a voluntary arm’s-length transaction.”

If both parties to the transaction agree, then the seller and the buyer will each select a “utility valuation expert” from a list to be selected and maintained by the PUC. The utility valuation experts will each perform an independent appraisal of the seller for the purpose of establishing its fair market value. The appraisals will employ cost, market and income approaches.

Act 12 provides that the “fair market value of the selling utility is the average of the two utility valuation expert appraisals.”

Charitable Trust / Nonprofit Organization

Pursuant to 20 Pa.C.S. § 7735, a “charitable trust may be created for the relief of poverty, the advancement of education or religion, the promotion of health, governmental or municipal purposes or other purposes the achievement of which is beneficial to the community.” (emphasis added). This is similar to such purposes in Indiana pursuant to which Citizens Energy Group was created. See *Emmert v. Union Trust Co.*, 86 N.E.2d 450, 452 (Ind. 1949) (finding that charitable purposes include: education, religion, health, relief of suffering, assistance to establish for life, erecting and maintaining public buildings, and lessening burdens.). Such a trust may be created by “written declaration, signed by or on behalf and at the direction of the owner of property . . . that the owner holds identifiable property as trustee.” *Id.* § 7731.

As soon as money or property is donated or committed to a charitable purpose, the Attorney General is empowered to act on behalf of the public's interest to ensure it is duly administered, including the assets held by nonprofit organizations formed for charitable purposes. The Pennsylvania Orphans' Court has jurisdiction over property committed to charitable purposes under Rule 2156 of the Pennsylvania Rules of Judicial Administration. The Nonprofit Law provides that charitable assets may not be diverted from the purposes for which they were donated, granted or devised without obtaining an order from the Orphans' Court specifying the disposition of the assets. 15 Pa. C.S.A. § 5547(b).

Section 5547 also expressly authorizes charitable nonprofit corporations to receive and hold property in trust, providing:

“Every nonprofit corporation incorporated for a charitable purpose or purposes may take, receive and hold such real and personal property as may be given, devised to, or otherwise vested in such corporation, in trust, for the purpose or purposes set forth in its articles. The board of directors or other body of the corporation shall, as trustees of such property, be held to the same degree of responsibility and accountability as if not incorporated, unless a less degree or a particular degree of responsibility and accountability is prescribed in the trust instrument, or unless the board of directors or such other body remain under the control of the members of the corporation or third persons who retain the right to direct, and do direct, the actions of the board or other body as to the use of the trust property from time to time.”

Further, as discussed above, Section 5607 of the Municipality Authorities Act provides that municipal authorities authorized to convey any and all property without limitation. With these broad provisions, therefore, there would appear to be no legal impediment to the creation of a charitable public trust and the transfer of the Water and Sewer System to such trust/nonprofit corporation.

Other transactions in the Commonwealth

Several precedent transactions have taken place in the Commonwealth in recent years. None of them are of the size and scope of what the City faces, but they are nevertheless instructive.

City of Allentown

In 2013, the City of Allentown leased its water and sewer system to the Lehigh County Authority, which was formed by the County of Lehigh in 1966 pursuant to the Municipality Authorities Act. LCA is a nonprofit, public agency, with its activities and services funded solely through revenues from its water and wastewater customers, and with its rate-making practices governed by the Municipality Authorities Act. This transaction involved a 50-year lease in exchange for a \$212 million upfront payment.

Although there were no legal impediments to consummation of this deal, Allentown and the LCA are currently in a dispute, with LCA alleging that, historically, Allentown was overcharging other municipalities for wastewater services, so that the accuracy of the data provided during the solicitation process was incorrect and allegedly harmed LCA after closing when it began correctly

calculating these charges. Because LCA cannot charge for inflation, the rates to the municipalities have gone down by 30% since the concession and allegedly is harming LCA.

Interestingly, in connection with this transaction, the PUC issued an opinion letter indicating that long-term leases to private entities would not fall under its jurisdiction.

Borough of Middletown

In 2014, the Borough of Middletown agreed to lease out its water and sewer systems to a partnership of private companies—United Water (now Suez) and financial partner KKR & Co. L.P.—for 50 years. Under the lease, Middletown received an up-front payment of \$43 million, and will receive substantial annual lease payments thereafter during the term of the lease. Although the Middletown Borough Authority owned the water and sewer assets and leased them to the Borough, the parties were able to agree to the terms of the lease with the private companies, with conveyance of the assets and approval by the Authority of a certificate that authorized the Borough to terminate the authority, in accordance with the Municipality Authorities Act.

City of Scranton

As discussed above, in December 2016, the Scranton Sewer Authority, another authority created under the Municipality Authorities Act, closed on a \$195 million sale of the Authority's wastewater system to Pennsylvania American Water Co. The agreement, which has been mired in controversy due to perceived excessively high legal fees with lower than expected returns to the City, ultimately received approval by the PUC after it was initially rejected. In approving the sale, the PUC delayed deciding whether Pennsylvania American may spread the costs of acquiring and upgrading the wastewater system among all its customers statewide. The PUC left that decision to Pennsylvania American's next rate case. In addition, in June 2017, Scranton City Council voted to approve a request for the Pennsylvania Attorney General to investigate the sale.

Conclusion

Based on all of the above, there is significant legal authority for the City and PWSA to pursue the various restructuring options under consideration, provided a certain amount of cooperation can be achieved. With respect to any conveyance possibilities, it must be observed that the City still owns the Water and Sewer System Assets; PWSA leases them from the City. Thus, any transfer of interest in those assets will require coordination between the City and PWSA. That said, although PWSA is independent from the City, provisions of the Municipality Authorities Act and the Cooperation Agreement provide the City with a certain amount of control over PWSA. A potential workable structure, in a conveyance scenario (whether by sale or lease), may entail both PWSA and the City transferring their respective interests to an acquiring entity, depending on the chosen structure.

Given PWSA's broad powers under the Municipality Authorities Act, another option may be for the City to fully transfer its remaining interest in the assets to PWSA at this time, contingent upon PWSA's subsequent transfer of the assets to either a nonprofit charitable public trust or a private entity, nonprofit or otherwise, as contemplated under the various public-private partnership restructuring options. Pursuant to this transfer, the private or public entity to which the assets would be transferred, either in part or in whole, would in some capacity, be responsible for the long-term operation and maintenance of the assets, as well as for the completion of essential capital improvements. Transactions of this nature have recently become fairly common in

Pennsylvania, with conveyances occurring in Scranton, Allentown, and Middletown, among others. While a purchasing entity would be subject to PUC regulation, it appears a leasing entity would not be subject to PUC regulation.¹

As has been discussed, a hybrid option may be pursued, one which involves the creation of a nonprofit public charitable trust that, pursuant to a long-term contract, would oversee the assets in an arrangement that would provide for continued public operation and ownership with private asset management. While operations would remain public, the private entity responsible for asset management would receive an availability payment for the continued maintenance of the assets under a performance-based contract. Such a contract may be structured in a way to ensure that a joint operating committee serves as a fiduciary for the public and provides for requirements to make capital investments in property, planning, and equipment. Such an arrangement also appears workable under applicable law, but would again require significant cooperation between the City and PWSA.

In the event the City and PWSA wish to pursue the internal improvement restructuring option, the City and PWSA will have to work together to bolster their current agreements to allow for heightened performance standards and their enforceability. As stated above, provided a certain amount of cooperation can be achieved, as should be possible given the interplay between various provisions of the relevant agreements and applicable laws, there would appear to be no legal impediments to achieving robust internal improvement. Current agreements between the City and PWSA expressly authorize waiver of certain provisions, as well as amendments, provided the City and PWSA agree in writing.

¹ It should be noted that, while these conveyance restructuring options appear legally feasible, any outstanding debt and related tax implications must be reviewed by bond counsel depending on the chosen restructuring option.