

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Valuation of Acquired Municipal Water &
Wastewater Systems - Act 12 of 2016
Tentative Supplemental Implementation
Order

Docket No.: M-2016-2543193

**COMMENTS OF THE CITY OF BEAVER
TO THE
FEBRUARY 7, 2024 TENTATIVE SUPPLEMENTAL IMPLEMENTATION ORDER**

I. INTRODUCTION AND BACKGROUND

The City of Beaver (the “City”) is a Home Rule Charter Municipality (as of January 3, 2022; the City was formerly a City of the Third Class) located in Beaver County, Pennsylvania, approximately 31 miles north of the City of Pittsburgh. The City is governed by a Mayor and a City Council comprised of four members. There are approximately 9,005 residents in the City (based on the 2020 U.S. Census). The City is approximately 2.317 square miles. According to the 2020 American Community Survey by the U.S. Bureau of the Census, the City’s median household income is \$35,951.

The City owns, operates and maintains a sanitary wastewater collection and conveyance system (the “Collection System”) and the Beaver Falls Sewage Treatment Plant (the “Plant” and together with the Collection System, the “System”). Along with the residents of the City, a total of seven municipalities contribute flow to be treated at the Plant, including North Sewickley, Patterson Township, West Mayfield Township, White Township, Patterson Heights Borough, Big Beaver Borough, and Eastvale Borough (the “Contributing Municipalities”). The City does not own any of the collection and conveyance sewers of the Contributing Municipalities. The City’s Collection System includes approximately 36.3 miles of pipe serving approximately 3,190

customers within the City. The Plant has a hydraulic design capacity of 4.8 million gallons per day.

After extensive considerations and discussions with City leadership, staff and with the public, the City decided to pursue the sale of the System. In 2020, the City conducted a thorough internal review and solicited outside experts to review the System taking into account future costs, regulatory challenges and the potential liabilities of managing the System.

The City conducted an evaluation to determine both qualitative and quantitative factors in reference to selling or maintaining ownership of the System during early through mid 2021. The careful and well-thought-out decision to sell resulted from the following main considerations. First, the City wanted to exit the business of providing sanitary sewer service and instead focus on its core governmental functions while still ensuring that our residents would have safe and reliable service at affordable rates. Second, we wanted to generate revenue that would help secure the City's financial stability in the coming years. This consideration was based upon the fact that the proceeds of the sale would help prevent the City from being named by the Commonwealth Department of Community and Economic Development ("DCED") a distressed community or to Act 47 status, which indicates severe financial difficulties and could lead to the City being placed in receivership.

After City Council made the decision to pursue the potential sale of the System based on the above considerations, the City issued a Request for Qualifications to select a pool of qualified buyers, and, after preparation and negotiation of a proposed Asset Purchase Agreement, a Request for Bids was issued on July 23, 2021. Once the City reviewed the responses, it was determined that Aqua Pennsylvania Wastewater, Inc., submitted a bid for the System that was in the best interest of, and provided the greatest value to, the City and its residents.

Before making any final determination to sell the System, the City held multiple public meetings to receive input from residents on the state of the System and the advantages and disadvantages of the potential sale. The duly elected members of City Council then decided that the Proposed Transaction was in the best interests of the City. After public meetings, as detailed above, the City Council voted to authorize the City's solicitor to prepare an ordinance/resolution to accept Aqua's bid. In compliance with the Third Class City Code, two readings of the proposed ordinance to approve the APA were held on September 14 and September 28, 2021. After providing notice to City residents publication was made in the Beaver County Times on September 22, 2021.

The City and Aqua executed the Asset Purchase Agreement dated as of October 20, 2021 (the "APA") and pursuant to the APA began working extensively together to prepare Aqua's 1329 application. The City authorized Gannett Fleming to work on the required fair market value appraisal on June 16, 2022.

On September 27, 2022, four of the Contributing Municipalities (Patterson Township, Patterson Heights Borough, West Mayfield Borough and White Township, collectively, the "Plaintiffs") filed a Writ of Summons against the City of Beaver Falls and Aqua in response to the anticipated sale of the Plant to Aqua. The Plaintiff's filed their Complaint on February 17, 2023 raising claims stemming from their assertion that they had an ownership interest in the Plant as customers who contributed to the Plant's capital improvements. The City strongly disputed their claims. After the pleadings closed and initial discovery efforts, the parties entered into mediation in May of 2023. The Parties ultimately came to a proposed settlement. Settlement agreements were circulated and executed by all parties relevant to the litigation. A Praecipe to Settle and Discontinue will be filed upon the closing of the APA.

On February 17, 2023 Aqua filed its 1329 application with the PUC seeking all necessary PUC approvals of the transactions contemplated by the APA docketed at PUC Docket No. A-2022-3033138. The Office of Consumer Advocate and the Bureau of Investigations and Enforcement have both issued extensive discovery requests in this matter. City personnel have spent countless hours addressing the requirements of the application and responding to these discovery requests and it has incurred substantial costs in doing so.

As one of the few municipalities which is well past the negotiation stage and has a binding agreement in place regarding the sale of its System and thus will be very much impacted by the Commission's *Implementation Order of Section 1329 of the Public Utility Code*, Docket No. M-2016-2543193 (Tentative Supplemental Implementation Order entered February 7, 2024 (the "2024 TIO")), the City feels it is critical to provide this Comment regarding the 2024 TIO.

II. REASONABLENESS REVIEW RATIO

We understand the Commission's desire to have a guidepost regarding purchase price when it analyzes and eventually makes a final determination on the overall merit of 1329 applications. Purchase price, however, is just one aspect of the application that should be considered by the Commission.

The condition of the municipality and the system as well as the positive impact the sale will have on the municipality should be key considerations when determining the overall prudence of a sale under 1329.

The City has historically experienced significant financial difficulties. Because of the financial condition of the City, the City likely will not be able to keep up with the growing capital needs of the aging System. If the City sells the System to Aqua, the capital needs will be met and the proceeds from the sale of the System will help prevent the City from being named by the Commonwealth Department of Community and Economic Development a distressed

community or Act 47 status indicating severe financial difficulties and possibly leading to receivership. Furthermore, the City has a revitalization plan that depends on these proceeds to fund it and improve the City.

In addition, the City believes that its System is troubled and that should be given greater weight by the Commission than the reasonableness review ratio (“RRR”). The City does not have the financial, managerial or technical ability to operate the System. It has been chronically unable to fill critical positions at the Plant, it does not provide for capital planning, and many serious safety and environmental deficiencies in the System operations have resulted over the last two years. The sale of the System to an experienced company like Aqua will ensure the System which services not only the City but also seven other municipalities across Beaver County is run well, is safe and the increasing environmental regulations are met.

The City’s position is consistent with the Commission’s prior findings. In *Implementation Order of Section 1329 of the Public Utility Code*, Docket No. M-2016-2543193 (Tentative Supplemental Implementation Order entered September 20, 2018), the Commission stated that “the development of water and wastewater service throughout the Commonwealth over the years has led to the creation of large numbers of geographically dispersed water and wastewater systems owned by municipal corporations or authorities. For these systems, sale to a larger, well-capitalized and well-run regulated public utility or entity can be prudent because it can facilitate necessary infrastructure improvements and access to capital markets, and, ultimately, it can ensure the long-term provision of safe, reliable service to customers at reasonable rates.”

III. Timing to Effectuate Proposed Changes

The Commission acknowledged in its 2024 TIO that “some transactions may be in the midst of negotiations, and as such, [the Commission will] provide due consideration to the timing of the initial RRR release.” The City believes that the Commission should find that pending

acquisitions such as the sale of the City's system to Aqua would not be subject to the as-yet finalized RRR.

The City and Aqua negotiated and executed the APA nearly two and half years ago. Aqua filed its 1329 application two years ago and the City has spent over a year in litigation with some of the Contributing Municipalities in connection with the 1329 application, finally coming to a mutually agreed upon settlement with each of the plaintiffs in that case.

The City invested countless hours, resources and money in this process based upon existing law at the time. It would be incredibly unfair to change the rules now. Furthermore, doing so may violate the Pennsylvania and United States Constitutions which prohibit *ex post facto* laws that impair the obligations of existing contracts. *See* Pa. Const. art. I, § 17; U.S. Const. art. I, § 10. *See also Workers' Comp. Judges Profl Ass'n v. Exec. Bd. of Commonwealth*, 39 A.3d 486, 493 (Pa. Commw. 2012), *aff'd*, 66 A.3d 765 (Pa. 2013). Applying an RRR, which will be calculated years after the APA was executed, would substantially impair the obligations of both parties to the APA. To survive a challenge under the Contracts Clause, if a state regulation constitutes a substantial impairment to a contract, the State may argue that it had a significant and legitimate *public purpose* behind the regulation, for example, if the intent behind the governmental action was to remedy a broad and general social or economic problem. *EmergyCare, Inc. v. Millcreek Twp.*, 68 A.3d 1, 4–5 (Pa. Commw. 2013). In order to implement the change in law with an RRR that is not in violation of the Contracts Clause, a court would need to determine that the State's *ex post facto* prohibition on the sale of the City's System meets that public interest-driven test. The City contends a court would not make such a determination especially in the case of the City which is financially distressed, the System is troubled and the City needs the proceeds for its Revitalization Plan.

The Pennsylvania General Assembly has determined and the Commission has relied upon such determination that acquisitions of municipal wastewater systems under Section 1329 further the public interest. *See, e.g., Application of Aqua Pennsylvania Wastewater, Inc.*, Docket No. A-2021-3026132, 2022 WL 3138913 (Pa.P.U.C.) at *22 (July 29, 2022). With respect to municipalities which are far down the road in the process of the sale of their systems in reliance upon the laws at the time, the City strongly encourages the Commission to effectuate the original significant and legitimate public purpose espoused by the Pennsylvania General Assembly when it passed Section 1329 in support of the sale of water and wastewater systems from municipalities to investor-owned public utilities.