REPLY COMMENTS ABOUT THE TENTATIVE SUPPLEMENTAL IMPLEMENTATION ORDER FROM HENRY YORDAN, JULIE FRISSORA, AND ROBERT SWIFT, RESIDENT INTERVENORS IN AQUA'S 2021 APPLICATION TO PURCHASE WILLISTOWN TOWNSHIP'S WASTEWATER SYSTEM

Docket #: M-2016-2543193 – Valuation of Acquired Municipal Water and Wastewater Systems—Act 12 of 2016 Implementation

April 2, 2024

I. Introduction

There were numerous Comments submitted before March 18, some containing statements and suggestions inconsistent with, or in disagreement with, some of the observations we made in our own Comments. We will not respond to all, only a few where clarification should be useful to the Public Utility Commission (PUC) deliberations in this matter. Not responding to a particular Comment previously submitted by other parties does not in any way imply that we agree unless specifically stated herein.

II. Unsubstantiated Assertions about PA Legislature's Intentions

Comments from investor-owned utilities and selling municipal utilities contained false assertions ascribing motives to the PA legislators in passing Pa 66 C.S., Sec 1329 (1329) that are not contained in any policy prescriptions set forth by the PA Assembly itself. PA American Water (PAAW) dedicates pages 2 through 7 of their Comments to arguing that legislators intended to give preference to larger investor-owned utilities over municipal utilities. They do not, indeed cannot, cite such prescriptions from the legislation directly of from the PA Assembly documents. Instead, they cite a litany of PUC Implementation Orders, such as the one being considered now, as proof

of legislative intent when they are simply **nothing more than** a preference expressed by an industry regulator.

Towamencin Township (Towamencin) more boldly makes an excessively repetitive series of unsubstantiated and false assertions about "legislative intent" of 1329. They state:

> "…legislative history of Section 1329 reflects a determination by the Pennsylvania General Assembly that fair-market-value acquisitions of municipal wastewater systems further the public interest."

The **legislative history of 1329 does no such thing**. In fact, determining whether an acquisition serves the public interest is not governed by 1329 but by Pa. 66 C.S., Sec 1102 (1102), and the PA Assembly left 1102 in place when passing 1329. **The unavoidable conclusion is that the PA Assembly does not believe that fair market value acquisitions automatically promote the public interest**. It left the burden of proving substantial public interest in each case before the PUC and the courts. Efforts by investor-owned utilities, the PUC, and municipalities looking to raise cash without accountability are efforts to dismantle 1102 administratively and should be recognized for what they are. The law in Pennsylvania still places the burden of proof on the acquiring utility to demonstrate that the acquisition will benefit the public, a very high hurdle for healthy systems run by healthy municipalities with ample financing capability.

Partly because the 1102 hurdle is so high, self-interested parties mentioned above wish to ascribe motives to the PA Assembly that are simply not there.

Towamencin goes on to argue:

> "… the Commission has relied upon the Pennsylvania General Assembly's determination that acquisitions for municipal wastewater systems under Section 1329 further the public interest in decisions."

The PUC has in fact issued decisions stating that acquisitions further the public interest, but **not based on any determinations by the PA General Assembly**, as Towamencin claims incorrectly.

Instead, such decisions have been based on the PUC's own interpretations of intent, often **based on their own tentative or final implementation orders that create legislative intent from whole cloth**.

PAAW and Towamencin are examples of biased entities who seek to make unsubstantiated assertions about legislative intent in order to circumvent their burden to prove that each acquisition furthers the public interest as stipulated in 1102. In the recent Commonwealth Court appeal of the PUC East Whiteland acquisition decision (Cicero), the Court determined that the PUC commissioners abused their discretion when they approved the East Whiteland acquisition, especially over the objections of their own administrative law judge, who determined in litigation that the acquisition did not further the public interest. We believe that attributing intent to the PA Assembly that is not present is an essential element of the abuse of discretion cited by the Commonwealth Court. We hope that Cicero will put an end to the practice.

III. Litigation Time Constraints

The above discussion of 1102 brings up the issue of the 6-month litigation period mandated for 1329 case adjudications. 1102 has no such time limitation, but the PUC has mandated that the 1102 and 1329 portions of the proceedings take place concurrently, thereby effectively imposing a 6-month limitation on 1102 when no such restriction exists in statute. We believe that **the 6-month limitation to adjudicate acquisition cases presents significant due process considerations, especially considering intervention by citizens like us, operating *pro bono*, without staff, without budget, and in the case of two of us, with no legal training. Until the PA Assembly repeals the abomination of 1329, the PUC approval proceedings should be separated into two cases, one for**

1329 and one for 1102, and the 1102 proceeding should be allowed to take longer than six months to address the due process concerns. In any event, the certificate of public convenience cannot be issued until the 1102 portion is concluded.

IV. Rate Impact Notice

As stated in our original comment on the TSIO, a rate impact notice should be moved up to the time of the initial public meeting of acquired customers, earlier than the filing of the application. This rate impact notice, however, **would not replace the rate impact notice currently sent weeks before the PUC litigation begins.** It would be an additional rate impact notice that only quantifies the estimate of the first rate increase resulting from the acquisition. The notice that also contains the length of the protest period and the date of the Public Input meeting, where parties may testify before a judge, will have to continue to be sent because it will contain additional information.

Aqua argues loudly, but unconvincingly, that the rate impact notice should contain estimated allocations of cost under Act 11. We disagree. **Costs allocated to the acquiring utility's existing customers will be offset by costs allocated to newly-acquired customers from other acquisitions completed by the acquiring utility.** The relevant rate impact is the one negotiated by the Office of Consumer Advocate (OCA) in the New Garden Township Commonwealth Court appeal (McCloskey), the one that measures the impact on rates without Act 11 allocations.

Aqua also argues that discussion of the rate impact from the acquisition needs to be accompanied by discussion of rate increases that would occur if the system remained in municipal hands. **This is a red herring argument designed to mislead the public and confuse separate issues. The**

McCloskey rate impact calculation is the cost to ratepayers of the initial acquisition price. The selling municipality already owns the system and the municipal ratepayers do not have to pay anything for it. If the system remains under municipal ownership, there is no initial rate impact; rather, rate increases imposed by the municipality would be attributable to future capital requirements or future increases in operating costs. The acquiring utility would seek to increase rates **beyond** what is quantified in the rate impact notice to pay for future capital expenditures or increased operating costs. These **additional** rate increases will likely exceed what the municipality will require given investor-owned utilities' substantially higher weighted average cost of capital.

V. 1329 Most Anti-Consumer Provision of PA Utility Code

We wish to associate ourselves with Mr. James Cawley's statement in Comment submitted on March 18:

> "…Section 1329, added by Act 12 of 2016, is a corruption of public utility ratemaking in Pennsylvania. It is completely contrary to the fair balance and public interest emphasis of the Public Utility Code and its predecessors. It is the most pro-utility, anti-customer provision ever added to Pennsylvania's public utility laws. It restores pre-1913 monopoly pricing to existing and acquired water and sewer customers. It has already caused extreme rate increases for those customers approaching $100 million *annually*, with much more to come..."

As citizens that could be significantly affected by these Big Water acquisitions, we are encouraged that an individual having the stature and experience of Mr. Cawley in utility and utility regulation matters holds beliefs so similar to ours. 1329 is an irredeemably anti-consumer legislation that needs repeal in order to bring safety to the water and wastewater consumers of Pennsylvania. Comments submitted by the investor-owned utilities and by the municipalities that sold their systems to the detriment of their customers transparently displayed how their interests are aligned against the water and wastewater consumers in the Commonwealth.

Respectfully submitted,

Henry Yordan, Julie Frissora, and Robert Swift
Willistown Township