

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION

BEFORE: ANGELA T. JONES, Administrative Law Judge

Pennsylvania Public Utility	:	Docket Nos.
Commission et. al	:	R-2009-2132019, et al. including
	:	No. C-2010-2155875
V.	:	
	:	
	:	
Aqua Pennsylvania, Inc.	:	

MAIN BRIEF OF PRO SE ACTIVE PARTICIPANT
JONATHAN BRISKIN, MD

Jonathan Briskin, MD
Pro Se Active Participant
(Attorney ID#21524)
PO Box 400
733 Old Lancaster Rd
Bryn Mawr, Pa. 19010
Telephone: 610-527-0401
Fax: 610-525-4553

Dated: April 29, 2010

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2. Aqua has failed to provide any record, proof or analysis that the Proposed rate increase is “JUST”.

3. The record is devoid of any proof that the proposed rate increase is just and therefore the requested rate increase must be denied in toto as a matter of statutory law.

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B. AQUA HAS FAILED TO MEET THE STATUTORY REQUIRED BURDEN OF PROOF THAT THE PROPOSED RATE INCREASE IS “REASONABLE”.

1. The rate of return should not exceed 4.75 to 5.0 percent, the rate payable on the 74.685 million dollars raised by Aqua Pa via tax exempt bonds issued November 15, 2009 rather than the 12 percent proposed by Aqua Pa’s proponent, Paul Moul.

2. Minimal weight should be given to the recommendation of Aqua’s expert on rate of return, Paul Moul, as it is speculative, based upon faulty methodology that can not be tested, peer reviewed, reproduced and has no established error rate. Further it is not objective, is inconsistent with his

testimony, fails to fully and fairly assess alternative methods and formulas, and reflects a total lack of consideration of customer impact.

3. Aqua's method of expensing depreciation constitutes unreasonable "Double Dipping" and \$52,774,920 should be removed as an expense When analyzing the requested rate increase.

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5. Aqua's inclusion of the costs to build the public fire hydrant system is not authorized under the law and is limited to the "cost of service" under section 1328 (a).

6. Aqua's decided method of apportioning the recoverable portion of service to the public fire hydrant system from "all customers" under section 1328(b) was deficient in design and fails to meet its burden of proof that the apportionment is "just and reasonable".

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III. CONCLUSION (Page 11)

A. Aqua has failed to meet its burden of proof that the proposed rate increase is just and reasonable

B. Aqua's rate increase request should be denied.

C. Pro se Active Participant requests trial by jury under section 901 for all issues of fact raised during these proceedings.

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I. INTRODUCTION

The Pro Se Active Participant joined the proceedings via formal complaint in opposition to Aqua Pa's request for an increase of rates payable by its customers, including the pro se active participant. It is not the position set forth in this brief that Aqua Pa provides sub standard service to it's customers, but rather that the requested rate increase is not "just and reasonable" and should therefore be denied.

In a time with the most serious economic downturn since the Great Depression, business as usual is inappropriate. All sectors of the economy must bear some financial burden. In addition to the water customers, corporate and investor interests should bear the impact of the financial downturn. To ignore such factors in a rate increase request would violate a basic statutory tenant of rate increases – that they must be both just and reasonable.

Aqua's rate increase submission is devoid of any attempt to assess the impact upon the customers in a time of serious economic disruption. The record has neither facts nor analysis of the economic impact of its proposed increases and apportionment of charges among its customers. As such it fails to meet its statutory burden of proof to show that there request must be both just and reasonable.

Aqua has included "expense" or cost items which should not be considered when assessing the requested increase. These include annual expenditures of \$52,774,920 in depreciation, \$7,658,109 in Management Services Fees, Millions of Dollars in executive remuneration of all types, and at least 20 to 30 Millions of Dollars in dividend payouts to its affiliate, Aqua America. These items should be excluded from the request under a "Just and Reasonable" test.

II. ARGUMENTS CONTRA GRANTING THE REQUESTED RATE INCREASE

A.

AQUA HAS FAILED TO MEET THE STATUTORY REQUIRED BURDEN OF PROOF THAT THE PROPOSED RATE INCREASE IS JUST

1. Aqua has the Burden of Proof to show that the proposed rate increase is both “JUST AND REASONABLE”.

66 Pa.C.S.A. section 1301. Rates to be just and reasonable.

This section in pertinent part establishes that, “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.”

66 Pa.C.S.A. section 315. Burden of proof.

This section at 315 (a) in pertinent part establishes that, “Reasonableness of rates.—In any proceeding upon the motion of the commission, involving any proposed or existing rate of any public utility, or in any proceedings upon complaint involving any proposed increase in rates, the burden of proof to show that the rate involved is just and reasonable shall be upon the public utility.”

2. Aqua has failed to provide any record, proof or analysis that the proposed rate increase is “JUST”.

While the record is replete with figures provided by Aqua attempting to demonstrate the reasonableness of its rate increase request, there is nothing in the record to support a finding that the request is also “just”. The statutory language is clear and without ambiguity in requiring not merely that the request be reasonable but also it must be “just”. Full meaning must be given to the all of the words of any statute and this section requires an equal emphasis on both just as well as reasonable.

At a minimum the record must contain facts and analysis demonstrating the clear economic impact of the proposed rate increase and customer allocations and charges on the public utility’s customers. No such facts or analysis appear in the record. In fact, Mr. Paul Moul, one of Aqua’s experts testified that he did not consider the impact of his recommendations on the customer base (P.741 L.24 to P.742 L.7). Other factors to consider on the question of whether a request is “just” might include determination and analysis of various cost and expense allocations to customers considering usage or whether they are commercial enterprises (large or small) or residential (various income levels).

3. The record is devoid of any proof that the proposed rate increase is just and therefore the request must be denied as a matter of statutory law.

How can the commission determine whether a requested rate increase is “just” without a proper record from which to make an assessment? Based on the inadequacies of the record before the Administrative Law Judge, it is submitted that the requested rate increase must be completely denied for failure to carry its burden of proof and establish that the rate increase request is “just”.

4. Aqua’s payments to executives including stock, retirement plans and other benefits; payments, stock and other benefits to the board of directors; and dividend payments to shareholders and Aqua America are unjust to the extent they are considered expenses or necessary expenditures in the context of the requested rate increase.

Aqua’s submission did not include the specific financial figures for the value of executive pay and other means of remuneration, pay and remuneration to the board of directors and the dividends paid out to Aqua America and shareholders. From testimony of the CFO for Aqua America and Aqua Pa, David Smeltzer (P.749 L. 15 to P.751 L.24) and Aqua’s expert Paul Moul (P.737 L.11 to P.738 L.6), it is clear that these items represent many millions of dollars siphoned from Aqua Pa which have not been fully and clearly disclosed. These facts are relevant to the issue of whether Aqua’s request is “just and reasonable” in the current economic times. Since the law places the burden of proof upon Aqua, it is its responsibility to create an adequate record of all relevant considerations. In this regard Aqua has not fulfilled its burden and these “expense” items should not be included as expenses for purposes of evaluation of the rate increase request.

B.

AQUA HAS FAILED TO MEET THE STATUTORY REQUIRED BURDEN OF PROOF THAT THE PROPOSED RATE INCREASE IS “REASONABLE”

1. The rate of return should not exceed 4.75 to 5.0 percent, the rate payable on the 74.685 million dollars raised by Aqua Pa via tax exempt bonds issued November 15, 2009 rather than the 12 percent proposed by Aqua Pa’s proponent, Paul Moul.

Aqua’s expert, Paul Moul, testified that Aqua Pa issued tax exempt bond in two tranches at 4.75 and 5.0 percent totaling 74.685 million dollars. (P.733 L.5 to P.734 L.2). This is in stark contrast to Mr. Moul’s speculative musings regarding investor

expectations (P.726 L.20) and his recommendation that his client deserves a rate of return of 11.75 percent (P.739 L.3 to P.742 L.7) plus 0.25 percent for “exemplary performance of its management”. This recommendation for the additional 0.25 percent was given despite Mr. Moul’s acknowledgement that “That is not my forte. That is not my area of expertise, to opine on management quality.” (P.740 L.19-20).

2. Minimal weight should be given to the recommendation of Aqua’s expert on rate of return, Paul Moul, as it is speculative, based upon faulty methodology that cannot be tested, peer reviewed or reproduced and has no established error rate. Further it is not objective, it is inconsistent with his testimony, fails to fully and fairly assess alternative methods and formulas, and reflects a total lack of consideration of customer impact.

Mr. Moul testified that he was hired and paid by Aqua Pa to come up with a rate of return that is fair to the company and its stockholders and will allow it to raise capital in the marketplace. (P.722 L.18 – 25, P.725 L.10 to 17). He testified that most recently in November of 2009 Aqua Pa was able to raise 74.685 million dollars from the sale of tax exempt bonds with interest rates of 4.75 & 5.0 percent . (P.733 L.5 to P.734 L.2). This is in stark contrast to Mr. Moul’s speculative musings regarding investor expectations (P.726 L.20) and his recommendation that his client deserves a rate of return of 11.75 percent (P.739 L.3 to P.742 L.7) plus 0.25 percent for “exemplary performance of its management”. This recommendation for the additional 0.25 percent was given despite Mr. Moul’s acknowledgement that “That is not my forte. That is not my area of expertise, to opine on management quality.” (P.740 L.19-20). Mr. Moul’s testimony confirmed that he is unable to determine an error rate for his predictions and recommendations. (P.727 L.10 to 16). Mr. Moul did not provide the record with any serious alternative rate of return scenarios reflecting substantial changes in the balance between capital raised via bonds and stock, or any other scenarios to raise new capital. None of Mr. Moul’s work and recommendations took into account the impact of a rate increase on the Aqua Pa customers. (P.741 L.13 to P. 742 L.7). Mr. Moul made no effort to look for the least expensive viable method of raising capital because he never even considered the possibility that the rate request would be denied. (P.734 L.20 to P.735 L.18). It is clear from the record and the testimony of Mr. Moul that he was not an objective expert demonstrating even-handedness to the company, investors and customers. He made no effort to develop approaches for the least expensive method to raise capital and instead recommended a rate based on excessively expensive methods despite knowing that most recently Aqua Pa raised 75.685 million dollars in capital for 5 percent or less.

3. Aqua’s method of expensing depreciation constitutes unreasonable “Double Dipping” and \$52,774,920 should be removed as an expense when analyzing the requested rate increase.

William Packer testified that depreciation was a NON CASH item (P.689 L.18 to P.690 L.6) and that no monies were actually paid out for this “expense”. He also testified that the amortization average was 36 years (P.690 L.7 to L.17). It is submitted that to allow this as an expense would constitute an unjust and unreasonable “double dipping”

in the context of this rate request. The benefit of the depreciation should inure to the benefit of the customers, not Aqua. Aqua claims the initial investments as an expense and then claims it again as a depreciation expense for purposes of its requested increase. Since the customers already pay for the cost of the capital expenditure they should not have to pay a second time for depreciation of the same capital expenditure. Further, an amortization average of 36 years is unreasonably low. 66 Pa.C.S.A. section 1703 (Depreciation accounts; reports) makes it clear that, "The commission shall not be bound in rate proceedings to accept, as just and reasonable for ratemaking purposes, estimates of annual depreciation established under the provisions of this section..." (subsection c). Subsection (b) states, "In making its findings, the commission shall give consideration to the experience of the public utility, and the predecessors of the public utility in accumulating depreciation reserves, the retirements actually made, and such other factors as may be deemed relevant." Thus, Aqua has the burden of proof to show that it is just and reasonable to utilize an accounting technique for rate increases that is designed to be utilized for business planning and taxation purposes. The record is deficient measured against the requirements of Section 1703 and inadequate to fulfill Aqua's burden that it is just and reasonable to include depreciation of \$52,774,920 as an expense.

4. Aqua's "Management Service Fees" of \$7,658,109 and dividend to Aqua America in the "neighborhood of 20 to 30 Million dollars per year" should be removed as an expense for failure to comply with the statutory proof requirements of section 2106 and as otherwise not just and reasonable.

William Packer testified that \$7,658,109 was paid to an affiliated interest, Aqua Services Inc. (P.698 L.11 to P.700 L.2). David Smeltzer testified that Aqua Pa pays a dividend to Aqua America, an affiliated interest, "in the neighborhood of 20 to 30 million dollars a year (P.749 L.15 to P.750 L.10). Both of these payments were made to an affiliated interest as used in 66 Pa.C.S.A. section 2106 (Effect on rates). The record submitted by Aqua does not comply with the requirements of section 2106 in that it did not include in the record "the original (or verified copies) of the relevant cost records and other relevant accounts of the affiliated interest (underline added), or such abstract thereof or summary taken therefrom as the commission may deem adequate, properly identified and duly authenticated." Furthermore, to include these as expenses for rate increase purposes based upon the current record does not meet the burden of proof to demonstrate that such increase would be just and reasonable.

5. Aqua's inclusion of the costs to build the public fire hydrant system is not authorized under the law and is limited to the "cost of service" under section 1328 (a).

66 Pa.C.S.A. section 1328 (a) establishes the general rule that, "A public utility that furnishes water to or for the public shall be allowed to recover in rates the full cost of service (emphasis added) related to public fire hydrants." Aqua in its rate request included the costs of construction in addition to the cost of service. This is not

permissible under the statute and this portion of their expense submission should be eliminated from consideration.

6. Aqua's method of apportioning the recoverable portion of service to the public fire hydrant system from "all customers" under section 1328 (b) is not "just and reasonable".

66 Pa.C.S.A. section 1328 (b) allows for recovery of the remaining cost of service for public fire hydrants not recovered from the municipalities by "assessing all customers of the public utility the remaining cost of service to the public fire hydrants." Aqua's record submission does not include alternative plans for assessing all customers. There is no record demonstrating the customer impact of alternative assessment methods to allow for a finding of just and reasonable. Based upon inadequacies of the record, Aqua has failed to meet its burden of proof that its method of assessment is just and reasonable and this portion of its request should be eliminated from the "utility's fixed or service charge or minimum bill." (section 1328 (b)(2)).

7. Aqua's payments to executives including stock, retirement plans and other benefits; payments, stock and other benefits to the board of directors; and dividend payments to shareholders and Aqua America are unjust to the extent they are considered expenses or necessary expenditures in the context of the requested rate increase.

Aqua's submission did not include the specific financial figures for the value of executive pay and other means of remuneration, pay and remuneration to the board of directors and the dividends paid out to Aqua America and shareholders. From testimony of the CFO for Aqua America and Aqua Pa, David Smeltzer (P.749 L. 15 to P.751 L.24) and Aqua's expert Paul Moul (P.737 L.11 to P.738 L.6), it is clear that this represents many millions of dollars siphoned from Aqua Pa which have not been fully and clearly disclosed. These facts are relevant to the issue of whether Aqua's request is "just and reasonable" in the current economic times. Since the law places the burden of proof upon Aqua, it is its responsibility to create an adequate record of all relevant considerations. In this regard Aqua has not fulfilled its burden and these "expense" items should not be included as expenses for purposes of evaluation of the rate increase request.

III. CONCLUSION

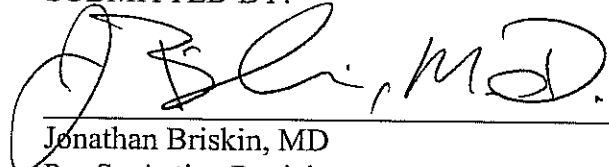
A. Aqua Pa has failed to meet its burden of proof that the proposed rate increase and allocation formulae are just and reasonable.

Aqua Pa has the burden to prove that its rate increase request and allocation formulae are just and reasonable. The record is barren with regard to whether or not the rate increase request and customer allocations are “just” and should therefore be denied. The record is insufficient to prove that the rate increase request and customer allocations are reasonable. To the contrary, the record demonstrates that capital can be raised for 4.75 & 5 percent rather than the 11.75 plus 0.25 percent proposed by Mr. Moul. The record further demonstrates numerous unreasonable expenses submitted as part of the justification for excessive rate increases. In particular, these include \$57,774,920 in annual depreciation, \$7,658,109 in annual “Management Services Fees”, 20 to 30 million dollars [or more than half of 68 million dollars (Moal P.737 L.19 to P.738 L.19)] in annual dividends to affiliate Aqua America or its stockholders, millions of dollars in generous executive and board of directors remuneration and an undetermined amount of dollars claimed for construction costs of the public fire hydrant system. These items total well in excess of ninety million dollars (\$90,000,000.00).

B. Aqua Pa’s rate increase request and allocation formulae should be denied.

C. Pro se Active Participant requests trial by jury under section 901 for all issues of disputed fact raised during these proceedings.

SUBMITTED BY:



Jonathan Briskin, MD
Pro Se Active Participant

CERTIFICATE OF SERVICE

Re: Pennsylvania Public Utility Commission
v.
Aqua Pennsylvania, Inc.
Docket No. R-2009-2132019 et al. including No. C-2010-2155875

I hereby certify that I have this day served a true copy of the foregoing Main Brief of Pro Se Active Participant, Jonathan Briskin, MD upon parties of record in this proceeding. Service is in accordance with the requirements of 52 Pa. Code §1.54 (relating to service by a participant), in the manner and upon the persons listed below:

Dated this 29th day of April 2010.

SERVICE BY EMAIL AND FIRST CLASS MAIL

Allison C. Kaster, Esquire
Carrie B. Wright, Esquire
Office of Trial Staff
Pa. Public Utility Commission
400 North Street
Harrisburg, PA 17105

Shaun A. Sparks
Assistant Consumer Advocate
Office of Consumer Advocate
555 Walnut Street
5th Floor, Forum Place
Harrisburg, Pa. 17101-1923

Anthony C. DeCusatis, Esquire
Thomas P. Gadsden, Esquire
Catherine G. Vasudevan, Esquire
Morgan Lewis & Bockius, L.L.P.
1701 Market Street
Philadelphia, PA 19103-2921
Counsel for Aqua Pennsylvania, Inc.

Charis Mincavage, Esquire
Carl J. Zwick, Esquire
McNees, Wallace & Nurick, L.L.C
100 Pine Street
P.O. Box 1166
Harrisburg, PA 17108-1166
Counsel for Aqua Large Users Group

Kimberly A. Joyce
Manager of Regulatory Affairs
Aqua Pennsylvania, Inc.
762 Lancaster Avenue
Bryn Mawr, PA 19010-3489
Aqua Pennsylvania, Inc. Counsel

Jonathan P. Foster, Sr., Esquire
407 South Main Street
Athens, PA 18810
Email: Jonathan.Sr.@fosterslawfirm.com
Solicitor for the Boroughs of Athens, Sayre & S. Waverly

Lauren M. Lepkoski
Assistant Small Business Advocate
Office of Small Business Advocate
Suite 1102, Commerce Building
300 North Second Street
Harrisburg, PA 17101

John F. Povilaitis, Esquire
Matthew A. Totino, Esquire
Ryan, Russell, Ogden & Seltzer
800 North Third Street, Suite 101
Harrisburg, PA 17102-2025
Counsel for Masthope Property Owners Council

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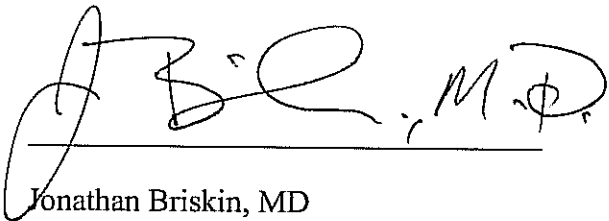
Zarrin Damavandi
3401 Goshen Road
Newtown Square, PA 19073

Jerome Linden
201 Cornell Drive
Bryn Mawr, PA 19010

William Frazier
907 Longacre Blvd.
Yeadon, PA 19050

Joseph A. Monaghan
2823 Haverford Road
Ardmore, PA 19003

Pastor William J. Burris
10 Third Avenue
Elysburg, PA 17824

A handwritten signature in black ink, appearing to read 'Jonathan Briskin, MD'. The signature is written in a cursive style with a horizontal line underneath it.

Jonathan Briskin, MD
Pro Se Active Participant
Box 400
733 Old Lancaster Road
Bryn Mawr, Pa. 19010
Telephone 610-527-0401