

COMMONWEALTH OF PENNSYLVANIA



OFFICE OF CONSUMER ADVOCATE

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April 5, 2011

Rosemary Chiavetta, Secretary  
PA Public Utility Commission  
Commonwealth Keystone Bldg.  
400 North Street  
Harrisburg, PA 17101

Re: Pennsylvania Public Utility Commission  
v.  
Deer Haven LLC d/b/a Deer Haven Sewer Company  
R-2010-2194577

Dear Secretary Chiavetta:

Enclosed for filing are the Exceptions of the Office of Consumer Advocate in the above-referenced proceeding.

Copies have been served as indicated on the enclosed Certificate of Service.

Sincerely yours,

A handwritten signature in cursive script that reads "Erin L. Gannon".

Erin L. Gannon  
Assistant Consumer Advocate  
PA Attorney I.D. # 83487

Enclosures

cc: Honorable Angela T. Jones  
Office of Special Assistants  
Certificate of Service

141180

BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

PENNSYLVANIA PUBLIC UTILITY COMMISSION :  
 :  
 v. : Docket No. R-2010-2194577  
 :  
 DEER HAVEN LLC d/b/a DEER HAVEN :  
 SEWER COMPANY :

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EXCEPTIONS OF THE  
OFFICE OF CONSUMER ADVOCATE

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DATED: April 5, 2011  
140825

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## I. INTRODUCTION

The OCA's Main and Reply Briefs (M.B. and R.B.) set forth its position that Deer Haven Sewer's (DHS) proposed rate increase should be denied in its entirety because of the Company's failure to provide adequate service. OCA M.B. at 9-23; OCA R.B. at 3-9. Specifically, the OCA calculated a revenue requirement of \$25,714 that would be reasonable if DHS were providing adequate service. Because DHS is not providing adequate service, the OCA recommends that the Commission deny any rate increase – including the portion of the Company's claim that was permitted on an interim, emergency basis in December 2010<sup>1</sup> – and re-establish rates at \$20 per month for sewage service.

On March 16, 2011, the Office of Administrative Law Judge issued the Recommended Decision (R.D.) of ALJ Angela T. Jones. Consistent with the factual record in this proceeding and the recommendations of the OCA, Office of Trial Staff (OTS) and Homeowners Association (HOA), the ALJ concluded as a matter of law that DHS has failed to furnish and maintain adequate service in violation of Section 1501 of the Public Utility Code, 66 Pa. C.S. § 1501. R.D. at 40-43. The ALJ also recognized that the Commission is required to review DHS's adequacy of service in the context of this base rate proceeding and that, if it determines that service is inadequate, that it has discretion to deny in whole or in part the proposed rate increase. R.D. at 28 (citing 66 Pa. C.S. §§ 523, 526(a)).

Despite finding that DHS is providing inadequate service and that the Commission has the authority to adjust rates to reflect inadequate service, however, the ALJ did not adopt the OCA's recommendation that no rate increase be allowed. *Id.* at 40. Moreover, she did not accept the OTS and HOA recommendations that no increase beyond the increase from \$20 to

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<sup>1</sup> See Petition of Deer Haven Sewer Co. for Extraordinary Rate Relief Under Section 1308(e) of the Public Utility Code, Docket No. P-2010-2204818, Order (Dec. 2, 2010).

\$39.70 per month permitted as interim, emergency rate relief be allowed. OTS M.B. at 11, 26; HOA M.B. at 9-10. The R.D. fails to recommend *any* adjustment to the \$46.60 per month rates produced by the ALJ's calculated revenue requirement. R.D. at 43, n.24.

As explained in the OCA's briefs, and below, where, as here, a utility is not providing adequate service, there is clear statutory, appellate and Commission precedent for denying a rate increase unless and until the utility can show actual results of service improvements. OCA M.B. at 9-11; OCA R.B. at 3, 6-9. Accordingly, the OCA excepts to the ALJ's failure to recommend that the Commission exercise its jurisdiction under Section 526, 66 Pa. C.S. § 526(a), to deny DHS's proposed increase in its entirety and submits its Exception thereto in Section II, *infra*.

In a number of other respects, the OCA supports the specific determinations made in the R.D. First, ALJ Jones adopted all of the OCA's expense adjustments, in recognition that DHS failed to provide sufficient evidence to support its claimed levels of expense for purchased power, testing, chemicals, miscellaneous, maintenance labor, operating labor, and sludge removal and piping. R.D. at 15-21. Based on those adjustments, the ALJ accepted the OCA's calculated additional revenue requirement of \$25,714<sup>2</sup> without reflecting any adjustment for inadequate service. Second, the ALJ adopted the OCA's undisputed recommendation that, going-forward, the Company's sole commercial customer be charged the same rate as the residential customers. R.D. at 27. Third, the ALJ found that the record conclusively shows that DHS has violated regulations promulgated under the Clean Streams Law, which provides authority for the Commission to order a capable public utility to acquire DHS. R.D. at 40; 66 Pa. C.S. § 529(a)(1). Regarding whether the Commission should exercise that authority, the ALJ also found that DHS is managerially incompetent based, *inter alia*, on its lack of credibility,

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<sup>2</sup> The \$1 difference between the ALJ's and OCA's calculated revenue requirement (\$25,715 v. \$25,714) appears to be due to rounding.

failure to comply with procedural regulations and statutes, and failure to act responsibly in its conduct of business. R.D. at 42; 66 Pa. C.S. § 529(c)(1). Thus, ALJ Jones recommended that the Commission immediately address the requirement of Section 529(b), which is to discuss with DHS, and allow DHS the opportunity to investigate, alternatives to acquisition. R.D. at 42.

As discussed within its Exception regarding appropriate rates, *infra*, the OCA submits that, as a matter of efficiency and plain reading of the statute, a determination under Section 529(b) should be made within the context of a Section 529 proceeding rather than as a condition precedent to initiation of a Section 529 proceeding. 66 Pa. C.S. § 529. In light of DHS's current inadequate service and in the interest of protecting customers in the event of its untimely abandonment, the OCA submits that the Commission should commence a Section 529 proceeding immediately wherein the remaining factual determinations can be made to accomplish acquisition. See, e.g., 66 Pa. C.S. § 529(e) (acquisition price), (i) (burden of proof).

## II. EXCEPTION

OCA Exception: The Commission Should Exercise Its Discretion Under Section 526 to Reject Any Rate Increase For Deer Haven Sewer Because the Company Continues to Provide Inadequate Service. (R.D. at 27-43; OCA M.B. at 9-23; OCA R.B. at 3-9.)

### A. Introduction

On pages 27 to 43 of the R.D., ALJ Jones discussed quality of service, the applicable legal standards and the evidence presented regarding technical and managerial fitness. The ALJ concluded as a matter of law that DHS has not furnished and maintained adequate and reasonable service pursuant to Section 1501 of the Public Utility Code. R.D. at 43; 66 Pa. C.S. § 1501. Her conclusion is based in part on the undisputed evidence that the treatment plant's effluent frequently exceeds permit limitations and has violated Department of Environmental Protection (DEP) regulations and statutes,<sup>3</sup> as shown by the issuance of multiple Notices of Violations (NOVs). R.D. at 40, 10-11; DHS St. 1 at 2-4. DHS's customers are paying rates that assume that the utility is, among other tasks, properly discharging effluent. The Company's failure to discharge effluent legally shows that service is not safe, adequate or reasonable for purposes of Section 1501 and that DHS is technically unfit.

Moreover, the data that is available through October 2010 shows that the Company's actions have not resolved the problems causing the violations. OCA St. 1S at 2-3. There is no evidence to show that DHS's actions during the past year have had any measurable impact on the quality of discharge effluent.<sup>4</sup> R.D. at 40-41; OCA M.B. 12-15; OCA St. 1S at 2; Tr. 285. As of January 2011, DHS acknowledged that further action is necessary to meet DEP criteria and indicates that it will make the necessary improvements if it is loaned money by a developer,

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<sup>3</sup> A discharge of sewage that violates the terms and conditions of a permit is a nuisance and in violation of the Clean Streams Law. 35 P.S. §§ 691.201, 691.202.

<sup>4</sup> Deer Haven provided no data to show that effluent levels improved in November 2010 or December 2010. Data through October 2010 shows continuing and consistent violations. OCA Exh. TLF-1S.

Pocono Lakefront, LLC. OCA M.B. at 13; Tr. 208-09, 214-15. The ALJ found this defense insufficient and rejoined that:

It is not enough to have intentions without achieving results to provide a sufficient standard of service when the Company is given the privilege to have the exclusive right to provide wastewater service within a specific territory.

R.D. at 40-41. Further, the ALJ also noted her concerns about the legality and prudence of the oral agreement orchestrated by DHS for a loan from Pocono Lakefront LLC. Id. at 34, n.18.

The ALJ expressed even greater concern regarding DHS's managerial fitness:

It is the actions of the management such as: (1) lack of credibility; (2) failure to comply with procedural regulations and statutes to the degree of cavalier-like attitude toward standard of customer service and Commission; (3) failure to act responsibly in business conduct (oral contracts, oral agreements, changing rates to customers without notice or proper procedure, no bookkeeping or record keeping of other business transactions) that are of grave concern and have a greater influence upon my recommendation. Such conduct cannot be condoned and should not be afforded the protections and privileges granted to be the sole supplier of wastewater service within the service territory of DHS. The ratepayers and general public deserve better conduct and certainly the performance should not be said to meet a minimum standard set by this Commission. This evidence is detrimental to DHS pursuant to Section 529(c)(1) as a factor to consider acquisition of the Company.

The totality of this record from the procedural falters before the undersigned ALJ by DHS[,] to the Company's conduct of customer service and managerial fitness demonstrates incompetence.

R.D. at 42 (citations omitted).

While recognizing that the Commission has statutory authority to deny DHS's increase in whole or part, ALJ Jones opined that if rates are not increased to cover operating expenses that DHS's management might abandon service. R.D. at 41. To prevent that, the ALJ recommended that DHS receive 100% of her calculated revenue requirement of \$25,715 (the Company's filed claim as adjusted by the ALJ and OCA to remove unsupported expenses). R.D. at 42-43. The OCA respectfully disagrees. Denying a rate increase to this utility is consistent with

Commission precedent and appropriate because it holds DHS to its regulatory bargain. As explained in the OCA's briefs and below, the quid pro quo is that a utility is only entitled to rates sufficient to earn a fair return if it provides adequate service. The problems underlying the ALJ's reasoning – that regardless of its performance, DHS is entitled to rates that cover its operating expenses – are addressed in detail below.

Respectfully, the Commission should adopt the OCA's recommendation to deny any rate increase for DHS while the utility continues to provide inadequate service because it is supported by the facts and law.

B. Legal Basis for Denial of Any Rate Increase

Section 523 of the Public Utility Code, 66 Pa. C.S. § 523, requires the Commission to “consider ... the efficiency, effectiveness and adequacy of service of each utility when determining just and reasonable rates. . . .” R.D. at 28; OCA M.B. at 9. In exchange for customers paying tariffed rates for service, a public utility is obligated to provide safe, adequate and reasonable service. Pa. P.U.C. v. Pennsylvania Gas & Water Co., 61 PaPUC 409, 415-16, 74 PUR4th 238 at 244-45 (1986) (PG&W 1986); 66 Pa. C.S. § 1501. Accordingly, the General Assembly has given the Commission discretionary authority to deny a proposed rate increase, in whole or in part, if the Commission finds “that the service rendered by the public utility is inadequate.” 66 Pa. C.S. § 526(a). In its Order regarding DHS's request for interim rate relief, the Commission recognized this authority and directed the parties to investigate and present service issues in the underlying base rate proceeding:

In this case, the service issues identified by the OCA were not fully developed during the hearing. As such, we conclude that the base rate case is a better forum to allow the parties to fully investigate the service issues that have been identified here and to present those issues to the Commission to be incorporated into any ratemaking adjustments to the Company's permitted rate of return.

Petition of Deer Haven Sewer Co. for Extraordinary Rate Relief Under Section 1308(e) of the Public Utility Code, Docket No. P-2010-2204818, Order at 13 (citing 66 Pa. C.S. § 526(a)) (Emergency Order) (attached in App. B to OCA M.B.). Accordingly, having fully investigated and presented evidence that DHS is technically, managerially and financially unfit and providing inadequate service, the OCA recommends that the Commission establish rates that reflect DHS's inadequate service by denying any rate increase. OCA M.B. at 11-22.

A complete discussion of the statutory, appellate and Commission precedent for denying a rate increase where a utility fails to meet the regulatory bargain is provided on pages 9 and 10 of the OCA's Main Brief. For purposes of this exception, it is worth repeating the Commission's holding in a 1988 base rate case, where it denied a utility's rate increase in its entirety based on its failure to demonstrate on the record that its ratepayers were currently receiving adequate service. Pa. P.U.C. v. Pennsylvania Gas & Water Co., 68 PaPUC 191 (1988) (PG&W 1988). In its Order, the Commission stated:

In support of our decision herein, we note that judicial precedents state that a utility is not guaranteed rate increases necessary for a return on its property; it is only entitled to rates sufficient to earn a fair return if it provides adequate service. This is the essence of the regulatory bargain. The Legislature has specifically made it part of the Public Utility Code [in 66 Pa. C.S. § 1501], which we are bound to administer...

Id. at 197; see also Market Street Railway Co. v. Railroad Comm'n of California, 324 U.S. 548 at 563-64 (1945); Colonial Products Co. v. Pa. P.U.C., 188 Pa. Super. 163, 172-73; 146 A.2d 657, 663 (1959) (in proper cases repairs and improvements needed to render reasonable and adequate service may be ordered though the immediate result thereof would be a financial loss to the utility); National Util. Inc. v. Pa. P.U.C., 709 A.2d 972, 977-80 (Pa. Commw. 1998) (NUI 1998).

Consistent with this legal precedent, the OCA recommends that, because the evidence in this case shows that DHS is providing inadequate service, the applicable constitutional and legal standards establish this Commission's authority and obligation to set rates which reflect that inadequacy.

C. DHS Should Be Held to the Regulatory Bargain.

On pages 11 to 22 of its Main Brief, the OCA provides a thorough discussion of the evidence in this proceeding, which demonstrates that DHS has provided inadequate service to customers and that the Commission has ample basis to exercise its discretion pursuant to Section 526 of the Public Utility Code, 66 Pa. C.S. § 526(a), to reject the Company's proposed rate increase. For purposes of this exception, the major points are that (1) the treatment plant's effluent frequently exceeds permit limitations and DEP has issued multiple Notices of Violations, most recently in October 2010; (2) there is no evidence that the Company's actions in December 2010 have improved the quality of the effluent and DHS admits that more steps must be taken to resolve the problems causing the violations; (3) DHS's owner (Deer Haven, LLC) abandoned service to its water customers without Commission approval, in violation of 66 Pa. C.S. § 1102(2); (4) during the pendency of this proceeding and without notice to the parties or approval by the Commission, DHS sold the land beneath its sewage treatment plant and an option to buy the water and sewer systems to an out-of-state developer, whom it admits knowing nothing about (not even its officers' last names); and (5) in January 2011, DHS entered into a verbal "loan" agreement with the same developer at an undetermined level of interest to pay for electricity, chemicals, the certified operator, sludge hauling and some system improvements, notwithstanding that the Commission approved an emergency rate increase in December 2010 for the Company to pay these same expenses. OCA R.D. at 33-34, 39-40; OCA M.B. at 11-22;

OCA St. 1 at 2-4, Exh. TLF-1S; OCA St. 1S at 2-3; OCA Cross-Exh. 3 (OCA-IV-1c); Tr. 221-26, 236, 239-241, 245-46, 259; Emergency Order at 14, 18-19.

Based on this and other evidence of Deer Haven's poor accounting and reporting practices, inefficient operation of the system, non-compliance with Commission laws and regulations, and unreasonable business decisions, the ALJ determined that DHS is providing inadequate service in violation of Section 1501. R.D. at 31-43. Even so, the ALJ declined to recommend that the Commission exercise its discretion under Section 526 of the Public Utility Code to deny DHS's proposed increase in its entirety. R.D. at 40-42. Instead, she recommended that DHS be allowed to recover her calculated revenue requirement of \$25,715 without any adjustment to reflect inadequate service.<sup>5</sup> Id. at 42-43. The ALJ reasoned that "the need to offer wastewater service still exists with expenses to offer it safely." Id. at 41. The OCA respectfully disagrees.

DHS is legally required to provide adequate service. 66 Pa. C.S. § 1501. In exchange, for providing adequate service, customers may be charged reasonable rates. Conversely, if DHS fails to provide adequate service, it is not entitled to charge rates that might otherwise be reasonable. As recognized by this Commission, "this is the essence of the regulatory bargain." PG&W 1988 at 197; see, e.g., Market Street at 563-64; Colonial Products, 188 Pa. Super. at 172-73, 146 A.2d at 663; NUI 1998 at 977-80. DHS should not be held to a different standard because it is a bad actor. Lesser rates are appropriate for a lesser and inadequate quality of service. Pa. P.U.C. v. Pennsylvania-American Water Co., 1989 PaPUC LEXIS 170 at \*16 (PAWC 1989); PG&W 1988 at 196.

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<sup>5</sup> It should be recognized that ALJ Jones recommended that this level of revenues be recovered "in the interim" while the Commission moves forward with the Section 529 process. R.D. at 43. The recommended rates are not "temporary rates," pursuant to Section 1310; they are "permanent" rates fixed under Section 1308(d). 66 Pa. C.S. §§ 1308(d), 1310.

The ALJ recognized that granting the Company more revenue will not make it a viable utility. R.D. at 41 (“one which is self-sustaining and has the commitment and financial, managerial and technical capabilities to reliably meet Public Utility Commission and [DEP] requirements on a long-term basis”). Policy Statement Re: Small Drinking Water System Viability and Memorandum of Understanding between Department of Environmental Resources and Pennsylvania Public Utility Commission, 52 Pa. Code § 69.701. Nor does the evidence support any expectation that service will improve if rates are increased. Rather, the ALJ recommends that rates be increased to prevent service from getting worse. She fears that unless the Commission grants a rate increase that DHS will “walk away.” R.D. at 41. In other words, although higher rates will not rectify existing problems, it is better for customers to pay higher rates for poor service than to have no service at all. The OCA disagrees. First, it would set a terrible precedent and render Section 1501 meaningless. Second, it would be inconsistent with a multitude of decisions that make clear that the Commission is not powerless to sanction inadequate service even when the denial of a rate increase would result in the utility operating at a loss:

If [the utility] is correct, it may disregard its public responsibilities at will ... and yet insist that the public respond to its demands for higher rates. We cannot accept that position. We do not believe the Constitution left the Commission impotent to deal with the situation confronting it in a reasonable manner.

PG&W 1988 at 197 (citing D.C. Transit Sys., Inc. v. Washington Metro. Area Transit Comm’n, 466 F.2d 394, 422 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1086) (Washington Metro); Colonial Products Co. v. Pa. P.U.C., 188 Pa. Super. 163, 172-73; 146 A.2d 657, 663 (1959). The Circuit Court in Washington Metro continues:

The Constitution does not guarantee a public utility immunity from loss occasioned by uneconomic and inefficient management decisions, and we do not believe that it bars a regulatory agency on a record such as this from taking

adequate steps to protect the public interest even if the short term effect of such an order is a temporary loss to the company.

Washington Metro at 422.

Third, the Commission has other means to protect DHS's customers. The OCA, OTS and HOA have recommended that the Commission immediately commence a Section 529 proceeding to address the outstanding factual determinations required for the Commission to order acquisition by a viable utility. OCA M.B. at 22; OTS M.B. at 13-14, 17-18; HOA M.B. at 16-17 (the Commission should take "any other action" deemed necessary to ensure service to DHS's customers in the event of abandonment). If DHS consents to abandonment, its cooperation will further speed the process. See 66 Pa. C.S. § 529(b), (e), (i)(1). ALJ Jones determined that evidence in this proceeding addresses subsections (a) and (c) of Section 529 but declined to recommend initiation of mandatory acquisition proceedings of DHS by a capable utility because subsection (b) has not been addressed. R.D. at 42. The OCA interprets Section 529 differently and submits that a determination under Section 529(b) should be made within the context of a Section 529 proceeding rather than as a condition precedent to initiation of a Section 529 proceeding. The purpose of a Section 529 proceeding is to determine whether the statutory requirements for the Commission to order a capable public utility to acquire DHS are met. See Investigation of W.P. Water Co., Inc. and W.P. Sanitary Co., Inc. pursuant to Section 529 of the Pennsylvania Public Utility Code, Docket No. I-00070114, Order (July 11, 2007) (attached as Appendix A hereto).

Fourth, as noted above, many of the factual determinations under Section 529 have already been addressed and the Company's cooperation would eliminate or shortcut a number of others. If the process could not be expedited quickly enough to ensure the continuous provision

of service to DHS customers, however, the Commission could exercise its authority under Section 529(g) to appoint a receiver.

For all of these reasons, the ALJ's recommendation to allow a rate increase for DHS should be rejected. As in PG&W 1988, NUI 1998 and, most recently, in Pa. P.U.C. v. Clean Treatment Sewer Co., the evidence supports the conclusion that no rate increase should be permitted for DHS unless and until it is providing adequate service to its customers. R-2009-2121928, Order (Apr. 22, 2010) (attached hereto in Appendix A).

D. Conclusion

As discussed in the OCA's Main Brief, ratepayers should not be required to provide funds to a utility so that the utility may, at some future time, provide adequate service. OCA M.B. at 15, 22-23. The Public Utility Code places on the utility the specific obligation to provide adequate service. The Code provides:

Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and shall make all such repairs, changes, alterations, substitutions, extensions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public.

66 Pa. C.S. § 1501 (emphasis added). Thus, under the Code it is the utility which has the obligation to make all improvements that may be necessary to provide such service. It is only after these improvements are used and useful in providing utility service that the ratepayers have the obligation to pay for those improvements. PG&W 1986; PG&W 1988; PAWC 1989. Until such time, and as long as service remains inadequate, DHS's usage customers should not be required to pay the rates which might be appropriate if service were adequate.

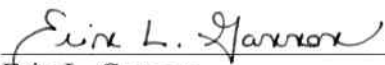
To the extent that the Commission does not adopt the OCA's recommendation and allows more than \$0 increase, the OCA recommends that the increase be tied to demonstrable

improvements in quality of service. In this manner, the impact of higher rates would be phased-in for customers, which would help to address affordability concerns, and no increase would be permitted while service continues to be inadequate. See OCA St. 1 at 12; see, e.g., Pa. P.U.C. v. Pennsylvania Gas & Water Co., 1993 PaPUC LEXIS 118; PG&W 1986; PG&W 1988; PAWC 1989. Respectfully, the Commission should exercise its authority to deny the proposed rate increase and quickly move forward with a Section 529 investigation to transfer this utility to financially, managerially and technically capable ownership. 66 Pa. C.S. § 529.

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### III. CONCLUSION

For all of the reasons discussed above and in its Main and Reply Briefs, the Office of Consumer Advocate submits that Deer Haven Sewer Company's proposal to increase rates should be denied and rates should be reset to the pre-interim relief rate of \$20 per month. DHS should be held responsible for its ongoing failure to provide adequate service to its customers and its lack of managerial and financial fitness. The Office of Consumer Advocate respectfully submits that the Commission should exercise its discretion under Section 526 to deny the proposed rate increase, including the portion of the requested increase granted on an emergency basis, prospectively. Furthermore, the Commission should move forward to initiate a Section 529 investigation to transfer this utility to more financially, managerially and technically capable ownership.

  
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Candis A. Tunilo  
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PA Attorney I.D. #89891

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DATED: April 5, 2011  
140825

## APPENDIX A

**PENNSYLVANIA  
PUBLIC UTILITY COMMISSION  
Harrisburg, PA. 17105-3265**

Public Meeting held July 11, 2007

Commissioners Present:

Wendell F. Holland, Chairman  
James H. Cawley, Vice Chairman  
Terrance J. Fitzpatrick  
Tyrone J. Christy  
Kim Pizzingrilli

In re: Investigation of W.P. Water Co., Inc. and W.P. Sanitary Co., Inc. pursuant to Section 529 of the Pennsylvania Public Utility code I-00070114

In re: W.P. Water Co., Inc. and W.P. Sanitary Co., Inc. P-00072313

Application of W.P. Sanitary Co., Inc. for Approval of Abandonment of Service A-230550F2000

**INVESTIGATION ORDER**

**BY THE COMMISSION:**

On June 6, 2007, the Office of Consumer Advocate ("OCA") filed a Petition for a Commission Order Instituting a Proceeding to Order the Acquisition of W.P. Water Company, Inc. and W. P. Sanitary Company, Inc. ("W.P.") pursuant to 66 Pa. C.S. § 529 ("Petition"). Under authority at section 529 of the Public Utility Code, the Commission may, after due process notice and opportunity to be heard, direct the acquisition of a small non-viable water or sewer company by a larger capable public utility.

In its petition, OCA requested that the Commission issue an expedited order pursuant to section 529 instituting a proceeding to facilitate the acquisition of W.P. by a proximate capable public utility. OCA states that all or virtually all of the evidence to support a Commission order directing the acquisition of W.P. has already been adduced in two recent proceedings involving W.P. An initial decision has been issued in one of these cases and a decision is pending in the other.<sup>1</sup> OCA asserts that evidence from these proceedings demonstrates the financial, technical and managerial inability of W.P. to provide or make necessary improvements to provide adequate service to customers as required under section 1501 of the Public Utility Code.

In a related matter, we note that OCA filed concurrently with the mandatory takeover petition, a separate petition for ex parte emergency relief under our regulations at 52 Pa. Code § 3.2. The petition for emergency order was docketed at P-00072312. Vice Chairman Cawley granted that petition, in part, by Emergency Order dated June 15, 2007.<sup>2</sup> The Emergency Order was ratified at the Public Meeting of June 21, 2007.

On June 14, 2007, W.P. filed an answer to OCA's section 529 petition. In its answer, W.P. specifically denied that it has violated statutory and/or regulatory standards as would support a section 529 proceeding. However, W.P. did not expressly object to the initiation of take-over proceedings and admitted that it was "both viable and practical to transfer assets of W.P. to a capable public utility and a proximate public utility." (W.P. Answer, Para. 18). Further, W.P.'s answer specifically identified United Water

Pennsylvania Inc., Aqua Pennsylvania, Inc., and Pennsylvania American Water as

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<sup>1</sup> Customers of W.P. Water and W.P. Sanitary filed complaints against W.P. between October 19, 2005 and November 10, 2005. Sylvester, et al v. W.P. Water Co., at Docket Nos. C-20055453, C-20055473 and C-20065849, and Sylvester, et al. v. W.P. Sanitary Co., at Dockets No. C-20055455, C-20055473 and C-20065850. Hearings were held on these matters and an Initial Decision by Presiding ALJ Ember S. Jandebeur is pending. Additionally, on May 1, 2007, ALJ Cocheres issued an Initial Decision at Docket No. A-210104F0074, Application of Aqua Pennsylvania, Inc. for approval to begin to offer, render, furnish and supply water service to the public in portions of Dallas Township, Luzerne County, Pennsylvania.

appropriate proximate utilities capable to acquire W.P. (W.P. Answer, Para. 19).

On June 22, 2007, OCA filed a Motion to Consolidate the Application of W.P. Sanitary Co., Inc. for Approval of Abandonment of Service at Docket No. A-230550F2000 (the Application) and the Petition for a Commission Order Instituting a Proceeding to Order the Acquisition of W.P. Water Co. Pursuant to 66 Pa.C.S. § 529 at Docket No. P-00072313 (the Petition). In its Motion, OCA asserts that the issues involved in both the Application and the Petition are the same, and that there are common questions of law and fact that warrant consolidation of the proceedings. We agree that consolidation of these proceedings would avoid unnecessary duplication and would allow the proceedings to be litigated more efficiently.

On June 28, 2007, W.P. filed its initial report<sup>3</sup> as required by the June 15, 2007 Emergency Order indicating the following actions on the part of W. P.: (1) W.P. has drilled a new well located approximately 110 feet North of the existing well #3; (2) the new well site yields water at the rate of 8 gallons per minute; (3) that W.P.'s engineer, Frank Westowski, P.E. has submitted to DEP an application for a construction permit for a new well and a 50,000 gallon underground concrete storage tank; (4) that W.P. is in the process of preparing the site for the 50,000 gallon storage tank; (5) that W.P. had contacted Richard Stepanski, P.E., technical services chief, DEP, Water Supply Program, and Larry Lash, P.E., Commission Bureau of Fixed Utility Services concerning the installation of meters to all customers; and (6) W.P. asserted that a geological study is not required to place the new well as a geological study had previously been completed for the existing well #3. In its report, W.P. also asserted that it had initiated compliance with

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<sup>2</sup> A copy of the June 15, 2007 Emergency Order is attached to this order.

<sup>3</sup> A copy of the June 28, 2007 report of W.P. is attached to this order.

all specific requirements of the Commission's Emergency Order and has made good faith efforts towards compliance with that Order.

However, it appears to this Commission that W.P. failed to appropriately respond to the June 15, 2007 Emergency Order. While W.P. may have drilled a new well, it did not follow proper permitting procedures and failed to follow procedures for determining a proper location for a new well site. Furthermore, the reported water flow rate of 8 gallons per minute from this new well site appears grossly inadequate for its intended purpose of ensuring continuous adequate service. In addition, while W.P. indicated that it has begun the process of preparing a site for a 50,000 gallon storage tank and ordering concrete to construct the tank on the premises at the Washington Park subdivision, it has done so without the necessary permits or without following DEP procedures for locating this facility by failing to first seek DEP permission. Also, the report submitted by W.P. fails to advise what steps it has taken to assure that customers will have adequate alternative supplies of potable water during all periods of low pressure and outage events. Finally, while W.P. asserted that a previously completed geological study would be adequate for determining the appropriate location of the new well, W.P. failed to provide the previous geological study with its report so that Commission Staff could determine whether this assertion is correct.

Based upon our review of the OCA's Petition and W.P.'s Initial Report to the June 15, 2007 Emergency Order, which does not appear to be adequate, the Commission has serious concerns regarding whether W.P. has the financial, technical and managerial ability to provide, or make improvements to provide adequate, efficient, safe and reasonable service to its customers. Under these circumstances, it appears that initiation of an investigation proceeding to determine whether the Commission may order a capable public utility to acquire W.P. is warranted; **THEREFORE,**

**IT IS ORDERED:**

1. That an investigation should be instituted into whether the Commission should order a capable public utility to acquire W.P. Water Company and W.P. Sanitary Company pursuant to 66 Pa. C.S. § 529.

2. That OCA's petition for a Commission Order Instituting a Proceeding to Order the Acquisition of W.P. Water Company and W.P. Sanitary Company Pursuant to 66 Pa. C.S. § 529 is granted in part and denied in part consistent with this Order.

3. That the Law Bureau is directed to participate in this investigation proceeding pursuant to 66 Pa. C.S. § 529(i).

4. That this investigation be referred to the Office of Administrative Law Judge for hearing and adjudication.

5. That the investigation proceeding instituted by this Order at Docket No. I-00070114 is hereby consolidated with the Application proceeding currently before Administrative Law Judge Ember S. Jandebour at Docket No. A-230550F2000.

6. That in addition to Law Bureau Prosecutory Staff, Washington Township and the following proximate public utilities should be joined as parties to the consolidated proceeding: United Water, Pa. American Water Company, and Aqua Pennsylvania, Inc. A copy of this Order should be served on each of above-named entities, as well as, the Office of Consumer Advocate, W.P. Water Company, W.P. Sewer Company, the Office

of Small Business Advocate, the Department of Environmental Protection, the  
Commission's Office of Administrative Law Judge and the Office of Trial Staff.

**BY THE COMMISSION**

James J. McNulty  
Secretary

(SEAL)

ORDER ADOPTED: July 11, 2007

ORDER ENTERED: July 11, 2007

CERTIFICATE OF SERVICE

PENNSYLVANIA PUBLIC UTILITY :  
COMMISSION :  
v. : Docket No. R-2010-2194577  
DEER HAVEN, LLC d/b/a :  
DEER HAVEN SEWER COMPANY :

I hereby certify that I have this day served a true copy of the foregoing Exceptions of the Office of Consumer Advocate upon parties of record in this proceeding 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 5th day of April 2011.

SERVICE BY EMAIL and IN PERSON

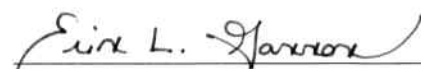
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