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October 31, 2012

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17120

VIA HAND DELIVERY

RE: Joint Application of Aqua Pennsylvania, Inc. and Total Environmental Solutions, Inc.;
Docket Nos. A-2012-2322416 and ~~A-2012-2322501~~
Joint Application of Little Washington Wastewater Company d/b/a Suburban
Water Company and Total Environmental Solutions, Inc.;
Docket Nos. A-2012-2322448 and A-2012-2322509

Dear Secretary Chiavetta:

Enclosed please find for filing with the Pennsylvania Public Utility Commission ("PUC" or "Commission") an original and three (3) copies of is the Protest Nunc Pro Tunc of the City of Dubois – Water Bureau in the above-referenced proceeding.

As shown on the attached Certificate of Service, all parties to this proceeding are being duly served. Please date stamp the extra copy of this transmittal letter and Protest and kindly return them for our filing purposes. Thank you.

Sincerely,

McNEES WALLACE & NURICK LLC

By 
Adeolu A. Bakare

Counsel to the City of DuBois – Water Bureau

Imc
Enclosure

- cc: Mr. John F. Suplizio (via e-mail)
- Ms. Toni Cherry (via e-mail)
- Robert F. Powelson, Chairman (via Hand Delivery)
- John F. Coleman, Vice Chairman (via Hand Delivery)
- Wayne E. Gardner, Commissioner (via Hand Delivery)
- James H. Cawley, Commissioner (via Hand Delivery)
- Pamela A. Witmer, Commissioner (via Hand Delivery)

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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

In re Joint Application of Aqua Pennsylvania, :
Inc. ("Aqua") and Total Environmental :
Solutions, Inc. ("TESI") for approval of: :
(1) the acquisition by Aqua of the water system :
assets of TESI situated in a portion of Sandy :
Township, Clearfield County, Pennsylvania; :
(2) the right of Aqua to begin to offer, render, : Docket Nos. A-2012-2322416
Furnish and supply water service to the public : A-2012-2322501
in a portion of Sandy Township, Clearfield :
County, Pennsylvania; and (3) the abandonment :
by TESI of public water service and its :
franchise in a portion of Sandy Township, :
Clearfield County, Pennsylvania :

**PROTEST NUNC PRO TUNC OF
THE CITY OF DUBOIS – WATER BUREAU**

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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

In re Joint Application of Little Washington :
Wastewater Company d/b/a Suburban Water :
Company (hereinafter referred to as "LWWC") :
and Total Environmental Solutions, Inc. :
(hereinafter referred to as "TESI") for approval :
of: (1) the acquisition by LWWC of the : Docket Nos. A-2012-2322448
wastewater system assets of TESI situated : A-2012-2322509
in a portion of Sandy Township, Clearfield :
County, Pennsylvania: (2) the right of LWWC :
to begin to offer, render, furnish and supply :
wastewater service to the public in a portion: :
of Sandy Township, Clearfield County, :
Pennsylvania and (3) the abandonment by TESI :
of public wastewater service and its franchise :
in a portion of Sandy Township, Clearfield :
County, Pennsylvania :

**PROTEST NUNC PRO TUNC OF
THE CITY OF DUBOIS – WATER BUREAU**

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INTRODUCTION

The City of DuBois – Water Bureau ("City Water Bureau" or "Protestant"), by and through its undersigned attorneys, hereby files, pursuant to 52 Pa. Code § 5.51, this Protest Nunc Pro Tunc ("Protest") to the Joint Applications of Aqua Pennsylvania, Inc., Little Washington Wastewater Company d/b/a Suburban Water Company (collectively, "Aqua"), and Total Environmental Solutions, Inc. ("TESI") (collectively, the "Joint Applicants") in the above-captioned proceeding. *In support of this Protest, the City Water Bureau avers as follows:*

PROTEST

Background

1. On August 31, 2012, the Joint Applicants filed a Joint Application with the Pennsylvania Public Utility Commission ("PUC" or "Commission") seeking approval of: (1) the acquisition by Aqua of the water system assets of TESI in Sandy Township, Clearfield County, Pennsylvania; (2) the right of Aqua to begin to offer, render, furnish and supply water service to the public in Sandy Township, Clearfield County, Pennsylvania; and (3) the abandonment by TESI of public water service in Sandy Township, Clearfield County, Pennsylvania. Also on August 31, 2012, the Joint Applicants filed a companion Joint Application with the Commission for approval of (1) the acquisition by Aqua of the wastewater system assets of TESI in Sandy Township, Clearfield County, Pennsylvania; (2) the right of Aqua to begin to offer, render, furnish and supply wastewater service to the public in Sandy Township, Clearfield County, Pennsylvania; and (3) the abandonment by TESI of public wastewater service in Sandy

Township, Clearfield County, Pennsylvania.¹ The TESI public water and wastewater systems both serve the Treasure Lake Community in Sandy Township.

2. Notice of the Joint Applications was published in the *Pennsylvania Bulletin* on September 15, 2012. 42 Pa.B. 5951 (September 15, 2012). Application of the default 60-day protest period provided in the Commission's Regulations would permit parties to file timely protests through November 14, 2012. However, the Notice established an alternative deadline of October 1, 2012 for the filing of protests. *Id.*

3. The full name, address and telephone number of the Protestant is:

Mr. John F. Suplizio
City Manager
The City of DuBois
P.O. Box 408
16 W. Scribner Avenue
DuBois, PA 15801

4. The City Water Bureau's attorneys in this matter are:

James P. Dougherty (Pa. I.D. No. 59454)
Adcolu A. Bakare (Pa. I.D. No. 208541)
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5. The City of DuBois ("City") is a Third Class City governed by the applicable laws and regulations of the Commonwealth of Pennsylvania. The City Water Bureau operates public water facilities within the City and in surrounding areas of Sandy Township. The Commission

¹ As noted above, "Aqua" refers to both Aqua Pennsylvania, Inc. and Little Washington Wastewater Company d/b/a Suburban Water Company for purposes of this Protest.

has jurisdiction over the City Water Bureau only with regard to public water service furnished to customers outside of the City's corporate boundaries.

Protest

6. Under Section 1103(a) of the Public Utility Code, the Commission may grant an application for a certificate of public convenience only upon a determination that "the granting of such certificate is necessary or proper for the service, accommodation, convenience or safety of the public." 66 Pa. C.S. § 1103(a). *See City of York v. PUC*, 295 A. 2d 825 (Pa. 1972) (the Pennsylvania Supreme Court held that the proponent of a merger has the burden to show that the merger will affirmatively promote the public interest); *see also Middleton Township v. PUC*, 482 A. 2d 674, 682 (Pa. Commw. Ct. 1984) (finding that the benefits and detriments of a merger will be measured under the public interest test in accordance with impacts upon "all affected parties").

7. The Commission's Regulations further provide that parties objecting to the approval of an application filed with the Commission may file a protest to the application. 52 Pa. Code § 5.51(a). A protest to an application must: (1) set out clearly and concisely the facts from which the alleged interest or right of the protestant can be determined; (2) state the grounds of the protest; and (3) set forth the facts establishing the protestant's standing to protest. 52 Pa. Code § 5.52(a).

8. The City of DuBois operates public water facilities within one mile of TESI's water and wastewater systems and possesses the willingness and resources to acquire both systems and provide safe and reliable service at rates substantially lower than Aqua's Main Division rates.

9. Due to the close proximity (within one mile) of TESI's public water and wastewater systems to the City Water Bureau's service territory, the City Water Bureau has direct and substantial interests in this proceeding.² See Joint Applications, Exhibit A (showing the City Water Bureau's service territory to be within one mile of TESI's service territory).

10. Aqua does not currently provide public water or wastewater service in Clearfield County or any county adjacent to Clearfield County, including Elk, Cameron, Clinton, Centre, Blair, Cambria, Indiana, or Jefferson Counties. See Aqua Pennsylvania, Inc. Service Territory Map available at <https://www.aquaamerica.com/Documents/State%20Maps/pennsylvania.pdf> (last visited October 30, 2012).

11. Aqua has not identified a Certified Operator for the TESI systems. Aqua expects to service the system out of its Shenango Operations Center. Aqua Response to TUS Discovery Set 1, Data Request A-5.

12. The Joint Applications fail to show any present intention to improve the infrastructure within TESI's Treasure Lake system. TESI currently operates a water distribution system relying on five wells for supply. Based on feedback from current TESI customers, water quality on the Treasure Lake system is inferior to the City Water Bureau's public water service. However, Aqua has not developed a plan or cost projections for improving the TESI systems, providing only a listing of potential improvements that may or may not actually materialize. Aqua Response to TUS Discovery Set 1, Data Request A-4.

13. In light of Aqua's geographical distance from the TESI systems and uncertain operational plans, it is unclear whether Aqua's acquisition would confer benefits of consolidation and regionalization upon TESI's current customers. While not directly referenced, the Joint Applications rely upon the Commission's policies encouraging acquisitions of water and

² If necessary, this Protest should be considered as a Petition to Intervene pursuant to 52 Pa. Code § 5.73(a).

wastewater utilities, claiming that Aqua's purchase of the TESI systems will benefit the public interest and further the benefits of regionalization and economies of scale. Joint Applications, p. 5; *see also* 52 Pa. Code § 69.721. These representations fail to account for the close proximity (one mile) of the City Water Bureau's public water and wastewater systems to TESI's Treasure Lake system.

14. As a Commission-certificated public water system operating adjacent to the TESI systems, the City Water Bureau is the preferable option for realizing the benefits of consolidation and regionalization. The City Water Bureau is a highly performing public utility, evidenced by the Recommended Decision praising the total lack of customer service complaints in the City Water Bureau's most recent base rate case. Recommended Decision at Docket No. R-00050671, pp. 5-6. Importantly, the City Water Bureau currently provides public water service within one mile of TESI's Treasure Lake system. Approval of the Joint Applications would unnecessarily deny ratepayers in the Treasure Lake Community the public interest benefits of locally controlled and managed water and wastewater services.

15. Additionally, the City Water Bureau is positioned to provide safe and reliable public water and wastewater service to TESI's current customers at a reasonable cost. While Aqua represents that it will maintain current rates upon approval of the Joint Applications, Aqua also confirms that rates for TESI's public water customers will likely increase over time to equal Aqua's Main Division rates. As reflected on Aqua's current tariff, Main Division consumption rates for residential customers are \$9.071/1000 gallons for usage up to 2000 gallons/month and \$10.0352/1000 gallons for usage exceeding 2000 gallons/month. Additionally, a Main Division residential customer with a 5/8 meter pays a monthly fixed customer charge of \$16.00. Conversely, the City Water Bureau's consumption charges for all customers outside the City's

corporate boundaries are \$5.15/1000 gallons for usage up to 9,000 gallons/quarter, \$3.30/1000 gallons for usage up to 300,000 gallons/quarter, and \$2.43/1000 gallons for usage over 300,000 gallons/quarter. A residential City Water Bureau customer with a 5/8 meter pays a quarterly fixed customer charge of \$10.30, approximately \$6.00 lower than Aqua's monthly customer charge for Main Division residential customers.

16. Based on the above statements, the City Water Bureau submits that the proposed acquisition is not in the public interest, will not further the benefits of regionalization and consolidation, and will not produce substantial affirmative benefits for the public. Accordingly, customers currently taking service from TESI would be better served by the City Water Bureau than by Aqua.

Reasons Justifying Protest Nunc Pro Tunc

17. The City Water Bureau requests that the Commission grant this Protest Nunc Pro Tunc because the original protest period is inadequate and contrary to Section 3.501 of the Commission's Regulations. 52 Pa. Code § 3.501; see also 52 Pa. Code § 5.43 (authorizing the Commission to grant waiver of its Regulations).

18. Section 5.14 of the Commission's Regulations provides the general notice provisions for application proceedings, establishing that a 15-day protest period shall apply except as otherwise directed by the Secretary or as set forth in additional Regulations, including Section 3.501. *See* 52 Pa. Code § 5.14.

19. The City Water Bureau acknowledges notice of the Joint Applications was provided through service of the Joint Applications on September 17, 2012. However, in determining the reasonableness of the original 15-day protest period, the City Water Bureau requests that the Commission consider procedural obstacles that would affect its substantive

ability to respond to the Joint Applications. For example, between service of the Joint Applications on September 17, 2012 and the conclusion of the original October 1, 2012 protest period, the City held only a single City Council meeting on September 24, 2012. The City Council did not reconvene until October 8, 2012.

20. Of further note, the Commission's Regulations specifically recognize that a 60-day notice period is appropriate for applications for certificates of public convenience to provide public water or wastewater service. 52 Pa. Code § 3.501. Adoption of the 60-day notice period would permit parties to file protests through November 14, 2012. Although the Commission has previously held that Section 3.501 does not compel a 60-day notice period when applicants are previously certificated public utilities, the Commission has also reiterated the necessity to permit discretionary allowance of additional notice beyond the 15-day protest period. *See Joint Application of United Water Works, Inc., Docket Nos. A-210390F5000, A-210013F0012, and A-210390F2000 (September 16, 1999).*

21. As indicated above, the protest period for the Joint Applications closed on October 1, 2012. As no parties filed protests to the Joint Applications, the proposed acquisition is currently uncontested on the record. However, the City Water Bureau notes that the Joint Applications are currently under review by the Commission's Bureau of Technical Utility Services ("TUS"). As of filing of this Protest, TUS remains actively involved in discovery and has not yet reached a determination as to whether the Joint Applications should be subject to evidentiary hearings. Further, as evidenced by responses to TUS discovery requests, Aqua has not obtained letters in support of the Joint Applications from Sandy Township or Clearfield County.³ Aqua Response to TUS Discovery Set I, Data Request A-6. Conversely, the City

³ Data Request A-6 refers to "Sandy Lake Township" which this Protest assumes to be an intended reference to Sandy Township. Aqua Response to TUS Discovery Set I, Data Request A-6.

Water Bureau has received inquiries from current TESI customers desiring localized water and wastewater service from the City Water Bureau.

22. The Joint Applications request that the Commission complete its review prior to March 1, 2013. Joint Applications, p. 2. Because the Joint Applications are currently before TUS, no procedural schedule for the Commission's review exists. Further, the City notes that application dockets proceed at the discretion of the Commission and are not limited to statutory review periods. Finally, as previously stated, the Joint Applications remain subject to evaluation by TUS, which may recommend that the Commission schedule an evidentiary hearing for further examination and investigation of the proposed acquisition. Because the progress of this proceeding remains largely uncertain, unscheduled, and fully within the discretion of Commission staff and the Commission itself, approval of the City Water Bureau's Protest cannot be construed as a material delay to the progress of this proceeding.

23. Finally, approval of the Protest will not unreasonably broaden the issues or shift the burden of proof. The central issue underlying this Protest is whether approval of the Joint Applications is in the public interest and would result in safe and reliable water and wastewater service to ratepayers. This is precisely the purpose of the ongoing TUS investigation. Approval of the Protest will ensure that the Commission receives a full and complete record of the impact of Aqua's proposed acquisition upon affected ratepayers, which can only be properly weighed and evaluated in conjunction with the available services from the City Water Bureau. As the Joint Applicants, Aqua and TESI will remain the Parties bearing the burden of proof as to whether approval of the Joint Applications is in the public interest.

CONCLUSION

24. The City Water Bureau respectfully requests that that Commission conduct a full and complete investigation of the proposed Joint Applications. If necessary, the significant public interest considerations must take precedence over Aqua's request for a Commission ruling before March 1, 2013.

25. The City Water Bureau submits that an evidentiary hearing is necessary and appropriate to address the issues of material fact raised in this Protest.

WHEREFORE, for all the reasons set forth above, the City Water Bureau hereby respectfully requests that the Commission (a) grant the Protest Nunc Pro Tunc filed by the City Water Bureau; (b) hold hearings on the Joint Applications; (c) deny the Joint Applications if they are not in the public interest; and (d) grant any other relief that is deemed to be reasonable and appropriate.

Respectfully submitted,

McNEES WALLACE & NURICK LLC

By 

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Counsel to the City of DuBois – Water Bureau

Dated: October 31, 2012

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VERIFICATION

I, John Suplizio, City Manager of the City of DuBois, hereby state that the facts contained in the foregoing document are true and correct to the best of my knowledge, information, and belief and that I expect to be able to prove the same at a hearing held in this matter. I understand that the statements herein are made subject to the penalties of 18 Pa. C.S. § 4904, relating to unsworn falsification to authorities.

10-26-2012

Date

John Suplizio
Signature

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served upon the following persons, in the manner indicated, in accordance with the requirements of § 1.54 (relating to service by a participant).

VIA E-MAIL AND FIRST-CLASS MAIL

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Clearfield County Commissioners
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Clearfield, PA 16830

Clearfield County Planning Commission
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Chris Corcoran, President
Treasure Lake Property
Owners Association, Inc.
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DuBois PA 15801

Certificate of Service

Docket Nos. A-2012-2322416, A-2012-2322501, A-2012-2322448 and A-2012-2322509

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Nels Taber, Regional Director
PA Department of Environmental Protection
Northcentral Regional Office
208 West Third Street, Suite 101
Williamsport, PA 17701



Adeolu A. Bakare

Dated this 31st day of October, 2012, in Harrisburg, Pennsylvania.

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