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November 9, 2012

Via Electronic Filing

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
P. O. Box 3265
Harrisburg, PA 17105-3265

In re: Dockets Nos. A-2012-2322416, A-2012-2322448, A-2012-2322501, and
A-2012-2322509; Joint Applications of Aqua Pennsylvania, Inc./Little
Washington Wastewater Company and Total Environmental Solutions, Inc.

Dear Secretary Chiavetta:

Enclosed for filing is the Answer of Aqua Pennsylvania, Inc., Little Washington Wastewater Company d/b/a Suburban Water Company, and Total Environmental Solutions, Inc., Joint Applicants in the above-referenced matters, to the request of the City of DuBois - Water Bureau for consideration of its Protest *Nunc Pro Tunc*. Copies of the Answer are being served in accordance with the certificate of service attached to it.

Very truly yours,

THOMAS, LONG, NIESEN & KENNARD

By

Thomas T. Niesen

Encl.

cc: Certificate of Service (w/encl.)
Keith E. Gabage (w/encl.)
Thomas J. Sniscak, Esq. (w/encl.)

121109-Chiavetta (Answer).wpd

**Before The
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

In re: Joint Application of Aqua Pennsylvania, Inc. :
(hereinafter referred to as “Aqua”) and Total :
Environmental Solutions, Inc. (hereinafter referred :
to as “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, : Docket Nos. A-2012-2322416
Pennsylvania; (2) the right of Aqua to begin to : A-2012-2322501
offer, render, furnish and supply water service to :
the public 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 :

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 wastewater system : Docket Nos. A-2012-2322448
assets of TESI situated in a portion of Sandy : A-2012-2322509
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 :

**ANSWER OF AQUA PENNSYLVANIA, INC., LITTLE WASHINGTON
WASTEWATER COMPANY D/B/A SUBURBAN WATER COMPANY, AND
TOTAL ENVIRONMENTAL SOLUTIONS, INC.
TO THE REQUEST OF THE CITY OF DUBOIS – WATER BUREAU FOR
CONSIDERATION OF ITS PROTEST *NUNC PRO TUNC***

AND NOW, come Aqua Pennsylvania, Inc. (“Aqua”), Little Washington Wastewater Company d/b/a Suburban Water Company (“LWWC”), and Total Environmental Solutions, Inc.

(“TESI”) (Aqua, LWWC, and TESI are collectively referred to herein as “Joint Applicants”), by their respective attorneys, and, pursuant to 52 Pa. Code § 5.61, submit their Answer to the petition for relief of the City of Dubois – Water Bureau (“City Water Bureau”) in the form of a Protest *Nunc Pro Tunc*, filed with the Pennsylvania Public Utility Commission (“Commission”) on October 31, 2012 in the above-captioned proceedings.¹ Specifically, Joint Applicants submit that the City Water Bureau’s request that the Commission consider its Protest *Nunc Pro Tunc* should be denied and its Protest dismissed on grounds that it is untimely. In support thereof, Joint Applicants submit as follows:

I. INTRODUCTION

1. On August 31, 2012, Aqua and TESI filed with the Commission a Joint Application 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, furnish and supply water service to the public in a portion of Sandy Township; and (3) the abandonment by TESI of public water service and its franchise in a portion of Sandy Township. Contemporaneously therewith, LWWC and TESI filed with the Commission a Joint Application for approval of: (1) the acquisition by LWWC of the wastewater system assets of TESI situated 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; and (3) the abandonment by TESI of public wastewater service and its franchise in a portion of Sandy Township. The water and wastewater system assets of TESI are located within the Treasurer Lake Community in Sandy Township.

¹ Although the above-captioned proceedings have not been consolidated, City Water Bureau nevertheless filed a single Protest to these matters. Therefore, Joint Applicants submit this Answer as a single pleading for consistency purposes.

2. Notice of the filing of the respective Joint Applications was published in the *Pennsylvania Bulletin* on September 15, 2012. *See* 42 Pa.B. 5951. The notice specified that formal protests and petitions to intervene were due on or before October 1, 2012. No protests were filed or received by the noticed deadline.

3. On October 31, 2012, a full month after the deadline established by the Commission in the *Pennsylvania Bulletin*, the City Water Bureau filed a Protest *Nunc Pro Tunc* objecting to the approval of the Joint Applications.

4. While styled as a “Protest,” the City Water Bureau’s pleading actually consists of a hybrid of two filings seeking separate and distinct relief – (1) a “protest” that contends the proposed acquisitions are not in the public interest and, therefore, seeks the denial of the Joint Applications;² and (2) a “request for relief” that asks for a waiver of the protest deadline and the Commission’s regulations related thereto and consideration of an admittedly late-filed protest.³ It is this latter portion of the Protest – *i.e.*, the request for relief set forth in Paragraphs 17 through 23 of the Protest – that Joint Applicants answer herein.

5. The Commission can, and should, deny the City Water Bureau’s petition to submit its protest after the protest deadline and, for the reasons stated in this Answer, dismiss the Protest on the ground that it is late-filed. Such disposition will avoid delay, time and expense for the Commission and the Joint Applicants and will not reward the City Water Bureau for its inexcusably tardy actions here. The Commission is empowered to rule directly on this matter in considering the Joint Applications, and the matter need not burden other Commission resources, such as referring the matter to the Office of Administrative Law Judge for disposition.

² *See* City Water Bureau Protest at 5-8, ¶¶ 6-16.

³ *See* City Water Bureau Protest at 8-10, ¶¶ 17-23. The fact that the City Water Bureau pleading does not expressly cite to 52 Pa. Code § 5.41(a) does not diminish the substance of the pleading or the requested relief.

6. Joint Applicants, therefore, do not address at this time, and the Commission need not consider at this time, the underlying merits of the Protest itself or whether the City Water Bureau has standing to protest or otherwise participate in the proceeding. In the alternative, Joint Applicants believe that the City Water Bureau's Protest is substantively baseless under established Commission precedent and that the City Water Bureau lacks standing to protest or participate in this matter because it maintains no direct, immediate, or substantial interest in Aqua's and LWWC's respective acquisitions of the TESI assets.⁴ Consequently, Joint Applicants reserve the right to file an appropriate motion seeking dismissal of the Protest on standing and substantive grounds, but submit that any such motion would be alternative to the arguments contained in this Answer and should not preclude the Commission from ruling immediately on the threshold issue related to the City Water Bureau's request for a waiver of the protest deadline and the corresponding Commission regulations. The City Water Bureau has failed to demonstrate good cause exists for granting its requested relief, and, thus, its late-filed Protest should be dismissed.

II. STANDARDS FOR LATE-FILED PROTESTS

7. In *Joint Application of Pennsylvania-American Water Company and Thames Water Aqua Holdings GmbH*, Docket Nos. A-212285F0096, A-230073F0004 (Order entered May 9, 2002), the Commission articulated the four factors to be considered when determining whether to consider a late-filed protest:

(1) Does the petitioner have a reasonable excuse for missing the protest due date?

⁴ See, e.g., *Application of Leatherstocking Gas Company, LLC*, Docket No. A-2011-2275595 (Order entered August 30, 2012); *Joint Application of Columbia Water Company and Marietta Gravity Water Company*, Docket Nos. A-2012-2282219 and A-2012-2282221 (Order entered July 20, 2012); *Application of Aqua Pennsylvania, Inc.*, Docket No. A-210104F0080 (Order entered March 27, 2012); *Joint Application of Aqua Pennsylvania, Inc. and Country Club Gardens Water Company, Inc.*, Docket Nos. A-210104F0066 and A-210620F2000 (Order entered April 7, 2006); *Re Consumers Pennsylvania Water Company – Shenango Valley Division*, Docket No. A-212750F0007 (Order entered January 11, 2001).

- (2) Was the proceeding contested at the time of the filing of the protest?
- (3) Will the receipt of the late filed protest delay the orderly progress of the case?
- (4) Will the late-filed protest significantly broaden the issues or shift the burden of proof?

A party requesting the Commission to grant its late-filed protest must address all four of these factors in order to allege good cause for the late filed protests. *See Application of Douglasville Water Co.*, Docket No. A-210760 (Order entered August 24, 1990); *Re S.T.S. Motor Freight, Inc.*, 54 Pa. P.U.C. 343 (1980); *Re Milton Transportation, Inc.*, 56 Pa. P.U.C. 623 (1982).

8. In its Protest, the City Water Bureau sets forth several reasons which allegedly justify the Commission granting its Protest *Nunc Pro Tunc*. Such reasons, however, do not demonstrate “reasonable excuse” or “good cause” for the City Water Bureau’s failure to file timely its Protest, and its request for consideration of its late-filed Protest should be denied.

III. JOINT APPLICANTS’ ANSWER

9. The City Water Bureau, by its own admission, was served with the Joint Applications in a timely fashion and had full, fair, and adequate opportunity to file a protest or petition to intervene before the deadline established by the Commission in the *Pennsylvania Bulletin*. It failed to do so of its own volition and provides no justification excusing its decision to wait 30 days after the deadline before finally filing a protest. The City Water Bureau’s procrastination and its failure to follow the Commission’s rules and regulations should not be rewarded. The arguments presented in Paragraphs 17 through 23 of its Protest are ill-timed, misplaced, and without merit. Accordingly, the relief requested by the City Water Bureau (*i.e.*, that the Commission waive the protest deadline and grant the Protest *Nunc Pro Tunc*) should be denied and the late-filed Protest should be dismissed with prejudice.

A. The City Water Bureau Lacks a “Reasonable Excuse”

10. In its Protest, the City Water Bureau contends that the original protest period was inadequate and contrary to Section 3.501 of the Commission’s regulations, 52 Pa. Code § 3.501, and that a 60-day notice period would be more appropriate.⁵ These contentions are misplaced. First and foremost, the protest period for the Joint Applications is properly governed by the Commission’s regulations at 52 Pa. Code §§ 5.14 and 5.53, which establish a 15-day protest period. Section 3.501 has no bearing on the Joint Applications, as it is well established that Section 3.501, including the 60-day notice period prescribed therein, is not applicable to the acquisition of one certificated water utility by another, but rather only applies to applications for certificates of public convenience submitted by new or existing “de facto” uncertified utilities. *See Joint Application of United Water Works, Inc.*, Docket Nos. A-210390F5000, A-210013F0012, and A-210390F2000 (Order entered September 16, 1999). Indeed, the City Water Bureau recognizes this very standard in Paragraph 20 of its Protest.

11. Second, it is disingenuous for the City Water Bureau to claim the protest period established in the *Pennsylvania Bulletin* was inadequate and that a 60-day period would be more appropriate when: (1) the Joint Applications were properly noticed in accordance with Sections 5.14 and 5.53 of the Commission’s regulations, and (2) the City Water Bureau was served with copies of the Joint Applications, which it acknowledges it received on September 17, 2012, only two days after the protest period began to run. As such, the original protest period afforded the City Water Bureau more than sufficient notice of the Joint Applications and provided full and fair opportunity for the filing of a protest before the deadline.

⁵ City Water Bureau Protest at 8-9, ¶¶ 17-18, 20.

12. The City Water Bureau also challenges the reasonableness of the 15-day protest period, claiming the Commission should consider the “procedural obstacles” faced by the City Water Bureau as justification for its late-filed Protest.⁶ Despite the City Water Bureau’s misplaced reliance on Section 3.501 of the Commission’s regulations, a 15-day protest period is consistent with the Commission’s regulations and other applications involving the acquisition of one certificated water utility by another. It, therefore, is *per se* reasonable, and the City Water Bureau’s arguments to the contrary ring hollow.

13. Furthermore, the Commission should not permit the City Water Bureau’s *unreasonable* actions to influence the reasonableness of the protest period utilized or to justify its failure to respond to the Joint Applications on a timely basis. If anything, the City Water Bureau’s recitation of its “procedural obstacles” reveals no obstacles at all and certainly does not demonstrate “reasonable excuse” for the untimeliness of the protest, but only confirms that it had ample opportunity to respond to the Joint Applications within the prescribed protest period and chose not to do so.

14. The City Water Bureau admits that it received service of the Joint Applications on September 17, 2012, two days after notice was published in the *Pennsylvania Bulletin*. A week later, on September 24, 2012, the City Council met, well before the protest deadline. Following that meeting a week still remained to file a protest. The City Water Bureau (and by extension the City Council) clearly had a reasonable period of time to discuss the Joint Applications, their interest in them, and their need to file a protest after being served with the Joint Applications. Yet, the City Water Bureau sat on its hands and did nothing. Now, in support of its requested relief, it offers no justification for its failure to timely act during the protest period or any

⁶ City Water Bureau Protest at 8-9, ¶¶ 20.

explanation about the significance of the alleged “procedural obstacles.” There is no justification provided regarding why the City Council failed to act on the Joint Applications at the September 24th meeting. Even assuming *arguendo* that City Council could not act at its September 24th meeting, the City Water Bureau provides no justification explaining why the City Council did not act at or promptly after its October 8th meeting, instead waiting more than 3 weeks later to file its protest on October 31, 2012. Simply put, the only “procedural obstacles” faced by the City Water Bureau were self-induced and could have been avoided through its own diligence and assiduousness. These “procedural obstacles” do not satisfy the “reasonable excuse” standard, and the fact remains that the City Water Bureau had adequate notice of the Joint Applications and could have acted within the mandated time period if it wanted.

B. Granting the Late-Filed Protest Will Substantially Delay These Otherwise Unprotested Proceedings And Create Avoidable Time and Expense to the Commission and the Joint Applicants

15. Despite the City Water Bureau’s assertions that granting its late-filed Protest will not be construed as a material delay to the progress of these matters, its actions have done exactly that. By waiting to file an out-of-time protest 30 days late, acceptance of the City Water Bureau’s Protest would convert these otherwise unprotested application proceedings, presently undergoing technical review and investigation by the Commission’s Bureau of Technical Utility Services, to contested proceedings, which would require assignment to the Commission’s Office of Administrative Law Judge for hearing and briefing. The result would not only prolong the disposition of these matters and waste valuable time and resources of the Commission and its Administrative Law Judges, but it would also jeopardize the Joint Applicants’ ability to obtain the requisite approvals prior to the date established to consummate the transaction.

16. The City Water Bureau is apparently attempting to use the regulatory process to leverage an acquisition of TESI's water and wastewater system assets by it instead of by Aqua and LWWC. Such actions should neither be tolerated nor rewarded by granting special permission to file a late-protest. Joint Applicants have presented an executed Assets Purchase Agreement for Commission review and approval. The Commission should move forward as expeditiously as possible to complete its review and approve the transaction which is in the public interest.

C. Expansion of the Issues

17. While the City Water Bureau claims approval of its late-filed Protest will not unreasonably broaden the issues or shift the burden of proof,⁷ its statements suggest otherwise. Most notably, the City Water Bureau contends that the Commission can only consider the impact of the proposed acquisition by Aqua in conjunction with a thorough evaluation of the services available from the City Water Bureau. If the City Water Bureau is allowed to go forward with its Protest and include an evaluation of its own services as part of these proceedings, the issues would be significantly broadened beyond the present scope of the proceedings, thereby further delaying the disposition of the Joint Applications.

18. Denying the City Water Bureau's late-filed Protest, however, would not threaten the Commission's ability to ensure that the Joint Applicants comply with all relevant statutory and regulatory requirements in order to obtain approval of the Joint Applications and that the Joint Applications promote the public interest. Indeed, certificates of public convenience will only be issued if they are "necessary or proper for the service, accommodation, convenience, or

⁷ City Water Bureau Protest at 10, ¶ 23.

safety of the public.” 66 Pa.C.S. § 1103. As recognized by Administrative Law Judge Salapa in *Application of Leatherstocking Gas Company, LLC*, Docket No. A-2011-2275595:

Whether approving an application promotes the public interest is a central consideration in every case reviewed by the Commission. Whether or not an application is protested, the Commission reviews the application to ensure that it complies with the relevant statutory and regulatory provisions and determines whether approving the application is consistent with its policies.⁸

Accordingly, the City Water Bureau’s arguments notwithstanding, a full and complete record will be developed and considered regardless of whether or not the late-filed Protest is considered.

19. The Commission’s regulations establishing protest deadlines are an important tool used by the Commission to ensure the orderly and efficient review and disposition of matters that come before it. Failure to uphold protest deadlines hampers and delays the approval of transactions that are in the public interest. The Commission should deny the City Water Bureau’s request for acceptance of its late-filed Protest.

⁸ *Application of Leatherstocking Gas Company, LLC*, Docket No. A-2011-2275595 (Initial Decision Sustaining Preliminary Objections and Dismissing Protest dated March 2, 2012), slip op. at 14.

IV. CONCLUSION

WHEREFORE, for the reasons set forth above, Joint Applicants Aqua Pennsylvania, Inc., Little Washington Wastewater Company d/b/a Suburban Water Company, and Total Environmental Solutions, Inc. respectfully request that the Pennsylvania Public Utility Commission deny the request for consideration of the Protest *Nunc Pro Tunc* filed by the City of Dubois – Water Bureau and dismiss the Protest *Nunc Pro Tunc* with prejudice.

Respectfully submitted,



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Dated: November 9, 2012

Before The
PENNSYLVANIA PUBLIC UTILITY COMMISSION

In re: Joint Application of Aqua Pennsylvania, Inc. : Docket Nos. A-2012-2322416
and Total Environmental Solutions, Inc. : A-2012-2322501

In re: Joint Application of Little Washington : Docket Nos. A-2012-2322448
Wastewater Company d/b/a Suburban Water : A-2012-2322509
Company and Total Environmental Solutions, Inc. :

CERTIFICATE OF SERVICE

I hereby certify that I have this 9th day of November 2012 served a true and correct copy
of the foregoing Answer, upon the persons and in the manner set forth below:

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