

COMMONWEALTH OF PENNSYLVANIA



OFFICE OF CONSUMER ADVOCATE

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July 19, 2017

Honorable Steven A. Haas
Office of Administrative Law Judge
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120

Re: Application of Aqua Pennsylvania
Wastewater, Inc. pursuant to Sections 1102
and 1329 of the Public Utility Code for
Approval of its Acquisition of the
Wastewater System Assets of Limerick
Township
Docket No. A-2017-2605434

Dear Judge Haas:

Enclosed please find the Office of Consumer Advocate's Motion to Strike in the above referenced proceeding.

Copies have been served as shown on the Certificate of Service.

Respectfully Submitted,

A handwritten signature in blue ink that reads "Christine Maloni Hoover".

Christine Maloni Hoover
Senior Assistant Consumer Advocate
PA Attorney I.D. # 50026
E-Mail: CHoover@paoca.org

Enclosures

cc: Rosemary Chiavetta, Secretary
Certificate of Service

*237603

CERTIFICATE OF SERVICE

Re: Application of Aqua Pennsylvania :
Wastewater, Inc. pursuant to Sections :
1102 and 1329 of the Public Utility Code : Docket No. A-2017-2605434
for Approval of its Acquisition of the :
Wastewater System Assets of Limerick :
Township :

I hereby certify that I have this day served a true copy of the following document, the Office of Consumer Advocate's Motion to Strike, 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 19th day of July, 2017.

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Dated: July 19, 2017

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Application of Aqua Pennsylvania	:	
Wastewater, Inc. pursuant to Sections	:	
1102 and 1329 of the Public Utility Code	:	Docket No. A-2017-2605434
for Approval of its Acquisition of the	:	
Wastewater System Assets of Limerick	:	
Township	:	

MOTION TO STRIKE OF THE
OFFICE OF CONSUMER ADVOCATE

I. INTRODUCTION

The Office of Consumer Advocate (OCA), pursuant to 52 Pa. Code § 5.103, files this Motion respectfully requesting presiding Administrative Law Judge Haas (ALJ) to strike Aqua Pennsylvania Wastewater’s (Aqua) direct testimony presented at the rebuttal phase of this proceeding. On July 11, 2017, Aqua presented new evidence on its fair market value appraisal and claim for ratemaking rate base of the wastewater system assets of the Limerick Township system. *See* Aqua Statement No. 3R - Rebuttal Testimony of Harold Walker, III and Aqua Statement No. 4R - Rebuttal Testimony of Adrienne M. Vicari.

Section 5.243(e) of the Pennsylvania Code prohibits the introduction of evidence during rebuttal which should have been included in the party’s case-in-chief or which substantially varies from the party’s case-in-chief. 52 Pa. Code § 5.243(e). The OCA submits that Aqua’s evidentiary presentation violates this regulation, as explained below. Further, Aqua’s impermissible conduct has created unnecessary effort, expense, and is otherwise a waste of public resources.

Aqua's proposed rate base valuation of Limerick Township sewer assets would add approximately 102.2% to its current total wastewater assets. Aqua did not provide testimony by the two Utility Valuation Engineers in support of their fair market value appraisals of Limerick Township's sewage collection and treatment system assets in its direct testimony and now seeks to present its case-in-chief on this issue in rebuttal testimony.

The regulations are clear. A party may not introduce evidence during the rebuttal phase that should have been included in the party's case-in-chief. 52 Pa. Code § 5.243(e). The bulk of the July 11, 2017 testimony of Harold Walker, III and Adrienne M. Vicari cannot be legitimately described as rebuttal testimony; it is Aqua's case-in chief on the valuations. Under the guise of responding to OCA direct testimony that Aqua failed to justify its rate base valuation claim, Aqua now proffers a large volume of fact-specific evidence and issues in its rebuttal testimony that could have been provided in its direct case in an attempt to remedy its previous failure.

Aqua is attempting to do precisely what Section 5.243(e) prohibits. The Presiding Officer should strike this material because Aqua should have presented it in its case-in-chief. The Presiding Officer should not allow Aqua to obtain the benefit of ambush and surprise with its late-filed submission. To address this issue, the OCA requests an expedited answer period and an expedited ruling on this Motion.

II. MOTION TO STRIKE

In support of this Motion, the OCA avers the following:

1. The Presiding Officer has authority pursuant to 66 Pa. C.S. §331(d) and 52 Pa. Code §5.103(d) to rule upon this Motion.
2. The Presiding Officer has authority to control the receipt of evidence and

otherwise regulate the conduct of this proceeding. 52 Pa. Code § 5.403 and § 5.483.

3. On May 19, 2017, the Applicant, Aqua, filed an application with the Commission by which it is seeking *inter alia* an order approving the acquisition that includes the ratemaking rate base of the Limerick wastewater system assets pursuant to Section 1329(c)(2) of the Pennsylvania Public Utility Code.

4. Aqua submitted direct testimony in support of its Application on that same date. Aqua did not request the opportunity to amend its filing at any time; rather, it agreed to a procedural schedule, the ALJ approved that schedule through a Prehearing Order issued on June 28, 2017 and the non-company Parties have acted according to that schedule. Under these circumstances, the Company's case-in-chief was complete as of May 19, 2017.

5. The OCA filed its direct testimony on July 3, 2017. There, its witnesses Ashley Everette and Glenn Watkins explained that Aqua had not provided adequate support for its claimed fair market value of the rate base pursuant to the standards set forth in the Public Utility Code, 66 Pa.C.S. §1329.

6. Aqua filed rebuttal testimony on July 11, 2017.

7. The Commission prohibits the type of trial by surprise and ambush that Aqua attempts here. The regulations at 52 Pa. Code § 5.243(e) provide:

(e) A party will not be permitted to introduce evidence during a rebuttal phase which:

(1) Is repetitive.

(2) Should have been included in the party's case-in-chief .

(3) Substantially varies from the party's case-in-chief.

52 Pa. Code § 5.243(e). The Aqua testimony from the two utility valuation experts (UVE) concerning their appraisals and the ratemaking rate base should have been included in Aqua's

case-in-chief. Aqua rebuttal testimony now attempts to support its fair market value appraisals when it did not do so in its direct testimony.

8. The Commission has consistently applied this regulation in situations like this one to exclude improper rebuttal testimony. “The clear purpose of it [the rule] is to avoid trial by ambush and the prevention of surprise can only be achieved if the parties are confined to the scope of their direct case.” Pa. PUC v. UGI Utilities, Inc., 1994 Pa. PUC LEXIS 138, 85; *see also* Pa. PUC v. City of Lancaster -- Sewer Fund, R-00049862, 2005 PaPUC LEXIS 44; Investigation pursuant to Section 3005 of the Public Utility Code, 66 Pa. C.S. § 3005, Docket No. M-00940587, 1992 Pa. PUC LEXIS 87 (rebuttal testimony will not be permitted if matters contained therein could have been presented through direct testimony.)

9. Aqua had its opportunity to provide the testimony in support of the appraisals used to establish its ratemaking rate base claim in a timely manner. Aqua was aware that the appraisals, contained in its Application, were a critical component to establishing the rate base value for which it is seeking ratemaking approval in this proceeding. Aqua chose not to submit direct testimony to sponsor the appraisal reports into the record and to explain how the reports were done. It cannot now, in rebuttal, present testimony in support of those reports. In addition to being impermissible, the offering of this evidence at the rebuttal stage disrupts the orderly progress of this case and compromises the due process rights of the OCA.

10. Further, the testimony from Aqua witness Vicari, Aqua Statement No. 4R, violates Section 5.243(e)(3), which prohibits the introduction of evidence in rebuttal that substantially varies from the party’s case-in-chief in violation of Section 5.243(e)(3). In developing his direct testimony, OCA witness Watkins relied on Ms. Vicari’s narrative within her valuation report regarding her rationale for her going value add-on because she did not

provide direct testimony. Aqua Exh. R at 11; OCA St. 2 at 14. Ms. Vicari's rebuttal testimony appears to retract her original rationale for her add-on for going value. Aqua St. 4R at 14; OCA St. 2S at 4.

11. In addition to violating the regulations, the submission of this testimony increases, rather than decreases the scope of the litigation, increases litigation expense, and effort, and unnecessarily burdens the Presiding Officer in resolving this matter within the required statutory time.

Based on the above, the OCA submits that the Presiding Officer should strike Aqua's rebuttal testimony, Statement Nos. 3R and 4R.

III. CONCLUSION

The Petitioners respectfully request that Administrative Law Judge Haas grant this Motion and issue an Order striking above-referenced portions of Aqua's rebuttal testimony. To accommodate this, the OCA respectfully requests an expedited answer period, and an expedited ruling.

Respectfully submitted,



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DATED: July 19, 2017
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