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August 24, 2020

VIA ELECTRONIC FILING

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor North
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Harrisburg, PA 17105-3265

**Re: Petition of Twin Lakes Utilities, Inc. for a Commission Order Authorizing the
Acquisition of Twin lakes Utilities, Inc. by a Capable Public Utility Pursuant to 66
Pa. C.S. Section 529
Docket No. P-2020-3020914**

Dear Secretary Chiavetta:

Enclosed for filing is Aqua Pennsylvania, Inc.'s Post-Hearing Main Brief in Opposition to the OCA's Petition for Interim Emergency Relief in the above-referenced proceeding. Copies will be provided as indicated on the Certificate of Service.

Respectfully submitted,



Garrett P. Lent

GPL/jl
Attachment

cc: Honorable Joel Cheskis

Certificate of Service

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I hereby certify that a true and correct copy of the foregoing has been served upon the following persons, in the manner indicated, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant).

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Date: August 24, 2020

Garrett P. Lent

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Petition of Twin Lakes Utilities, Inc. For A :
Commission Order Authorizing The :
Acquisition Of Twin Lakes Utilities, Inc. By : Docket No. P-2020-3020914
A Capable Public Utility Pursuant to 66 Pa. :
C.S. § 529 :

**AQUA PENNSYLVANIA, INC.'S
POST-HEARING MAIN BRIEF IN OPPOSITION TO
THE OCA'S PETITION FOR INTERIM EMERGENCY RELIEF**

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Date: August 24, 2020

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I. INTRODUCTION

Aqua Pennsylvania, Inc. (“Aqua” or the “Company”) hereby files this Post-Hearing Main Brief in Opposition to the Petition of the Office of Consumer Advocate (“OCA”) For Issuance Of An Interim Emergency Order On An Expedited Basis (“Emergency Petition”) on August 18, 2020 (“Emergency Petition”). OCA has failed to demonstrate that it is entitled to the interim emergency relief it seeks under Section 3.6(b) of the Pennsylvania Public Utility Commission (“PUC” or the “Commission”) regulations at this time. 52 Pa. Code § 3.6(b). In a proceeding initiated by the decision of Middlesex Water Company (“Middlesex”) to terminate its Service Agreement with Twin Lakes Water Utilities, Inc. (“Twin Lakes”),¹ Middlesex’s subsidiary, , which would result in the termination of water service to Twin Lakes’ customers on September 1, 2020, and Twin Lakes’ decision file a Petition for a Commission order authorizing the acquisition of Twin Lakes by a “capable public utility” under Section 529 of the Public Utility Code (the “TLU Petition”), OCA has asked the Commission to mandate Aqua to act as the receiver—i.e., public utility operator—of the Twin Lakes water system effective immediately. For all of the reasons explained below, the extraordinary relief sought by the OCA, in the form of a mandatory preliminary injunction, should be denied at this time.

Rather, to the extent that the Commission deems it necessary to consider whether to appoint a receiver for the Twin Lakes system it should (1) order and require Middlesex and Twin Lakes to extend the Service Agreement until at least January 1, 2021, (2) permit Aqua until at least January 1, 2021, to complete normal due diligence and conduct a reasonable investigation of the Twin Lakes system and make a recommendation to its management regarding whether Aqua should voluntarily act as a receiver, and (3) stay all proceedings and pending filings associated with the

¹ The Twin Lakes water system serves a residential community known as “Sagamore Estates.”

TLU Petition. This solution would ensure continued service to Twin Lakes' customers and provide Aqua a reasonable opportunity to learn about the known and unknown risks associated with the Twin Lakes water system before it becomes responsible for its safe and reliable operation.

II. BACKGROUND

A. PROCEDURAL HISTORY

On July 16, 2020, Twin Lakes filed with the Commission a Petition for a Commission Order authorizing the acquisition of Twin Lakes pursuant to Section 529 of the Public Utility Code, 66 Pa. C.S. § 529, by a capable public utility.

Twin Lakes is a wholly owned subsidiary of Middlesex, a New Jersey Corporation and water utility providing water service to customers in New Jersey. Middlesex provides operational support to Twin Lakes through a Service Agreement dated December 1, 2009.

On June 1, 2020, Middlesex issued a notice that it would terminate the Service Agreement effective September 1, 2020.

On July 22, 2020, John J. Gallagher filed a Notice of Appearance for Twin Lakes.

On July 23, 2020, the Commission's Bureau of Investigation and Enforcement ("I&E") filed a Notice of Appearance.

On July 24, 2020, the OCA filed a Notice of Appearance.

A Prehearing Conference was held on July 27, 2020.

The OCA filed its Petition on August 18, 2020, requesting that the Commission name Aqua as Receiver for the Twin Lakes system under Section 529 of the Public Utility Code, 66 Pa. C.S. § 529.

On August 19, 2020, Aqua filed a Notice of Appearance in the proceeding.

On August 19, 2020, a further Prehearing Conference was held, and Second Scheduling Order issued that same day directing parties to file any answers to OCA's Petition on August 20, 2020.

On August 20, 2020, Aqua filed an additional Notice of Appearance, entering the appearance of Michael W. Hassell and Garrett P. Lent as additional counsel for Aqua.

Also on August 20, 2020, Aqua, I&E and Twin Lakes each respectively filed an Answer to the Emergency Petition.

A Briefing Order was issued on August 21, 2020.

B. STATEMENT OF THE EVIDENCE PRESENTED

A telephonic evidentiary hearing regarding OCA's Emergency Petition was held on August 21, 2020.

At the hearing, OCA presented the oral testimony of Sean Kemether, the Chairman of the Sagamore Estates Property Owners' Association, and Eric Bartolacci, a Sanitarian Supervisor with the Pennsylvania Department of Environmental Protection ("DEP"). OCA Exhibits 1 (a formal notice to the customers of Twin Lakes of the Section 529 Petition at Docket No. P-2020-3020914), and 3 (the Class "A" and "B" Water Company PUC Annual Report of Aqua for the year ended December 31, 2019) were admitted into the record. OCA also entered the following testimony from Twin Lakes' most recent base rate proceeding at Docket No. R-2019-3010958 into the record: OCA Exhibit 4 (OCA St. 1, the direct testimony of Stacy L. Sherwood); OCA Exhibit 5 (OCA St. 1-SR, the surrebuttal testimony of Stacy L. Sherwood); OCA Exhibit 6 (OCA St. 3, the direct testimony of Terry L. Fought); OCA Exhibit 7 (OCA St. 3-SR, the surrebuttal testimony of

Terry L. Fought); and OCA Exhibit 8 (various portions of the transcriptions of the public input hearings held in that proceeding on October 17, 2019).²

Twin Lakes presented the oral testimony of Bruce O'Connor, the Vice President and Treasurer of Twin Lakes, and Robert K. Fullagar, the President of Twin Lakes. Twin Lakes Exhibit 1 (the TLU Petition) was also admitted into the record.

I&E did not present any witnesses and offered no exhibits for admission in the record.

Aqua presented the oral testimony of Stephen E. Clark, the Direct of Operations for Aqua's Greater Pennsylvania Service Area. Aqua did not offer any exhibits for admission into the record.

III. SUMMARY OF ARGUMENT

An interim emergency order is an extraordinary remedy that is designed to prohibit parties from altering the status quo before or during the pendency of a proceeding before this Commission. The Emergency Petition filed by OCA takes this extraordinary remedy one step further, and seeks to alter the status quo of the parties to this proceeding. There are substantial legal, factual and practical issues with OCA's requested relief and, therefore, it should be denied.

At the outset, it should be noted that OCA's Emergency Petition does not request traditional injunctive relief that prohibits a party from taking actions that could alter the status quo. Rather, OCA's Emergency Petition—when filed—specifically sought preliminary injunctive relief that would require a non-party to the TLU Petition, Aqua, to take specific affirmative actions. This sort of injunctive relief, more commonly known as a mandatory injunction, is granted even less

² Aqua objected to the admission of this prior testimony on the basis of each piece constituting hearsay, and Aqua not being provided an opportunity to cross examine the declarants responsible for each of the various statements. (Tr. 144-145.) Aqua was not a party to Twin Lakes' last base rate proceeding at Docket No. R-2019-3010958, and none of the declarants was called as a witness in this proceeding. (Tr. 144-145.) Aqua's objection was overruled and each piece of prior testimony was admitted. (Tr. 148.)

frequently that a prohibitive injunction and, under Commission precedent and Pennsylvania law, the party seeking a mandatory injunction must present “a stronger case than that needed to warrant the granting of a restraining-type injunction.” In this regard, OCA must demonstrate that its right to relief under 52 Pa. Code § 3.6(b)(1) is not only “clear,” but that it is “entirely clear.” The Company respectfully asserts that the OCA has failed to carry its burden.

OCA has not shown that its right to relief is entirely clear. Importantly, the mandatory preliminary injunction sought by OCA would subvert, rather than preserve, the status quo of this proceeding. OCA’s requested relief would relieve Middlesex and Twin Lakes of their current service obligations to Twin Lakes’ customers and require Aqua to shoulder these burdens going forward. In this regard, OCA essentially requests the ALJ and the Commission to grant the specific affirmative relief sought by Twin Lakes in the TLU Petition, prior to the resolution of the underlying Section 529 proceeding. This sort of relief is contrary to long-standing Pennsylvania appellate precedent regarding mandatory preliminary injunctions.

Relatedly, it is not clear whether the facts presented qualify Twin Lakes for relief under Section 529 of the Public Utility Code. Indeed, it appears that the sole reasons for the pending termination of service to Twin Lakes’ customers is the voluntary decision of Middlesex to terminate the Service Agreement with Twin Lakes and withdraw its capital support from Twin Lakes. There is no evidence that Middlesex lacks the technical, financial or legal capability to continue to operate the Twin Lakes system. Instead, it simply appears that Middlesex wants to relieve itself of a financially poor performing segment of its larger business. As such, it is not clear at all whether relief under Section 529 of the Public Utility Code is appropriate.

In addition, OCA has not shown that the need for the relief it seeks is immediate. The pending September 1, 2020 termination of service is entirely driven by Middlesex’s voluntary

decision to terminate the Service Agreement and the Commission should not Commission should not indirectly reward Middlesex and Twin Lakes for creating the alleged “immediacy” at issue by granting the OCA’s Emergency Petition.

Third, OCA did not demonstrate that irreparable injury would result if its specific relief is not granted. Rather, any irreparable injury is attributable to Middlesex and Twin Lakes’ actions precipitating the termination of service, and could be avoided by enjoining these entities from taking those actions.

Finally, OCA did not show that the mandatory preliminary injunction it seeks is not injurious to the public interest. Importantly, Aqua presented unrebutted testimony that it has had no opportunity to conduct normal due diligence or otherwise investigate and learn about the known and unknown risks associated with the Twin Lakes System. Aqua has also had no opportunity to initiate normal customer outreach and communications with the customers currently served by the Twin Lakes system. Yet, the relief sought by OCA would force Aqua to step into Twin Lakes’ shoes *in less than two weeks*, prior to Aqua having completed these normal pre-operation actions. Although Aqua understands the need to ensure continuous water service to the customers served by the Twin Lakes system and has acted as a receiver in the past, Aqua also demonstrated that the relief sought by the OCA could simply perpetuate the issues confronted by the prior owner. And, Aqua further demonstrated, that the relief sought by OCA would also frustrate Aqua’s ability to provide Twin Lakes’ customers with reasonable service and similarly frustrate Aqua’s obligations to its existing customers and shareholders to take on risks knowingly.

Although OCA has failed to demonstrate that it is entitled to the specific, mandatory injunctive relief sought by the Emergency Petition, Aqua recognizes the importance of water service being continuously provided to Twin Lakes’ customers. As such, Aqua proposes an

alternative solution that would allow it the opportunity to investigate and learn about the Twin Lakes system in an appropriate and reasonable timeframe, while ensuring that Twin Lakes' customers continue to receive water service, throughout the course of this proceeding. To the extent the ALJ and the Commission determine it is necessary to order the continued provision of water service to Twin Lakes' customers, it should prohibit Middlesex and Twin Lakes from terminating service during the pendency of this proceeding, and provide Aqua until at least January 1, 2021, to investigate the system and determine whether it will voluntarily agree to act as a receiver. This alternative solution adequately balances the interests of all parties, and ensures Twin Lakes' customers continue to receive water during the pendency of this proceeding.

Therefore, and for the reasons more fully explained below, the OCA's request for an Interim Emergency Order that immediately appoints Aqua as the receiver for the Twin Lakes system should be denied at this time.

IV. ARGUMENT

A. OCA HAS FAILED TO DEMONSTRATE THEY ARE ENTITLED TO INTERIM EMERGENCY RELIEF.

An interim emergency order is an extraordinary remedy that can only be granted after a party meets several, "essential prerequisites." See *Summit Towne Ctr., Inc. v. Shoe Show of Rocky Mt., Inc.*, 828 A.2d 995, 1001 (Pa. 2003) (citations omitted); *Golden Triangle News v. Corbett*, 689 A.2d 974, 978 (Pa. Cmwlth. 1997) (citation omitted); *Schwartz v. Delaware & Hudson Rwy. Co.*, 2011 Pa. PUC LEXIS 1715, at *12-13 (Order entered July 5, 2011) (citation omitted).

In order to justify this extraordinary relief, OCA must demonstrate all of the following elements: (1) the petitioner's right to relief is clear; (2) the need for relief is immediate; (3) injury would be irreparable if relief is not granted; (4) relief requested is not injurious to the public

interest. 52 Pa. Code § 3.6(b); *see also Summit*, 828 A.2d at 1001 (citations omitted); *see also Peoples Natural Gas Co. v. Pa. Pub. Util. Comm'n*, 555 A.2d 288, 291 (Pa. Cmwlth. 1989). If the OCA fails to prove any one of the four requirements, the Commission will deny the relief requested. *Crums Mill Assoc. v. Dauphin Consolidated Water Supply Co.*, 1993 Pa. PUC LEXIS 90 (Order dated April 16, 1993); *see also County of Allegheny v. Commonwealth*, 544 A.2d 1305, 1307 (Pa. 1988) (“For a preliminary injunction to issue, every one of the[] prerequisites must be established; if the petitioner fails to establish any one of them, there is no need to address the others.”).

However, Pennsylvania law has long distinguished between injunctive relief that prohibits a party from acting and injunctive relief that mandates a party to take a specific action. As the OCA has sought preliminary injunctive relief which would mandate Aqua to act as a receiver for Twin Lakes (i.e., “the performance of some positive or affirmative act”), OCA seeks a mandatory injunction. *Crums Mill Assoc., et al. v. Dauphin Consolidated Water Supply Company*, Docket No. C-00934810, 1993 Pa. PUC LEXIS 89, at *10 (Interim Emergency Order Denying Relief dated Mar. 23, 1993) (citing *Audenried v. Philadelphia R.R. Co.*, 68 Pa. 370 (Pa. 1871)). A party “seeking a mandatory injunction is required to present a stronger case than that needed to warrant the granting of a restraining-type injunction.” *Crums Mill Associates, et al.*, 1993 Pa. PUC LEXIS 89, at *10 (citing *Allen v. Colautti*, 417 A.2d 1303 (Pa. Cmwlth. 1980)). Indeed, “when a preliminary injunction contains mandatory provisions which will require a change in the positions of the parties, it should be granted even more sparingly than one which is merely prohibitory.” *Zebra v. School Dist.*, 206 A.2d 748, 750 (Pa. 1972).³

³ The Supreme Court of Pennsylvania further recognized in *Zebra* that “Courts are further restrained, when dealing with matters of school policy, by the long-established and salutary rule that the courts should not function as super school boards.” *Zebra*, 206 A.2d at 750. This principle is analogous to long-standing precedent that recognizes the Commission “is not empowered to act as a super board of directors for the public utility companies of this state.”

Consistent with these principles, Pennsylvania law has generally held that a preliminary injunction “could not be mandatory.” See *McMullan v. Wohlegmuth*, 281 A.2d 836, 841 (Pa. 1971) (citing *Audenried*). Only in circumstances where the rights of the party seeking the injunction are entirely clear or the party that would be subject to the injunction has sought change the status of the parties while the result of a proceeding is pending, may a preliminary injunction that is mandatory in nature be granted. *McMullan*, 281 A.2d at 841. Moreover, Pennsylvania courts will not grant a mandatory preliminary injunction except “where the rights of the parties are entirely clear. *Id.* (quoting *Phila. Rec. Co. v. C.-M. News, Inc.*, 157 A. 796 (Pa. 1931)). Indeed, a mandatory preliminary injunction will only issue “in the clearest cases, and only so far as is necessary to restore the status quo, that is, the last actual peaceable and uncontested status which preceded the pending controversy. *Leisenring v. Pennsylvania Lighting Co.*, 59 Pa. Super. 202, 208 (Pa. Super. 1915) (emphasis added); see also *Drum v. Dinkelacker*, 105 A. 509, 511 (Pa. 1918) (explaining that a mandatory preliminary injunction “will not issue in mandatorily requiring the removal of the garage, and the restoration of the alley, and in placing the costs of the case on the defendant,” which “[i]n effect that is a final decree” that “[i]nstead of maintaining, until final hearing, the status which existed at the time the bill was filed...wholly destroy[s] that status.”)

As explained below, however, OCA has failed to satisfy the “essential prerequisites” necessary to demonstrate that it is entitled to preliminary injunctive relief and, furthermore, has failed to present the “stronger case” required to show it is entitled to preliminary injunctive relief that is mandatory in nature. Therefore, and for the reasons more fully explained below, the ALJ

See, e.g., Metropolitan Edison Co. v. Pa. Pub. Util. Comm’n, 437 A.2d 76, 80 (Pa. Cmwlth. 1981). Here, the relief sought by OCA would require to Commission to impermissibly act in this role by mandating Aqua to take over the operation of the Twin Lakes water system, prior to conducting normal and reasonable due diligence of the system and allowing its management to evaluate the known and unknown risks associated with the system.

and the Commission should decline to order Aqua to immediately act as the receiver for the Twin Lakes water system at this time.

1. OCA Has Failed To Demonstrate Its Right To Relief Is Clear.

In order to find that OCA's right to preliminary mandatory injunctive relief is clear, it must demonstrate that "the rights of the parties are entirely clear." *McMullan*, 281 A.2d at 841 (quoting *Phila. Rec. Co. v. C.-M. News, Inc.*, 157 A. 796 (Pa. 1931)). Moreover, OCA must demonstrate that the mandatory injunction it seeks is necessary to restore the status quo which preceded the underlying controversy. *See Leisenring*, 59 Pa. Super at 208. Indeed, OCA cannot carry its burden if its relief subverts rather than maintains the parties' existing statuses until the merits of the TLU Petition can be heard and determined. *Fredericks v. Huber*, 37 A. 90 (Pa. 1897) (explaining that a preliminary injunction is "not to subvert but to maintain the existing status until the merits of the controversy can be fully heard and determined" and relying upon *Audenried*). OCA has failed to show its right to relief is clear because the preliminary injunction it seeks is mandatory in nature, and would subvert rather than maintain the existing status quo for Twin Lakes and Middlesex, Twin Lakes' customers and Aqua.

The "status quo" in this proceeding, i.e., "the last actual peaceable and uncontested status which preceded the pending controversy," is the status preceding Middlesex's decision to terminate its Service Agreement with Twin Lakes. Middlesex provided all customer service functions to Twin Lakes and its customers. (Tr. 107.) Middlesex provided all billing and meter reading functions to Twin Lakes and its customers. (Tr. 107.) Middlesex provided all capital support for Twin Lakes. (Tr. 107.) In addition, Middlesex purchased all chemicals necessary to treat the water for Twin Lakes and its customers. (Tr. 107.) With this support provided under the Service Agreement, Twin Lakes operated the subject water system. (Tr. 107.)

Conversely, Aqua had no role in the ownership, operation or maintenance of the Twin Lakes systems during the “last actual peaceable and uncontested status which preceded the pending controversy.” It is undisputable that Aqua had no prior role in the ownership, operation or maintenance of the Twin Lakes system. (*See* Tr. 118.) Indeed, Aqua has not even had the opportunity to conduct or complete reasonable due diligence to learn about the risks facing the Twin Lakes system. (Tr. 118, 119.) If granted, OCA’s relief would require Aqua to shoulder a new status: that of the operator of the Twin Lakes system. (Tr. 117.)

While Aqua expects that OCA will assert that the material “status quo” is the continued provision of water service to Twin Lakes’ customers, the ALJ and the Commission cannot disregard who will be responsible for providing this service, when analyzing this question. The result sought in OCA’s Emergency Petition would relieve Twin Lakes and Middlesex of their existing status preceding the initiation of the TLU Petition (i.e., as the operators of the Twin Lakes system) and would foist upon Aqua an entirely new status which did not exist prior to the initiation of this proceeding (i.e., as the receiver-operator of the Twin Lakes system). In this regard, OCA’s Emergency Petition simply seeks to subvert the status quo, rather than preserve it.⁴ Therefore, OCA has failed to demonstrate its right to relief is “entirely clear.”

Moreover, OCA’s Emergency Petition exclusively requests the Commission to issue an interim emergency order under Section 529(g) of the Public Utility Code, 66 Pa. C.S. § 529(g), that appoints Aqua as a receiver for the Twin Lakes water system. Emergency Petition ¶¶ 10, 18. Relatedly, the underlying TLU Petition similarly requests that the Commission exercise its authority under Section 529. *See generally* Twin Lakes Exhibit 1. In this regard, OCA essentially

⁴ Indeed, as in *Drum*, the relief OCA seeks is essentially a final decree with respect to the underlying TLU Petition pursuant to Section 529 of the Public Utility Code, which the Supreme Court of Pennsylvania has explained is improper. *Drum*, 105 A. at 511.

requests that the Commission impose the ultimate relief sought by the TLU Petition: the transfer of responsibility for the operation of the Twin Lakes' system to a new, capable public utility.

Aqua further submits that in order for the Commission to act under Section 529 of the Public Utility Code, it must first determine “that the small water...utility is in violation of statutory or regulatory standards...which affect the safety, adequacy, efficiency or reasonableness of the service provided by the small water or sewer utility” and “that the small water...utility has failed to comply...with any order of the Department of Environmental Resources or the commission concerning the safety, adequacy, efficiency or reasonableness of service,” among other requirements. *See* 66 Pa. C.S. § 529(a)(1)-(2).⁵

However, Twin Lakes presented no evidence that it is in violation of any “statutory or regulatory standards...which affect the safety, adequacy, efficiency or reasonableness of the service” it provides. *Id.* at § 529(a)(1). In addition, Twin Lakes presented no evidence that it “has failed to comply...with any order of the Department of Environmental Resources or the commission concerning the safety, adequacy, efficiency or reasonableness of service.” *Id.* at § 529(a)(1). OCA similarly did not show that the requirements of Sections 529(a)(1) or (2) have been satisfied.⁶

⁵ As such, it is not clear that the necessary requirements of Section 529 have been met in order for the Commission to exercise its discretion and appoint Aqua as a receiver under Section 529(g) of the Public Utility Code, 66 Pa. C.S. § 529(g) (“The commission may, in its discretion, appoint a receiver to protect the interests of the customers of the small water or sewer utility.”). And, even if OCA is not required to demonstrate that the requirements of Section 529(a) have been met in order for the Commission to act under Section 529(g), the absence of such a demonstration weighs against the Commission exercising its discretion under Section 529(g).

⁶ Both of the cases that OCA identified in its Emergency Petition as being similar to the case at hand dealt with small water utilities that were currently violating water quality standards and had failed to remedy those violations after receiving notices from the DEP. *See Ex Parte Emergency Order*, Docket No. P-2018-3006216 and C-2018-2644592, at 1 (Order issued Nov. 29, 2018, ratified Dec. 6, 2018) (noting that the water utility had failed to correct water condition issues consistent with a DEP directive); *In re: The Indian Springs Water Co.*, Docket No. M-2019-3011972, at 1-2 (Opinion and Order entered August 8, 2019) (noting that DEP had issued the utility ten Notices of Violation to the subject water utility).

Rather, the record evidence demonstrates that the pending termination of service to Twin Lakes' customers is solely the result of Middlesex's decision to voluntarily terminate the Service Agreement between Middlesex and Twin Lakes. (Tr. 81, 102.) Importantly, there is no evidence demonstrate that Middlesex is technically, financially or legally incapable of continuing to operate the Twin Lakes system. Both of Twin Lakes witnesses admitted that the operation and management of the system were not the biggest problem with the system. (Tr. 85, 105 (Twin Lakes' witness admitting on cross that Middlesex is a "well-run company").) Rather, this is a situation where the "the current owner is put through this 529 proceeding really in an effort to eliminate a financially poor performing segment of their overall business." (Tr. 118.)

Indeed, Twin Lakes witness Bruce O'Connor admitted in response to questions from the ALJ that the only reason Twin Lakes intends to terminate service on September 1, 2020, is because Middlesex sent a 90-day notice of intent to terminate the Service Agreement on June 1, 2020. The following exchange:

JUDGE CHESKIS: And what is the significance of September 1st?

THE WITNESS: I think September 1st is -- I would look to Mr. O'Connor to verify this -- but I think that's the date where we would start -- financially we would no longer have the money to continue to pay for those services.

MR. GALLAGHER: It's a contract termination date, Your Honor. The contracts between Middlesex and Twin Lakes are, my understanding, a series of time tranches.

JUDGE CHESKIS: Okay. So on June 1st Middlesex sends Twin Lakes this letter saying that we're giving you our 90-day notice. Again I apologize for thinking on my feet here, but that's where we are with this expedited emergency order. But on June 1st Middlesex sends this letter to Twin Lakes saying that as of September 1st we're no longer going to be providing these specific

services. What would have been different had Middlesex provided that letter to Twin Lakes on July 1st? And I'm asking Mr. Fullagar.

THE WITNESS: Could you restate that, Your Honor? I apologize.

JUDGE CHESKIS: Sure. I understand that September 1st is 90 days after June 1st which was when Middlesex provided the notice to Twin Lakes. But what would be different had Middlesex provided that letter to Twin Lakes on July 1st?

THE WITNESS: I think that would mean October 1st would then be the -- would be 90 days forward. So on or about October 1st is when the agreement would terminate if I'm understanding your question correctly.

(Tr. 139-140 (emphasis added).) Indeed, the 90-day “deadline” ending on September 1, 2020 was artificially imposed by Middlesex, by its decision to terminate the Service Agreement on June 1, 2020, rather than another date. In this regard, OCA has also failed to demonstrate that its right to the specific, mandatory preliminary injunction it seeks is “entirely clear” because it is not clear that either OCA or Twin Lakes can obtain relief under Section 529, where the current owner and operator of the water system at issue is simply deciding to try and walk away from the system where it is dissatisfied with the cost it is incurring to own and operate the system.

For these reasons, OCA has failed to demonstrate its right to relief is “entirely clear” under the law or the facts and circumstances of this case. Therefore, the mandatory preliminary injunction sought by the Emergency Petition should be denied at this time.

2. OCA Failed To Demonstrate That The Need For Relief Is Immediate.

The need for relief is not immediate where the complained of events are not imminent, or likely to occur. *See Application of Fink Gas Company for Approval of the Abandonment of Service by Fink Gas Company to 22 Customers Located in Armstrong County, Pennsylvania, and the Abandonment by Fink Gas Company of all Natural Gas Services and Natural Gas Distribution Services*, Docket No. A-2015-2466653, 2015 Pa. PUC LEXIS 408, *21-22 (Order entered Aug. 20, 2015); *see also Zebra v. School Dist.*, 206 A.2d 748, 752 (Pa. 1972).

OCA has failed to demonstrate that the new for relief is immediate. Notably, the sole cause of the September 1, 2020, termination date was Middlesex's voluntary decision to provide notice of intent to terminate its Service Agreement with Twin Lakes on June 1, 2020. (*See* Tr. 107, 139-140.) Indeed, Twin Lakes' witnesses admitted that if notice of intent to terminate was issued after June 1, 2020, then termination would not occur until 90-days after that date. (Tr. 139-140.) The Commission should not indirectly reward Middlesex and Twin Lakes for creating the alleged "immediacy" at issue by granting the OCA's Emergency Petition.

Moreover, the need for the specific, mandatory relief sought by OCA, i.e., the appointment of Aqua as a receiver of the Twin Lakes system, is not immediate. As explained above, the appointment of Aqua as receiver will subvert, rather than preserve the status quo in this proceeding. To the extent that there is an immediate need to preserve the status quo, Twin Lakes should be required to continue operating its system and Middlesex should be required to continue supporting Twin Lakes under the Service Agreement. Under Section 2103 of the Public Utility Code, 66 Pa. C.S. § 2103, the Commission has continuing supervisory control over the terms and conditions of contracts with affiliated interests, and pursuant to that supervisory control should direct Middlesex and Twin Lakes to continue the contract pending a final resolution of this case.

As the OCA has failed to show the need for the mandatory preliminary injunction sought by the Emergency Petition is immediate, the Emergency Petition should be denied at this time.

3. OCA Failed To Demonstrate That The Alleged Injury Would Be Irreparable If Relief Is Not Granted.

The third standard that the Commission evaluates in determining whether to grant injunctive relief is whether the alleged injury would be irreparable if relief is not granted. 52 Pa. Code § 3.6(b)(3). OCA has failed to demonstrate irreparable harm would result if the mandatory preliminary injunction it seeks is not granted.

While Aqua understands the need to ensure continuous water service to the customers served by the Twin Lakes system to avoid critical health and safety concerns for Twin Lakes' customers, a mandatory injunction that requires Aqua to provide that service at this time is not necessary to avoid these harms. Importantly, OCA has not shown that Middlesex and Twin Lakes are incapable of providing the necessary technical, financial and legal support to operate the Twin Lakes system. (Tr. Tr. 85, 105.) Rather, service will only cease on September 1, 2020, because Middlesex has voluntarily attempted to relieve itself of the operation and financing of Twin Lakes by terminating the Service Agreement between them. (Tr. 107, 139-140.) It is to be emphasized that no evidence was offered to demonstrate Middlesex is incapable of fulfilling its responsibilities under the Service Agreement and as the owner of Twin Lakes. Aqua submits that any alleged irreparable harm could be avoided by requiring Middlesex and Twin Lakes to continue operating the system and, therefore, the specific relief sought by OCA is not necessary to avoid such harms.

For these reasons, OCA has failed to demonstrate that irreparable harm would if the specific relief sought by the Emergency Petition is not granted. Therefore, the Emergency Petition should be denied at this time.

4. The Requested Relief Would Be Injurious To The Public Interest.

The fourth standard that the Commission evaluates in determining whether to grant injunctive relief is whether the relief requested is injurious to the public. 52 Pa. Code § 3.6(b)(4). OCA specifically argued that the mandatory preliminary injunction it seeks will “support the public interest by ensuring the continued provision of water service to the Twin Lakes’ customers.” Emergency Petition ¶ 16. Contrary to OCA’s assertions, a Commission order mandating Aqua to immediately act as a receiver at this time is not in the public interest. Although Aqua understands the need to provide continuous service to Twin Lakes’ customers, the relief sought by OCA would

only continue the provision of water service and would prevent Aqua from being able to immediately improve that service. (Tr. 136-137.)

Aqua presented un rebutted testimony that, if it were required to immediately act as a receiver, it would be forced to take on more “unknown risks” than it would otherwise under normal circumstances. (Tr. 117, 122.) Aqua witness Mr. Clark explained that, when Aqua is appointed as a receiver for a small water system, it becomes the custodian for the financial, regulatory and operational affairs of the water system, and becomes responsible for the safe and reliable provision of water service to the customers connect to that system. (Tr. 115.) Indeed, once Aqua is appointed a receiver, it faces the same service expectations and obligations from DEP and the Commission as if it were the owner of the system. (Tr. 117.) As such, before Aqua is appointed as a receiver, it conducts essential due diligence and customer communication and outreach, to investigate and learn about the water system.⁷ (See Tr. 116-118.)

With respect to its due diligence efforts, Aqua conducts site visits, water quality sampling and environmental site assessments. (Tr. 115-116.) It also conducts numerous document reviews, including: reviews of the water systems files (to the extent they are available); full reviews of DEP files regarding the water system; and review of financial statements. (Tr. 115-116.) In addition, Aqua develops a capital and expense budget plan, in order to hit the ground running in addressing any problems facing the system. (See Tr. 116.) With respect to its customer communication and outreach efforts, Aqua regularly sends pre-receivership notices to customers and meets with

⁷ Although Aqua might voluntarily act as a receiver in a true emergency situation where the present owner ceased to exist or was incapable of providing safe and reliable service to customers, that does not appear to be the case here. (Tr. 117-118, 129.) Middlesex remains financially and technically capable of operating the Twin Lakes System. (Tr. 85, 105, 118.) Rather, in Mr. Clark’s opinion, it appears that the current owner has simply filed the TLU Petition in an effort to eliminate a financially poor performing segment of their overall business. (Tr. 118.)

customers in advance. (Tr. 116.) Aqua does this to learn firsthand about the issues faced by the water system's customers. (Tr. 116-117.)

This entire process takes approximately 90 days under normal operating circumstances. (Tr. 117.) However, the COVID-19 pandemic presents specific, additional hurdles to completing these due diligence efforts, including the inability to conduct a full DEP file review. (Tr. 117, 119-120.)

Aqua has not yet conducted normal and reasonable due diligence, and will have no opportunity to do so prior to becoming involved with the Twin Lakes system if OCA's Emergency Petition is granted, all right before a three day holiday weekend in less than two weeks' time. Mr. Clark explained:

Q. And in your opinion, if Aqua were appointed as a receiver for Twin Lakes prior to completing its normal due diligence process and normal customer outreach and communication process, would Aqua be forced to take on more unknown risks than it would under normal circumstances?

A. Yes.

Q. And why is that?

A. Well, without the information that would be obtained through a thorough due diligence, we have to assume that the risk potentials have been fully communicated by the current owner.

Again, I refer back to the notice of termination and the final operational support letter that Middlesex provided to PUC. In that letter they said that soon after beginning to operate the system it became apparent that the condition of this asset was significantly poorer than represented by the former owner had been visible in the inspection and assessment that was part of their due diligence.

So, in their own words, accepting receivership in advance of completing due diligence would be a potential repeat of that mistake; and we just don't want to find ourselves in the same position as Middlesex making a decision maybe without having all the information.

(Tr. 122-123 (emphasis added).) Without being able to obtain this information, there is a substantial risk that Aqua could be placed into a position that perpetuates the same mistakes made by the prior ownership.⁸ (Tr. 123.) It is simply not in the public interest to place Aqua, as a receiver, in a position where it is at risk of perpetuating the mistakes of past ownership.

In addition, Mr. Clark explained that Aqua has a responsibility to its shareholders and existing customers to make prudent business decisions and knowingly take on risks. (Tr. 123-124.) The relief sought by OCA would frustrate these responsibilities by forcing Aqua to make specific business decisions with more unknown risks than normal circumstances.⁹ (Tr. 124.)

Finally, Mr. Clark explained that the fact that the current owner and operator of the system remains capable of providing adequate service further complicates this matter. Unquestionably, Middlesex and Twin Lakes have more knowledge of the system and all of the associated risks and problems than Aqua does. (Tr. 123.) As such, it is not reasonable to substitute the current system operator with another that knows less about the system. Such an action does nothing to improve the current situation for current customers. (Tr. 124 (“That action really wouldn’t do anything to improve the current situation for the customers.”) and 136.)

For all of these reasons, Mr. Clark explained that Aqua is willing to participate in the Section 529 process if the Commission determines to begin such a proceeding, but that OCA’s Emergency Petition simply seeks to implement the ultimate outcome of that process too fast. Indeed, Aqua simply needs to time conduct normal due diligence and customer outreach efforts,

⁸ The due diligence conducted by Twin Lakes appears to have been limited from a visible inspection of aboveground facilities. (Tr. 123.) In addition, Twin Lakes admitted Middlesex was not aware of the physical condition of the Twin Lakes system when it purchase it and that Middlesex purchased the system without knowing its actual condition. (Tr. 105.)

⁹ As explained in footnote 3, *supra*, the relief sought by OCA would require to Commission to impermissibly mandate a specific business decision by Aqua, i.e., to take over the operation of the Twin Lakes water system, which would subordinate the independence of Aqua’s management to evaluate the known and unknown risks of the Twin Lakes system prior to becoming responsible for its operation.

prior to making a recommendation to its management team as to whether it will agree to voluntarily act as the receiver for the Twin Lakes system. (Tr. 131-132, 137.) As explained in Section IV.B., below, providing Aqua that opportunity best balances and protects the interests of all parties to this proceeding.

For all of the reasons explained above, OCA has not demonstrated that its requested mandatory preliminary injunction, which would require Aqua to immediately take over the operation of the Twin Lakes system as its receiver, is not injurious to the public interest. The lack of knowledge that Aqua currently possesses regarding the Twin Lakes system and the risks (both known and unknown) associated with the operation of that system, would subject Aqua, its shareholders, its existing customers and, indeed, Twin Lakes' customers to additional unknown and potentially unnecessary risks, compared to risks faced by the parties by the continued operation of the system by Middlesex and Twin Lakes. As such, the Commission should deny the relief requested by the OCA's Emergency Petition at this time.

B. IF THE ALJ AND THE COMMISSION DETERMINE IT IS NECESSARY TO ISSUE INJUNCTIVE RELIEF TO CONTINUE THE PROVISION OF WATER SERVICE TO TWIN LAKES' CUSTOMERS, THEN MIDDLESEX AND TWIN LAKES SHOULD BE REQUIRED TO CONTINUE TO PROVIDE SERVICE.

Aqua understands the need to ensure continuous water service to the customers served by the Twin Lakes system. However, as explained above, there are substantial legal, factual and practical considerations that warrant the denial of the specific relief requested in OCA's Emergency Petition at this time. In this regard, Aqua proposes the following solution to the ALJ and the Commission, which reasonably balances and protects the interests of all parties to this proceeding.

If the ALJ and the Commission determines that an injunction should issue to continue the provision of water service to Twin Lakes' customers, it should issue a traditional, prohibitive

injunction that prohibits Middlesex and Twin Lakes from terminating water service to their customers, subject to the following conditions:

- Middlesex and Twin Lakes are prohibited from terminating service to the customers served by the Twin Lakes system during the pendency of the proceeding at Docket No. P-2020-3020914;
- Middlesex and Twin Lakes are prohibited from terminating the Service Agreement between them until at least January 1, 2021;
- Aqua shall be provided until at least January 1, 2021, to complete normal due diligence and conduct a reasonable investigation of the Twin Lakes system and consider making a recommendation to its management regarding whether Aqua should voluntarily act as a receiver. During this period, Aqua will provide the Commission with regular status reports regarding its due diligence efforts, and Middlesex and Twin Lakes will fully cooperate with Aqua in its investigation of the system;
- On January 4, 2021, Aqua will file a letter with the Commission indicating whether it will agree to voluntarily act as the receiver of the Twin Lakes system during the pendency of the Docket No. P-2020-3020914; and
- The Commission shall stay all proceedings and pending filings associated with Docket No. P-2020-3020914 until January 4, 2021.

Importantly, unlike the relief sought by OCA, this alternative relief would actually freeze the status quo in this proceeding. Middlesex and Twin Lakes will continue to provide service to customers in accordance with DEP and Commission regulations. Twin Lakes' customers will continue to be provided service. And Aqua will be afforded the opportunity to participate in any Section 529 proceeding and conduct normal due diligence efforts before a decision to appoint the receiver is made for the Twin Lakes system.

Moreover, this relief will avoid the substantial legal, factual and practical problems with the relief sought by OCA. This relief does not require the ALJ and the Commission to make specific management decisions regarding the Twin Lakes system, prior to conducting a reasonable investigation of the Twin Lakes system. It also avoids the substantial risks to the customers of

Twin Lakes associated with Aqua being forced to prematurely take over the operation of this system, prior to conducting such a reasonable investigation.

For these reasons, and the reasons more fully explained above, the ALJ and the Commission should deny the specific relief sought by the OCA at this time. Rather, to the extent that the ALJ and the Commission deems it necessary to order the continued provision of water service to Twin Lakes' customers, it should adopt the alternative solution proposed above, which both ensures that Twin Lakes' customers will continue to receive water and also balance the interests of Aqua, its shareholders and its existing customers.

V. **CONCLUSION**

WHEREFORE, Aqua Pennsylvania, Inc. respectfully requests that the Deputy Chief Administrative Law Judge Joel H. Cheskis and the Pennsylvania Public Utility Commission immediately deny the Petition of the Office of Consumer Advocate For Issuance Of An Interim Emergency Order On An Expedited Basis at this time.

Respectfully submitted,



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Date: August 24, 2020

Counsel for Aqua Pennsylvania, Inc.

APPENDIX A – Proposed Findings of Fact

1. On July 16, 2020, Twin Lakes Utilities, Inc. (“Twin Lakes”) filed with the Pennsylvania Public Utility Commission (“PUC” or the “Commission”) a Petition for a Commission Order authorizing the acquisition of Twin Lakes pursuant to Section 529 of the Public Utility Code, 66 Pa. C.S. § 529, by a capable public utility (the “TLU Petition”).

2. Twin Lakes is a wholly owned subsidiary of Middlesex Water Company (“Middlesex”), a New Jersey Corporation.

3. Middlesex provides operational support to Twin Lakes through a Service Agreement dated December 1, 2009.

4. On June 1, 2020, Middlesex issued a notice that it would terminate the Service Agreement effective September 1, 2020.

5. Middlesex provided all customer service functions to Twin Lakes and its customers. (Tr. 107.)

6. Middlesex provided all billing and meter reading functions to Twin Lakes and its customers. (Tr. 107.)

7. Middlesex provided all capital support for Twin Lakes. (Tr. 107.) And Middlesex purchased all chemicals necessary to treat the water for Twin Lakes and its customers. (Tr. 107.)

8. With this support provided under the Service Agreement, Twin Lakes operated the subject water system. (Tr. 107.)

9. The pending termination of service to Twin Lakes’ customers is solely the result of Middlesex’s decision to voluntarily terminate the Service Agreement between Middlesex and Twin Lakes. (Tr. Tr. 81, 102.)

10. There is no evidence demonstrate that Middlesex is technically, financially or legally incapable of continuing to operate the Twin Lakes system.

11. Twin Lakes witnesses admitted that the operation and management of the system were not the biggest problem with the system. (Tr. 85, 105 (Twin Lakes' witness admitting on cross that Middlesex is a "well-run company").)

12. In this proceeding, "the current owner is put through this 529 proceeding really in an effort to eliminate a financially poor performing segment of their overall business." (Tr. 118.)

13. Twin Lakes witness Bruce O'Connor admitted in response to questions from the ALJ that the only reason Twin Lakes intends to terminate service on September 1, 2020, is because Middlesex sent a 90-day notice of intent to terminate the Service Agreement on June 1, 2020. (Tr. 139-140.)

14. If notice of intent to terminate was issued after June 1, 2020, then termination would not occur until 90-days after that date. (Tr. 139-140.)

15. Aqua Pennsylvania, Inc. ("Aqua") is a regulated Pennsylvania public utility that provides water service to approximately 443,000 customers throughout the Commonwealth of Pennsylvania.

16. Aqua was not a party to this proceeding until after the Office of Consumer Advocate ("OCA") filed its Petition of the Office of Consumer Advocate For Issuance Of An Interim Emergency Order On An Expedited Basis ("Emergency Petition") on August 18, 2020.

17. Aqua has had no prior role in the ownership, operation or maintenance of the Twin Lakes system. (See Tr. 118.)

18. If Aqua it were required to immediately act as a receiver, it would be forced to take on more "unknown risks" than it would otherwise under normal circumstances. (Tr. 122-123.)

19. When Aqua is appointed as a receiver for a small water system, it becomes the custodian for the financial, regulatory and operational affairs of the water system, and becomes responsible for the safe and reliable provision of water service to the customers connect to that system. (Tr. 115.)

20. Once Aqua is appointed as receiver, it faces the same service expectations and obligations from DEP and the Commission as if it were the owner of the system. (Tr. 117.)

21. Before Aqua is appointed as a receiver, it conducts essential due diligence and customer communication and outreach, to investigate and learn about the water system. (*See* Tr. 116-118.)

22. Aqua conducts site visits, water quality sampling and environmental site assessments. (Tr. 115-116.)

23. It also conducts numerous document reviews, including: reviews of the water systems files (to the extent they are available); full reviews of DEP files regarding the water system; and review of financial statements. (Tr. 115-116.)

24. In addition, Aqua develops a capital and expense budget plan, in order to hit the ground running in addressing any problems facing the system. (*See* Tr. 116.)

25. With respect to its customer communication and outreach efforts, Aqua regularly sends pre-receivership notices to customers and meets with customers in advance. (Tr. 116.)

26. Aqua does this to learn firsthand about the issues faced by the water system's customers. (Tr. 116-117.)

27. This entire process takes approximately 90 days under normal operating circumstances. (Tr. 117.)

28. However, the COVID-19 pandemic presents specific, additional hurdles to completing these due diligence efforts, including the inability to conduct a full DEP file review. (Tr. 117, 119-120.)

29. If Aqua is deprived of this opportunity that it cannot be sure whether it is meeting all applicable expectations and obligations to customers and regulators, because it would be taking on numerous “unknown risks” that can put at risk the associated utility service. (*See* Tr. 122-123.)

30. If Aqua does not obtain this information, there is a substantial risk that Aqua could be placed into a position that perpetuates the same mistakes made by the prior ownership. (Tr. 123.)

31. The problems facing the Twin Lakes system were greater than represented to Twin Lakes by the prior owner, and were not apparent to Twin Lakes during its due diligence of the system. (Tr. 122-123.)

32. The due diligence conducted by Twin Lakes appears to have been limited from a visible inspection of aboveground facilities. (Tr. 122-123.)

33. Aqua has a responsibility to its shareholders and existing customers to make prudent business decisions and knowingly take on risks. (Tr. 123-124.)

34. The relief sought by OCA would frustrate these responsibilities by forcing Aqua to make specific business decisions with more unknown risks than normal circumstances. (Tr. 124.)

35. Middlesex and Twin Lakes have more knowledge of the system and all of the associated risks and problems than Aqua does. (Tr. 123.)

APPENDIX B – Proposed Conclusions of Law

1. An interim emergency order is an extraordinary remedy that can only be granted after a party meets several, “essential prerequisites.” See *Summit Towne Ctr., Inc. v. Shoe Show of Rocky Mt., Inc.*, 828 A.2d 995, 1001 (Pa. 2003) (citations omitted); *Golden Triangle News v. Corbett*, 689 A.2d 974, 978 (Pa. Cmwlth. 1997) (citation omitted); *Schwartz v. Delaware & Hudson Rwy. Co.*, 2011 Pa. PUC LEXIS 1715, at *12-13 (Order entered July 5, 2011) (citation omitted).

2. In order to justify this extraordinary relief, OCA must demonstrate all of the following elements: (1) the petitioner’s right to relief is clear; (2) the need for relief is immediate; (3) injury would be irreparable if relief is not granted; (4) relief requested is not injurious to the public interest. 52 Pa. Code § 3.6(b); see also *Summit*, 828 A.2d at 1001 (citations omitted); see also *Peoples Natural Gas Co. v. Pa. Pub. Util. Comm’n*, 555 A.2d 288, 291 (Pa. Cmwlth. 1989).

3. If the OCA fails to prove any one of the four requirements, the Commission will deny the relief requested. *Crums Mill Assoc. v. Dauphin Consolidated Water Supply Co.*, 1993 Pa. PUC LEXIS 90 (Order dated April 16, 1993); see also *County of Allegheny v. Commonwealth*, 518 Pa. 556, 544 A.2d 1305, 1307 (Pa. 1988) (“For a preliminary injunction to issue, every one of the[] prerequisites must be established; if the petitioner fails to establish any one of them, there is no need to address the others.”).

4. As the OCA has sought preliminary injunctive relief which would mandate Aqua to act as a receiver for Twin Lakes (i.e., “the performance of some positive or affirmative act”), OCA seeks a mandatory injunction. *Crums Mill Assoc., et al. v. Dauphin Consolidated Water Supply Company*, Docket No. C-00934810, 1993 Pa. PUC LEXIS 89, at *10 (Interim Emergency

Order Denying Relief dated Mar. 23, 1993) (citing *Audenried v. Philadelphia R.R. Co.*, 68 Pa. 370 (Pa. 1871)).

5. A party “seeking a mandatory injunction is required to present a stronger case than that needed to warrant the granting of a restraining-type injunction.” *Crums Mill Associates, et al.*, 1993 Pa. PUC LEXIS 89, at *10 (citing *Allen v. Colautti*, 417 A.2d 1303 (Pa. Cmwlth. 1980)).

6. “When a preliminary injunction contains mandatory provisions which will require a change in the positions of the parties, it should be granted even more sparingly than one which is merely prohibitory.” *Zebra v. School Dist.*, 206 A.2d 748, 750 (Pa. 1972).¹⁰

7. Generally, a preliminary injunction “could not be mandatory.” *See McMullan v. Wohlegmuth*, 281 A.2d 836, 841 (Pa. 1971) (citing *Audenried*). Only in circumstances where the rights of the party seeking the injunction are entirely clear or the party that would be subject to the injunction has sought change the status of the parties while the result of a proceeding is pending, may a preliminary injunction that is mandatory in nature be granted. *McMullan*, 281 A.2d at 841.

8. Pennsylvania courts will not grant a mandatory preliminary injunction except “where the rights of the parties are entirely clear. *Id.* (quoting *Phila. Rec. Co. v. C.-M. News, Inc.*, 157 A. 796 (Pa. 1931)).

9. A mandatory preliminary injunction will only issue “in the clearest cases, and only so far as is necessary to restore the status quo, that is, the last actual peaceable and uncontested status which preceded the pending controversy.” *Leisenring v. Pennsylvania Lighting Co.*, 59 Pa.

¹⁰ The Supreme Court of Pennsylvania further recognized in *Zebra* that “Courts are further restrained, when dealing with matters of school policy, by the long-established and salutary rule that the courts should not function as super school boards.” *Zebra*, 206 A.2d at 750. This principle is analogous to long-standing precedent that recognizes the Commission “is not empowered to act as a super board of directors for the public utility companies of this state.” *See, e.g., Metropolitan Edison Co. v. Pa. Pub. Util. Comm’n*, 437 A.2d 76, 80 (Pa. Cmwlth. 1981). Here, the relief sought by OCA would require to Commission to impermissibly act in this role by mandating Aqua to take over the operation of the Twin Lakes water system, prior to conducting normal and reasonable due diligence of the system and allowing its management to evaluate the known and unknown risks associated with the system.

Super. 202, 208 (Pa. Super. 1915) (emphasis added); *see also Drum v. Dinkelacker*, 105 A. 509, 511 (Pa. 1918) (explaining that a mandatory preliminary injunction “will not issue in mandatorily requiring the removal of the garage, and the restoration of the alley, and in placing the costs of the case on the defendant,” which “[i]n effect that is a final decree” that “[i]nstead of maintaining, until final hearing, the status which existed at the time the bill was filed...wholly destroy[s] that status.”)

10. OCA has failed to carry its burden of demonstrating that its right to relief is entirely clear. 52 Pa. Code § 3.6(b)(1); *see also McMullan*, 281 A.2d at 841.

11. OCA has failed to carry its burden of demonstrating that the need for the relief it has requested is immediate. 52 Pa. Code § 3.6(b)(2).

12. OCA has failed to carry its burden of demonstrating that the alleged injury will be irreparable if its relief is not granted. 52 Pa. Code § 3.6(b)(3).

13. OCA has failed to carry its burden of demonstrating that the relief it seeks will not be injurious to the public interest. 52 Pa. Code § 3.6(b)(4).

APPENDIX C – Proposed Ordering Paragraphs

1. The relief sought by the Petition of the Office of Consumer Advocate For Issuance Of An Interim Emergency Order On An Expedited Basis is denied at this time.
2. The proceeding at Docket No P-2020-3020914 shall proceed to hearing.

Alternative Proposed Ordering Paragraphs¹¹

3. Middlesex and Twin Lakes are prohibited from terminating service to the customers served by the Twin Lakes system during the pendency of the proceeding at Docket No. P-2020-3020914.
4. Middlesex and Twin Lakes are prohibited from terminating the Service Agreement between them until at least January 1, 2021.
5. Aqua shall be provided until at least January 1, 2021, to complete normal due diligence and conduct a reasonable investigation of the Twin Lakes system and make a recommendation to its management regarding whether Aqua should voluntarily act as a receiver. During this period, Aqua will provide the Commission with regular status reports regarding its due diligence efforts, and Middlesex and Twin Lakes will fully cooperate with Aqua in its investigation of the system.
6. On January 4, 2021, Aqua will file a letter with the Commission indicating whether it will agree to voluntarily act as the receiver of the Twin Lakes system during the pendency of the Docket No. P-2020-3020914.
7. The Commission shall stay all proceedings and pending filings associated with Docket No. P-2020-3020914 until January 4, 2021.

¹¹ See Section IV.B. of Aqua’s Main Brief.

