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August 24, 2020

VIA HAND DELIVERY

Honorable Rosemary Chiavetta
Secretary
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

**Re: Petition of Twin Lakes for Commission Order
Authorizing the Acquisition of Twin Lakes Utilities Inc.
By a Capable Public Utility
Docket No. R-2020-3020914
MAIN BRIEF, Proposed Finding of Facts Conclusions of Law**

Dear Secretary Chiavetta:

On behalf of the Twin Lakes Utilities, Inc. ("Twin Lakes") please find enclosed a copy of Twin Lakes Main Brief in this matter.

If you have any questions concerning this filing, please contact me at your convenience.

Copies of this document has been served on the parties listed in the attached Certificate of Service.

Sincerely,



John J. Gallagher
Counsel for Twin Lakes Utilities Inc.

cc: Certificate of Service
Mr. Jay Kooper, Esq.
Mr. A. Bruce O'Connor

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing document upon the participants, listed below, in the manner indicated below, and in accordance with the requirements of § 1.54 (relating to service by a party).

VIA ELECTRONIC MAIL

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Date: August 24,2020

Honorable Joel H. Cheskis
Deputy Chief Administrative Law Judge
Pennsylvania Public Utility Commission

**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 a Capable Public
Utility Pursuant to 66
Pa. C. S. § 529

Docket No. R 2020-3020914

**MAIN BRIEF
ON BEHALF OF
THE TWIN LAKES UTILITIES, INC.**

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TABLE OF CONTENTS

I INTRODUCTION

II SUMMARY OF ARGUMENT

III. ARGUMENT

A TWIN LAKES HAS THOROUGHLY PRESENTED ALL OF ITS OPTIONS REGARDING CONTINUED OPERATION OF THE TWIN LAKES SYSTEM

B. THE COMMONWEALTH OF PENNSYLVANIA AND ITS AGENCIES LACK JURISDICTION TO EXERCISE ANY AUTHORITY OVER MIDDLESEX WATER, A FOREIGN CORPORATION

C. IF TWIN LAKES IS ORDERED TO CONTINUE SERVICE ON SEPTEMBER 1, 2020 THE HEALTH AND SAFETY OF THE TWIN LAKES CUSTOMERS WILL BE SEVERELY JEOPARDIZED

IV. CONCLUSION

APPENDIX A

(1) TL Exhibit No. 1 Because of its size sent as a Separate Document

(2) PROPOSED FINDING OF FACTS, CONCLUSIONS OF LAW AND ORDERING PARAGRAPHS

TABLE OF AUTHORITIES

- Case Law: (1) *Sullivan v. A.W. Chesterton , Inc. (In re Asbestos Prods. Lia. Litig. No .VI) 2019 U.S. Dist. LEXIS 95861 (E.D. Pa. June 6, 2019)*
- (2) *Daimler AG v Bauman, 571 U.S. 117, 134 S.Ct. 746, 187L, Ed. 2d 624 (2014).*
- Statutes: Pennsylvania Public Utility Code
Section 529, 66 PaC.S. §529

I. INTRODUCTION

The Twin Lakes Utilities Inc. (Twin Lakes) system serves 114 residential customers, and is comprised of one functional well (Well No. 2), one non-functional well (Well No. 1), a small treatment/pumping station including an atmospheric 20,000 gallon storage tank integral to the station, approximately 3.7 miles of water main of various diameter and approximately 120 active and inactive services combined. On May 28, 2020 Middlesex Water Company (“Middlesex”) issued a letter to Twin Lakes demanding immediate payment of the total amounts due on three outstanding Unsecured Revolving Promissory Notes between Middlesex as Lender and Twin Lakes as borrower. On May 29, 2020 Twin Lakes issued a letter to Middlesex stating that was unable to meet Middlesex’s payment demand.

On July 16, 2020, Twin Lakes filed a Petition requesting Commission Authorization the Acquisition of Twin Lakes Utilities, Inc. by a Capable Public Utility pursuant to 66 Pa. C.S.. § 529. (“529 Petition”) On August 5, 2020 the Office of Consumer Advocate (“OCA”) filed an Answer in Support of Twin Lakes 529 Petition. On August 5, 2020 the Bureau of Investigation (I&E) and Enforcement filed an Answer in Opposition to the 529 Petition. On August 18, 2020 the OCA filed a Petition for Issuance of an Interim Emergency Order on an Expedited Basis in this matter. A Prehearing Conference was convened on August 19, 2020. An on-the-record evidentiary hearing was held on August 22, 2020 before Deputy Chief Administrative Law Judge Joel H. Cheskis.

II SUMMARY OF ARGUMENT

The issue before Your Honor is whether to grant OCA’s Petition to appoint Aqua Pennsylvania, Inc. as emergency receiver for the Twin Lakes system effective on or before September 1, 2020. This issue is the end-result of almost a decade of meetings, discussions and efforts by Twin Lakes to find a buyer for this system and obtain the Commission’s assistance in finding a buyer, as detailed by

Twin Lakes witness A. Bruce O'Connor both at the August 21, 2020 evidentiary hearing and in Discovery Response M-8 (attached), a response incorporated by referenced in the Twin Lakes Petition, admitted into the record here as Exhibit TLU-1.

It is also the end-result of Twin Lakes' efforts through three rate cases to obtain a fair opportunity to earn a just and reasonable return of, and return on, the significant capital investments required to sustain safe and adequate service for the Twin Lakes customers . Such a return was, and remains, necessary to maintain a high quality of service for the Twin Lakes customers through three rate cases, the most recent case fully litigated and one which was decided in large part due to concerns for customer affordability by the Commission. Despite this result, as Twin Lakes' witness Robert Fullagar stated in his testimony, the system has been, and, continues to experience a high level of unaccounted-for-water due to continually occurring leaks. These leaks are the result of a combination of factors including age and quality of the original pipe material, and poor quality workmanship associated with leak repairs that all took place prior to the acquisition of the system by Twin Lakes.

Finally, this matter is the end-result of efforts by both Twin Lakes and the OCA to obtain Section 529 relief, efforts that were rejected by the Commission in Twin Lakes' most recent rate case because, according to the Commission, Twin Lakes' then ongoing efforts to secure a PENNVEST grant and loan, combined with the rate increase granted, did not make a Section 529 proceeding necessary "at this time." The testimony of Mr. O'Connor in this matter places a firm spotlight that this is not the case.

This immediate matter will resolve the question of whether Aqua Pennsylvania will or will not be the appointed emergency receiver of the Twin Lakes system as of September 1, 2020. What is beyond dispute is that as of September 1, 2020, Middlesex will no longer provide contract services or be a source of funding for Twin Lakes and cannot be legally compelled by the

Commonwealth of Pennsylvania to continue to lend money to, or make further equity investments in, Twin Lakes or to continue to provide the services it has provided under the Service Agreement dated December 1, 2009, a contract Middlesex was well within its legal and contractual rights to terminate. As detailed by Mr. Fullagar in his testimony, the consequences of compelling Twin Lakes to keep the Twin Lakes system operating on September 1, 2020 without the financial and operational backing of Middlesex will be nothing short of catastrophic to the customers of Twin Lakes... For all of these reasons, Twin Lakes supports OCA's Petition for Emergency Relief.

III ARGUMENT

Introduction

Twin Lakes submitted Oral Testimony and one Exhibit TL-1 by witnesses Mr. A. Bruce O'Connor and Mr. Robert K. Fullagar to support its position in these matters. Aqua, Pennsylvania, OCA and the Pennsylvania Department of Environmental Protection ("DEP") submitted oral testimony and the OCA submitted 3 exhibits on these issues.

A TWIN LAKES HAS THOROUGHLY PRESENTED ALL OF ITS OPTIONS AND PLANS REGARDING CONTINUED OPERATION OF THE TWIN LAKES SYSTEM

Mr. O'Connor testified that Twin Lakes has initiated and engaged in for almost a decade beginning in July 2011, discussions with other water companies for the acquisition of the Twin Lakes system, as well as traveled to Harrisburg to meet with the Chairman of the Commission, Commission Staff and representatives of the OCA. The sole purpose of the meetings with the

Commission, its Staff and the OCA was to request assistance in identifying a system takeover solution that would eliminate the inevitable need for Twin Lakes to file for repeated triple-digit base rate increases to mitigate the risk of being unable to sustain safe and adequate service to its customers over the long term. In Twin Lakes latest rate case, the Commission rejected the recommendations of the OCA and Twin Lakes for the initiation of a Section 529 proceeding for purposes of determining whether the Commission should direct a capable public utility to acquire Twin Lakes. The Commission in its Order rejected the recommendations based upon the revenue increase approved and the potential Twin Lakes opportunity to obtain PENNVEST funding. Mr. O'Connor then explained that \$4.6 million of PENNVEST funding as a grant was approved. It was subsequently determined however, that the grant would result in an income tax liability of \$1.38 million due to the fact that the grant would be considered a Contribution in Aid of Construction, and therefore taxable as revenue, under Federal Tax Law. This \$1.38 million tax burden would be properly recoverable from Twin Lakes. Recovery of this tax obligation, in and of itself, would require almost doubling the existing customer's rates. This fact must be seen in the context that in Twin Lakes most recent rate case, where the Commission had approved a rate increase far below the level requested and required because of concerns with the affordability of rates of customers. The tenor of the 2019 Rate Case Order provided Twin Lakes with zero assurance that this looming tax burden, or any future rate increases required to address the significant utility infrastructure investment needs of the Twin Lakes system, would be recoverable from customers given the Commission's clearly stated views on affordability.

On May 28, 2020 Middlesex issued a letter to Twin Lakes demanding from Twin Lakes the total amounts due on the three outstanding Unsecured Revolving Promissory Notes between Middlesex and Twin Lakes. A copy of this letter is attached as Appendix G to Twin Lakes Exhibit TL-1 (Petition for 529 approval) which was admitted into the record at August 21, 2020 hearing.

On May 29, 2020 Twin Lakes issued a letter to Middlesex stating that it was unable to meet Middlesex's payment demand and did not expect to have the ability to satisfy any repayment of the three outstanding Notes. See Appendix H attached to Twin Lakes Exhibit TL-1 which was admitted at the hearing of August 21, 2020. Mr. O'Connor stated that the obvious impact of repayment demands is that Middlesex no longer provides any financial support to Twin Lakes effective May 28, 2020. Further, on June 1, 2020 Middlesex issued a letter notice of termination of the Service Agreement with Twin Lakes and that the termination would become effective on September 1, 2020, thereby leaving Twin Lakes with no system operator as of the termination date. With this knowledge Twin Lakes filed a Petition for a Commission Order Authorizing the Acquisition of Twin Lakes Utilities, Inc. by a Capable Public Utility Pursuant to Section 529 of the Public Utility Code. This Petition, marked as TL Exhibit No-1 is attached to this Brief as Appendix A.

B THE COMMONWEALTH OF PENNSYLVANIA AND ITS AGENCIES LACK JURSDICTION TO EXERCISE ANY AUTHORITY OVER MIDDLESEX, A FOREIGN CORPORATION

I&E, the PADEP and Aqua Pennsylvania have either in their Answers to OCA's Petition for Issuance of an Emergency Order or, in testimony presented at the August 21, 2020 evidentiary hearing, indicated that the Commonwealth of Pennsylvania and its agencies have jurisdiction over Middlesex. These parties imply that perhaps a solution to this issue can come by way of compelling Middlesex to continue the Service Agreement or, end its withholding of financing of Twin Lakes. These parties make these arguments without citing to a single source of legal authority and for good reason. These arguments are plain wrong – the Commonwealth of Pennsylvania lacks the jurisdiction to compel Middlesex to do anything or refrain from doing anything, full stop. In fact, PADEP's witness

Mr. Bartolacci acknowledged this fundamental truth when he testified that PADEP could not compel Middlesex to continue operations of the Twin Lakes system after 12:01 am on September 1, 2020 given this circumstance.

Middlesex is a New Jersey Corporation. It is incorporated in New Jersey with its principal place of business in New Jersey. It is not registered to do business in the Commonwealth of Pennsylvania. It is not a jurisdictional public utility in the Commonwealth of Pennsylvania. Middlesex is not the entity that entered into the Asset Purchase Agreement to acquire the Twin Lakes system on November 3, 2009, and is not the entity listed on the Recorded Deed as the record owner of the Twin Lakes system. (See Discovery Response to I&E Discovery M-3 attached, which is incorporated by referenced by the Twin Lakes Petition, Exhibit TLU-1). In short, Middlesex is a foreign corporation to the Commonwealth of Pennsylvania.

It is hornbook law that the Commonwealth of Pennsylvania cannot exercise jurisdiction over a foreign corporation that is not registered to conduct business in the Commonwealth. In the matter of *Sullivan v. A.W. Chesterton, Inc. (In re Asbestos Prods. Lia. Litig. No. VI) 2019 U.S. Dist. LEXIS 95861 (E.D. Pa. June 6, 2019)*, the U.S. District Court for the Eastern District of Pennsylvania held that Pennsylvania business registration statutes, which have generally provided for “consent jurisdiction” over entities that register to do business in the Commonwealth of Pennsylvania, are unconstitutional. In so holding, the Eastern District of Pennsylvania rejected the theory of “consent jurisdiction” based on a corporation’s registration to do business in Pennsylvania; that is, it rejected the notion that a foreign corporation’s mere act of registering to do business in the Commonwealth automatically enabled the Commonwealth of Pennsylvania to constitutionally exercise jurisdiction over the foreign corporation. This is because such a holding violated the U.S. Supreme Court’s decision in *Daimler AG v Bauman*, 571 U.S. 117, 134 S.Ct. 746, 187L, Ed. 2d 624 (2014).

Here, Middlesex Water Company *is one-step further removed from the*

plaintiffs in Sullivan. Middlesex is not even registered to conduct business in the Commonwealth of Pennsylvania. Accordingly, the Commonwealth of Pennsylvania and its agencies – be it the PAPUC or the PADEP – lack the jurisdiction to exercise any jurisdiction to compel Middlesex to do, or refrain from, doing anything. Therefore, the Commonwealth of Pennsylvania cannot force Middlesex to rescind its termination of the Service Agreement or its decision to no longer lend money to Twin Lakes, the latter having defaulted on three Promissory Notes to Middlesex.

The implication for this matter is clear. Here, there are only two jurisdictional entities – Twin Lakes (which is a Pennsylvania corporation) and Aqua Pennsylvania. As of September 1, 2020, Twin Lakes will not have an operator to run the system as Middlesex’s termination of the Service Agreement takes effect. In addition, Twin Lakes will continue to operate without financial support from Middlesex as Middlesex has terminated that support effective May 28, 2020. Faced with this situation, Twin Lakes has two options on September 1, 2020 if OCA’s Petition For Emergency Relief is not granted – shut off the water service at Twin Lakes or not shut off the water service (the latter presumably under order to not do so). If Twin Lakes were to not shut off the water service under these circumstances, as highlighted by Mr. Fullagar’s testimony discussed more herein, the results for Twin Lakes’ customers will be catastrophic. Simply put, if Twin Lakes is ordered to not terminate service on September 1, 2020, it does not have the financial or operational resources to conduct the critical day-to-day operations of the system and the system will fail as addressed through the following discussion of Twin Lakes Witness Fullagar’s testimony.

C. IF TWIN LAKES IS ORDERED TO CONTINUE SERVICE ON SEPTEMBER 1, 2020 THE HEALTH AND SAFETY OF THE TWIN LAKES CUSTOMERS WILL BE SEVERELY JEOPARDIZED SINCE THERE WILL BE NO OPERATIONAL OR FINANCIAL RESOURCES AVAILABLE TO PERFORM CRITICAL OPERATIONS FUNCTIONS.

As directed by Administrative Law Judge Cheskis the following outcomes are probable based upon the testimony of Twin Lakes Witness Robert Fullagar at the August 21, 2020 hearing. Mr. Fullagar testified that Twin Lakes maintains a water distribution system consisting of: one functional well (Well No. 2); one non-functional well (Well No. 1); a small treatment/pumping station with an integral atmospheric 20,000 gallon storage tank; approximately 3.7 miles of water main of various diameters; and, approximate combined 120 active and inactive services. With the termination of operational and financial support from Middlesex, Twin Lakes will no longer have an operator or source of financing and therefore, will not only not have the ongoing ability to pay its vendors, including its Licensed Operator, but will also not have an operator on-site to ensure the system functions in a manner necessary to meet the basic needs associated with delivering water service. At that time, without its Licensed Operator and without adequate financial support, Twin Lakes will unfortunately have no possible means to maintain water quality or distribute water of any quality to its customers and therefore, water service will likely cease. With the loss of operational and financial support the following scenarios will occur;

1. Loss of treatment

Without the ability to purchase, receive and introduce treatment

chemicals and in the absence of human intervention, specifically, the replenishment of sodium hypochlorite solution used for disinfection, within one week the system will no longer produce potable water. Without disinfection, customers who consume the water without boiling it first will be at risk of contracting water-borne diseases and illness which could range from mild to fatal depending on the status of their immune system. In addition, there would be no one on site to even be able to alert the customers of the need to boil their water.

2. Water Quality Assurance

If daily process control and compliance monitoring ceases on September 1, 2020 then without these crucial functions being performed microbial contamination could occur in the water system and go unnoticed which could result in a range of mild to fatal illnesses among the customers.

3. Loss of Power

The Twin Lakes water system is susceptible to power failures as it is not equipped with an emergency stand by generator. Human intervention is required to manually re-start the pumping and treatment processes following the restoration of power by the electric utility. At any time on, or subsequent to, September 1, 2020, weather events could result in a loss of power which results in the loss of pressure in the entire water system and therefore, a loss of water service to the customers. The loss of water pressure in the system, particularly one that has, and, continues to be

plagued by hidden leaks, can allow microbial contamination to enter the system through ground water intrusion and from customers' premises. This microbial contamination would result in illness among customers ranging from mild to fatal. Upon restarting the pumping and treatment processes, personnel have historically coordinated, recorded and issued an automated telephonic boil water notification to all customers. On or after September 1, 2020, without a system operator no one will be available to restart the pumping and treatment processes and issue the boil water notification.

4. Significant Leaks

In the event that a significant leak occurs on or after September 1, 2020, it would go unrepaired leading to a loss of water pressure and service in the entire system.

5 Well Borehole Collapse

Significant leaks mentioned above also result in over-pumping of the single remaining functional well. Over-pumping increases the stress on the well borehole which increases the susceptibility of the well borehole to collapse. Such over-pumping due to leaks contributed to the failure of Well No. 1, which remains out of service to this day since there is no funding available to replace the failed well. In the absence of an on-site operator, the collapse of the well borehole in Well No. 2 would result in an indefinite water service outage to the entire customer base. Numerous smaller

leaks, the majority of which are hidden, will continue to develop. Individually, these leaks contribute marginally to over-pumping and stress on Well No. 2, however, when considered collectively, these leaks are significant and increase the stress on this single remaining functional well.

IV CONCLUSION

For all of the foregoing reasons, Twin Lakes requests Your Honor to approve in its entirety the OCA's Petition for Issuance of an Interim Emergency Order as the OCA's right to relief is clear; the need for relief is urgent and immediate; and, that the injury to Twin Lakes' customers is irreparable if the requested relief is not granted.

Respectfully submitted,



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Dated: August 24, 2020

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing document upon the participants, listed below, in the manner indicated below, and in accordance with the requirements of § 1.54 (relating to service by a party). (relating to serve by a party as amended the Emergency Order issued by the Pennsylvania Public Utility Commission on March 20, 2020 in Docket No. M-2020-3019262.

VIA ELECTRONIC MAIL

I, hereby certify that I have this day served a true copy of the foregoing Main Brief of Twin Lakes Utilities, Inc. in the manner and upon the persons below in accordance with requirements of §1.54

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**TWIN LAKES UTILITIES INC. PROPOSED FINDINGS OF FACT,
CONCLUSIONS OF LAW, and ORDERING PARAGRAPHS
DOCKET NO. R- 2020- 3020914**

I FINDINGS OF FACT

1. Twin Lakes Utilities Inc. is a jurisdictional water distribution company providing water service to approximately 113 residential customers in Pike County, Pennsylvania. TL Exhibit No.1 at 1.

2. Twin Lakes Utilities Inc. presented oral testimony of A. Bruce O'Connor, and Robert K Fullager, TL Exhibit No.-1

3. OCA submitted three exhibits the testimony of Stacy L Sherwood Statement No 1(Direct) and 1-R (Rebuttal); Terry L. Fought OCA Statement No. 3 (Direct).

4. Middlesex Water Company acquired the Twin Lakes system in 2009. At that time, the Twin Lakes system was subject to frequent boil water advisories issued by the Pennsylvania Department of Environmental Protection and water service was frequently suspended due to operational problems. TL Exhibit No1

5. Subsequent to the acquisition it was determined that the pump station lacked a properly functioning master meter. The previous owner had no information in relation to the well pumps and their service or maintenance records. As a result it was impossible for Twin Lakes Utilities, Inc. to ascertain what the Unaccounted-for-Water rate was at the time of the acquisition. TL Exhibit No 1

6. Following the acquisition of Twin Lakes, it became apparent that the condition of the assets was significantly poorer than had been represented by the former owner or had been visible from the inspection and assessment that was part of the due diligence work performed by Middlesex professionals. TLU Statement No. 1 at 3.

7. The Twin lakes system serves 114 customers and is comprised of one functional well (Well No.2) , one non-functional well (Well No.1), a small treatment /pumping station including an atmospheric 20,000gallon storage tank integral to the station, and approximately 3.7 miles of water main of various diameter and approximately 120 active and inactive services combined. TL Exhibit No.1 at

9. The Twin Lakes system is continually plagued by excessive unaccounted –for water loss, (ranging from 50% to 87%) due to leaks. The leaks are the result of a combination of factors including age and quality of the original pipe material and poor quality workmanship associated with leak repairs prior to the acquisition by Middlesex. TL Exhibit No.1

10. The over pumping due to the excessive leak rate in the system causes the wells to constantly over-pump which in turn, stresses the wells to the point where their operational viability is at risk. The over-pumping due to the excessive leak rate in the distribution system was a contributing factor in the collapse of well No.1 rendering it non-usable. Consequently, this condition has increased the stress of Well No. 2, the only remaining well serving Twin Lakes customers. TLU Exhibit No 1

11. Shohola Township has an ordinance that prohibits the installation and use of private wells on parcels of property smaller than one acre. The Company considered the installation of individual private wells in Sagamore estates and concluded that such an installation would present too high a public health risk for its customers because of the Township ordinance. TLU Statement No. RKF-2R at 7

12. On May 28, 2020 Middlesex Water issued a letter to Twin Lakes demanding from Twin Lakes immediate payment of the total amounts due on the three outstanding Unsecured Revolving Promissory Notes between Middlesex as Lender and Twin Lakes as Borrower. TLU Exhibit No 1 at 8 and attached to the Exhibit as Appendix I.

13. On May 29, 2020, Twin Lakes issued a letter to Middlesex responding to this payment demand. In this response letter, Twin Lakes stated that it was unable to satisfy any repayment of the three outstanding notes. TL Exhibit 1 listed as Appendix I

14. On June 1, 2020, Middlesex issued a letter notice of termination of the service agreement between Middlesex and Twin Lakes advising that pursuant to Section 1 of the Service Agreement, the termination would become effective on September 1, 2020. On that same date, June 1, 2020, Twin Lakes issued a letter to Middlesex confirming receipt of Middlesex's notice of termination. TL Exhibit No. 1 listed as Appendix I

15. With the termination of the Service Agreement n, and at the end of financing or operations support , Twin Lakes will no longer have the ongoing ability to pay its vendors including its Licensed Operator and without adequate financial support , Twin Lakes will unfortunately have no possible means to maintain water quality or distribute water of any quality to its customers and therefore, water service will likely cease. TL Exhibit at p.9

II CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and subject matter of this proceeding. 66 Pa.C.S. § 1308(d), 66 PA C.S. § 1308(d)

2. The party seeking a rule or order from the Commission has the burden of proof in that proceeding. It is well-established that “[a] litigant’s burden of proof before administrative tribunals as well as before most civil proceedings is satisfied by establishing a preponderance of evidence which is substantial and legally credible.” *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm’n*, 578 A.2d 600, 602 (Pa.Cmwlth. 1990). Section 332(a) of the Public Utility Code, 66 Pa.C.S. § 332(a).

3. That the OCA has satisfied the requirements for the issuance of Interim Emergency Order pursuant to 52 Pa. Code § 3.6

4. The burden of proof is comprised of two distinct burdens: the burden of production and the burden of persuasion. The burden of production tells the adjudicator which party must come forward with evidence to support a particular proposition. See *In re Loudenslager’s Estate*, 430 Pa. 33, 240 A.2d 477, 482 (1968). The burden of persuasion determines which party must produce sufficient evidence to convince a judge that a fact has been established, and it never leaves the party on whom it is originally cast. *Reidel v. County of Allegheny*, 633 A.2d 1325, 1329 n. 11 (Pa.Cmwlth. Ct. 1993).

5. The OCA and Twin Lakes Utilities, Inc. have met their burden of proof regarding the need for an Emergency Order in this matter.

III PROPOSED ORDERING PARAGRAPHS

1. It is hereby ORDERED that Aqua, Pennsylvania be appointed Receiver for Twin Lakes Utilities, Inc.

