


COMMONWEALTH OF PENNSYLVANIA



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September 4, 2020

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

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. § 529
Docket No. P-2020-3020914

Dear Secretary Chiavetta:

Attached for electronic filing please find the Office of Consumer Advocate's Brief in Opposition to the Order Denying Petition of the Office of Consumer Advocate for Issuance of an Interim Emergency Order on an Expedited Basis Filed Pursuant to Sections 3.6, 3.6a and 3.7 of the Commission's Regulations in the above-referenced proceeding.

Copies have been served as indicated on the enclosed Certificate of Service.

Respectfully submitted,

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Enclosures:

cc: The Honorable Joel H. Cheskis (**email only**)
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Certificate of Service

*295418

CERTIFICATE OF SERVICE

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

I hereby certify that I have this day served a true copy of the following document, the Office of Consumer Advocate's Brief in Opposition to the Order Denying the Petition of the Office of Consumer Advocate for Issuance of an Interim Emergency Order on an Expedited Basis Filed Pursuant to Sections 3.6, 3.6a and 3.7 of the Commission's Regulations, 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 4th day of September 2020.

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Dated: September 4, 2020
*295414

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 :

OFFICE OF CONSUMER ADVOCATE'S
BRIEF IN OPPOSITION TO THE
ORDER DENYING
PETITION OF THE OFFICE OF CONSUMER ADVOCATE
FOR ISSUANCE OF AN INTERIM EMERGENCY ORDER ON AN EXPEDITED BASIS
FILED PURSUANT TO SECTIONS 3.6, 3.6a and 3.7
OF THE COMMISSION'S REGULATIONS

On August 18, 2020, the Office of Consumer Advocate (OCA) filed a Petition for Issuance of Interim Order (OCA Petition) on an expedited basis with the Commission, in response to Twin Lakes Utilities, Inc.'s (Twin Lakes or Company) indication that it will no longer be providing service to Twin Lakes' customers as of September 1, 2020.

On August 28, 2020, Administrative Law Judge Joel H. Cheskis (ALJ Cheskis) issued an order denying the OCA's Petition, discussing each element of 52 Pa. Code § 3.6(b) which are required to be met by a petitioner seeking interim emergency relief.¹

On September 1, 2020, Twin Lakes filed an amendment of the service agreement with Middlesex Water that would extend the service agreement until October 1, 2020. Application of Twin Lakes Utilities, Inc., For Commission Approval, Nunc Pro Tunc, of First Amendment To

¹ The facts supporting the need for interim emergency relief must include (1) the petitioner's right to relief is clear; (2) the need for relief is immediate; (3) the injury would be irreparable if relief is not granted; and (4) the relief requested is not injurious to the public interest. 52 Pa. Code § 3.6(b).

The Service Agreement Between Middlesex Water Company and Twin Lakes Utilities, Inc. Pursuant to 66 Pa. C.S. §2102, Docket No. G-2020-3020941 (Sept. 1, 2020). As discussed below, this amendment will ensure the status quo until October 1, 2020, but provides for no assurances after that. The customers remain in the same situation – no assurance that safe adequate, and reliable water service will continue after October 1, 2020, despite an ALJ or Commission Order requiring Twin Lakes to meet its public service obligation.

Regarding the ALJ's Order,² ALJ Cheskis found that the OCA met the first element of § 3.6(b), that its right to relief is clear, but failed to meet the remaining three requirements.

As to the second element, ALJ Cheskis determined that the need for relief is not immediate, stating that “Twin Lakes is a certified public utility in Pennsylvania and has an obligation to provide service pursuant to its certificate of public convenience until the Commission directs otherwise.” Order at 24. Further, ALJ Cheskis stated that “Twin Lakes cannot shut down its system thereby effectively terminating service to all customers as of 12:01 a.m. on September 1, 2020 without permission from the Commission to do so. As a result the need for relief in the form of forcing Aqua to act as a receiver effective at this time is not immediate.” Id. While the OCA agrees that Twin Lakes legally requires permission of the Commission to terminate service, the record here established that Twin Lakes, and its parent, Middlesex, were not intending to wait for Commission permission. The belated extension of the Service Agreement only postpones this “game of chicken” for another month.

As to the third element, ALJ Cheskis determined that the OCA failed to meet the requirement of showing that injury would be irreparable if relief is not granted, stating that injury

² The OCA incorporates its Main Brief filed on August 24 and its Reply Brief filed on August 25, 2020 by reference.

would be irreparable with or without the issuance of interim emergency relief. Order at 29. The OCA notes that the ALJ's determination -- that denying the petition and ordering Twin Lakes to continue to provide service on an interim basis is reasonable only on the condition that Twin Lakes and Middlesex continue the service agreement-- was not a certainty at the time of the ALJ's Order as was clear from the record. Twin Lakes and Middlesex had provided no indication that the service agreement would do anything but terminate on September 1, 2020. Also clear from the record is that without the service agreement, the Twin Lakes' customers' injury was clear and involved public health and safety. Twin Lakes testified that it would issue a "do not consume" notice and would not be able to assure any repairs if there were disruptions in the provision of water service.

As to the fourth element, ALJ Cheskis determined that the OCA failed to meet the requirement of showing that the requested relief is not injurious to the public interest, stating that "the public interest will be injured regardless of whether the petition is granted." Order at 34. The OCA submits that the injury to the customers, which the ALJ acknowledges is "paramount," must outweigh the concerns about an undefined public. The OCA acknowledges the public interest in not countenancing threats to walk away from the public service obligation, but addressing those threats should not place the safety of consumers and the public in jeopardy. As the OCA noted in its briefs, the relief it requests is not in lieu of any actions or remedies that might be sought by the Commission or the Department of Environmental Protection. OCA M.B. at 10-11, 22; OCA R.B. at 3. Those legal remedies are outside of the scope of the OCA's Interim Emergency Petition and cannot serve as a substitute for water service. Generally, the OCA submits that a better avenue to address such public interest concern is to pursue those other actions and remedies rather than risk placing the health and safety of the consumers and communities at risk.

The ALJ also appears to be concerned that the public interest would be injured because of relying on large water companies to “rescue” smaller water companies. See Order at 37. It should be noted that the “rescue” of smaller companies is done to protect the public health and safety of the customers. Those smaller companies that were “rescued” in the past, were, in large part, also certificated public utilities that had an obligation to provide safe, adequate, and reliable service under the Public Utility Code and had failed to do so.³ That puts the Twin Lakes’ customers in the same unfortunate situation. Until that situation is resolved, through the underlying Section 529 proceeding, the Twin Lakes’ customers are entitled to the same protection as any other customers of a water small water or wastewater utility. They did not choose the utility, the utility’s corporate parent or anything else. They are paying for water service that is supposed to be safe, adequate, and reliable, and has been determined to be inadequate by the Commission merely five months ago. The ALJ’s order puts those customers at continuing risk of not receiving even the inadequate service that they have now.

ALJ Cheskis stated that “Aqua is advised to begin taking the necessary steps in anticipation of the possibility that it may soon be ordered by the Commission to operate the system as a capable public utility in response to its review of this order or I&E’s petition for interlocutory review.” Order at 37. As a result of Aqua’s concerns and ALJ Cheskis’ determination that Twin Lakes is required to continue providing service to its customers under the Public Utility Code, ALJ Cheskis determined that the OCA did not meet all of the requirements under 52 Pa. Code § 3.6(b).

³If the ALJ is concerned about Twin Lakes filing a petition asking the Commission to initiate a Section 529 proceeding, the OCA has addressed that issue in its Brief in Opposition to I&E’s Petition for Interlocutory Review (I&E Petition) that is pending before the Commission in this docket. As stated in the OCA’s Brief in Opposition to I&E’s Petition, the Commission has addressed and rejected that issue in prior proceedings. Petition of Delaware Sewer Co. for the Opening of an Investigation into Whether the Public Utility Commission Should Order a Capable Public Utility to Acquire the Company Pursuant to 66 Pa. C.S. § 529, Docket No. P-2014-2404341 slip op. at 23-24 (January 28, 2016).

The OCA acknowledges Aqua's need to complete due diligence and that the timeframe in which to do that in this case is extremely limited. As ALJ Cheskis stated, "...both scenarios resulting from the disposition of this order are far from ideal." Order at 30. The OCA agrees that we are not operating under ideal circumstances in this case. Decisions made under such limitations will not produce ideal results, no matter what decision is made. The most important issue in this proceeding is ensuring that Twin Lakes' customers continue to receive safe, adequate, and reliable water service.

As a result of the ALJ's conclusion that the OCA failed to meet the requirements under 52 Pa. Code § 3.6(b), ALJ Cheskis prohibited Twin Lakes from terminating water service. Order at 38. As discussed above, the service Twin Lakes provides is heavily dependent on the continuation of its service agreement with Middlesex, which has now been extended until October 1, 2020. However, at the time that the ALJ issued his order, that was not assured. Nor is it assured after October 1, 2020.

I&E and Aqua have also argued throughout this proceeding that since Twin Lakes has been providing service, it is capable, willing and able to continue providing service past September 1, 2020. The OCA does not dispute the legal requirements imposed on Twin Lakes as a Pennsylvania certificated public utility. However, there is no record evidence of Twin Lakes' commitment to continue providing service past September 1, 2020, and now past October 1, 2020. In fact, there is unrefuted evidence to the contrary. The unrefuted evidence shows that even if the ALJ orders Twin Lakes to continue providing service, as he did, when the service agreement ends, Twin Lakes will inform its customers not to drink the water because of concerns regarding the safety and quality of the water where there is no certified operator on site. OCA R.B. at 8-14; Tr. 54, 103. Twin Lakes provided sworn, un rebutted testimony that in the event of a leak or a storm causing a

service interruption, it will not be able to address those problems, and water service would cease within a couple days, or at most, a week. Id.

The OCA submits that ALJ Cheskis' decision to order Twin Lakes to continue providing service does not address the Company's statements that it will not be present to treat the water or address normal operating issues after the service agreement with Middlesex ends and the fact that the customers would be in the same situation they would be in without the ALJ's order (facing unpotable water and the threat of complete cessation of service). The OCA is concerned about the safety and public health concerns that will result from the ALJ's order forcing Twin Lakes to continue operating, without any other requirements on the parties to ensure Twin Lakes' customers will have safe, adequate, and reliable service. If at any point Twin Lakes does what it has threatened to do, leave the water on and essentially walk away from operating the system, a major leak or collapse of the only working well would be devastating.

The OCA submits that there is an alternate position, offered by Aqua, and addressed by the OCA in its Reply Brief at 16-17, that would (1) ensure Twin Lakes' customers continue to receive water service, and (2) provide Aqua with time to conduct its due diligence prior to takeover. An order requiring Twin Lakes to continue providing service consistent with the service it was providing under the Service Agreement between Middlesex and Twin Lakes along with an order requiring Aqua to perform a sixty or ninety day due diligence investigation would provide a compromise that would afford Twin Lakes' customers with some level of promise that they will continue to receive water service while the underlying Section 529 proceeding continues in accordance with the schedule ordered by ALJ Cheskis.

As discussed above, on August 31, 2020 Twin Lakes filed an amendment that would continue its service agreement with Middlesex Water. It is hoped that this extension will continue to provide the customers with assurance that the water service will continue for the next thirty days. However, it is not clear what will happen after October 1, 2020 and the OCA submits that the testimony in this proceeding, as discussed above, indicates that the impact on the Twin Lakes' customers would place public health and safety in jeopardy. The OCA submits that there are additional steps that should be ordered if the ALJ's certified question is answered in the affirmative. Specifically, the OCA proposes the following additional directives:

- Twin Lakes and Middlesex shall extend the service agreement at least until January 1, 2020; and
- Aqua shall continue to conduct its due diligence over the next sixty to ninety days, and
- Aqua will be appointed interim receiver as soon as its due diligence is completed.

Finally, while these additional directives are in place, the underlying Section 529 proceeding should continue in accordance with the established schedule so that a long-term solution can be found through that investigation. The OCA submits that these additional protections should be sufficient to ensure continued water service.

The Office of Consumer Advocate respectfully requests that the material question be answered in the negative for the reasons set forth above and as set forth in the OCA's Main and Reply Briefs in Support of the OCA's Petition for Interim Emergency Relief, incorporated herein. The Office of Consumer Advocate respectfully requests its relief requested in the OCA Petition for Interim Emergency Relief be granted as modified above or as set forth in the OCA's Reply Brief.

Respectfully Submitted,

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