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February 25, 2021

***VIA ELECTRONIC FILING***

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street, 2nd Floor North  
P.O. Box 3265  
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. § 529  
Docket No. P-2020-3020914**

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Dear Secretary Chiavetta:

Attached is the Reply Brief of Aqua Pennsylvania, Inc. for filing in the above-referenced proceeding. Copies will be provided as indicated on the Certificate of Service.

Respectfully submitted,



Garrett P. Lent

GPL/kl  
Attachment

cc: Honorable Joel H. Cheskis  
Certificate of Service

**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 :

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**REPLY BRIEF OF  
AQUA PENNSYLVANIA, INC.**

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Date: February 25, 2021

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*Joint Application of Middlesex Water Company (Middlesex) and Twin Lakes Water Services, LLC (Twin Lakes) for approval of 1) the transfer by sale of Twin Lakes to Middlesex; 2) the right of Middlesex to begin to offer, render, furnish and supply water service to the public in the development of Sagamore Estates, Shohola Township, Pike County; and 3) the abandonment of public water service by Twin Lakes, Docket No. A-2008-2050092 (Order entered March 2, 2009). .....6*

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## **I. INTRODUCTION**

Aqua Pennsylvania, Inc. (“Aqua” or the “Company”) hereby files this Reply Brief in response to the Main Briefs submitted by Twin Lakes Utilities, Inc. (“Twin Lakes”), the Pennsylvania Public Utility Commission’s (“Commission”) Bureau of Investigation and Enforcement (“I&E”), and the Office of Consumer Advocate (“OCA”). In its Main Brief, Aqua submitted that the 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 dated July 26, 2020 (“Petition”), should be denied and that the Commission should decline to order Aqua to acquire the Twin Lakes water system as a part of this proceeding. Alternatively, to the extent that the Commission deems it appropriate to require Aqua to acquire the Twin Lakes water system, Aqua argued the Commission should condition such an order upon Middlesex Water Company (“Middlesex”), the parent company of Twin Lakes, contributing to an escrow fund in order to offset the costs of repairing and remediating the system.

Aqua fully addressed in its Main Brief Twin Lakes’ failure to satisfy all of the requirements set forth in Section 529(a) of the Public Utility Code, 66 Pa.C.S. § 529(a), as well as several other important considerations under Sections 529(c)(6) and 529 (e), 66 Pa.C.S. §§ 529(c)(6) and 529(e), that weigh against the Commission granting Twin Lakes the relief it seeks. Nevertheless, Aqua submits this Reply Brief to address the fundamental deficiencies in Twin Lakes’ case that were further highlighted in Twin Lakes’ Main Brief. In addition, Aqua responds to certain arguments raised by OCA regarding the possible alternatives to acquisition, and also addresses the requirements under Sections 529(j), (k) and (l) of the Public Utility Code, 66 Pa.C.S. §§ 529(j)-(l), raised by OCA.

For these reasons explained below, and those set forth in its Main Brief, Aqua submits that Twin Lakes’ Petition should be denied and that Deputy Chief Administrative Law Judge Joel H.

Cheskis (the “ALJ”) and the Commission should decline to order Aqua to acquire the Twin Lakes water system as a part of this proceeding.

## **II. SUMMARY OF REPLY ARGUMENT**

The Main Briefs submitted by Twin Lakes, OCA and I&E further highlight the fundamental flaws in Twin Lakes’ Petition and its request that Aqua be forced to acquire the Twin Lakes water system. Although it is undisputed that the system is in significant disrepair, Twin Lakes has failed to satisfy two of the requirements set forth in Section 529(a) of the Public Utility Code: (1) Twin Lakes has not demonstrated that it would lack the operational, financial and technical capability to continue operating the system, where it would only lack these capabilities due to the voluntary decision by Middlesex—its parent and a capable corporation—to attempt to abandon its customers by walking away from the Twin Lakes system (*see* 66 Pa.C.S. §§ 529(a)(3) and (c)(1)); and (2) Twin Lakes has not demonstrated that each of the alternatives listed in Section 529(b) are impractical or not economically feasible (*see* 66 Pa.C.S. § 529(a)(4)).

Aqua explained in its Main Brief that the record evidence demonstrates Twin Lakes, through Middlesex, has the financial, managerial and technical capability to continue to own and operate the system. Twin Lakes argues in its Main Brief that the Commission should not and cannot consider Middlesex’s capabilities as a part of the determinations to be made in this proceeding. However, each of the arguments advanced by Twin Lakes should be rejected. The record evidence submitted in this proceeding demonstrates that, at all times relevant, the only reason Twin Lakes possessed the requisite capabilities to operate the system is because Middlesex provided it the operational, technical and financial support necessary to do so. As such, Twin Lakes’ capabilities are inextricably intertwined with Middlesex’s, and Twin Lakes’ attempts to divorce their joint consideration should be denied.

Moreover, Twin Lakes' arguments regarding the alternatives to acquisition that have been considered in this proceeding are misleading. Although Twin Lakes claims that other utilities simply ceased discussing potential acquisitions despite its efforts, Aqua fully explained that the condition of the system, the existing customer rates and the level of investment necessary to remediate and replace its infrastructure were such that Aqua determined an acquisition to not be in the interests of its business or existing customers. This evidence strongly suggests that an acquisition negotiated at arm's length in the past may not have been possible because the current owner of the Twin Lakes system was not willing to recognize the condition of the system in these discussions. Moreover, Aqua notes that it has already agreed to act as receiver and can continue in that role while Middlesex negotiates a price with a willing buyer that recognizes the deteriorated state of the Twin Lakes system and requisite level of investment. Therefore, Twin Lakes cannot show this alternative is impractical or not economical.

In addition, OCA's arguments regarding the lack of evidence presented about the costs of converting current customers to private wells (or other alternative water sources) highlights Aqua's concerns about how Middlesex, through Twin Lakes, is attempting to use the Section 529 process. In traditional abandonment proceedings, the costs of conversion are considered in tandem with the alternatives available to the customers that will be abandoned, and abandonment is regularly conditioned upon contributions by the abandoning utility to the costs of converting these customers to alternative service. Here, Twin Lakes already had an application to abandon service denied because it did not present any information about converting customers to private wells. Rather than re-submit its request to abandon, Twin Lakes filed the instant Petition, in what appears to be an attempt to avoid any consideration of contributing to the costs of converting its customers to alternate water sources.

Finally, Aqua responds briefly to OCA's arguments under Sections 529(f), (j), (k) and (l) of the Public Utility Code. Although Aqua generally agrees that these determinations should be made at a later date, it notes that the record evidence submitted in this proceeding already supports certain findings and determinations under each of these sections. As explained below, Aqua submits that the evidence shows if it is ordered to acquire the Twin Lakes system, and if such order is conditioned as proposed by Aqua, it should be permitted to submit an improvement plan that reflects the proposed contribution by Middlesex. In addition, the evidence supports strong limitations on Aqua's liability and strong protections from enforcement actions against Aqua. If Aqua is ordered to acquire the Twin Lakes system, Aqua, its shareholders and its ratepayers must be appropriately protected from the prior actions and omissions of the current owner, which have caused or contributed to the substantially poor condition of the Twin Lakes system.

For the reasons explained below and in Aqua's Main Brief, Twin Lakes' Petition should be denied because it has failed to satisfy all of the necessary requirements of Section 529 of the Public Utility Code and, moreover, its Petition appears to be an improper attempt by a financially solvent and operationally capable owner to divest itself of a deteriorated and poor performing public utility system. Therefore, the Petition should be denied.

### **III. REPLY ARGUMENT**

#### **A. TWIN LAKES HAS FAILED TO SATISFY THE REQUIREMENTS OF SECTIONS 529(A)(3) AND (4) OF THE PUBLIC UTILITY CODE.**

As explained in Aqua’s Main Brief, the Commission “must determine that each of the six standards” set forth in Section 529(a) is met before it can order a capable public utility to acquire a small water utility. *Interlocutory Review Order* at \*21.<sup>1</sup> Although the record evidence in this case supports the requisite findings necessary to satisfy the requirements of Section 529(a)(1), (2), (5) and (6), Twin Lakes has failed to demonstrate that it has satisfied the requirements of Section 529(a)(3) and (4). Twin Lakes’ Main Brief highlights the fundamental deficiencies in its case regarding each of these factors and, therefore, the Commission should deny the relief sought.

##### **1. Twin Lakes’ Financial, Managerial And Technical Capabilities Is Inextricably Intertwined With The Capabilities of Middlesex.**

Each of the parties’ respective Main Briefs makes clear that the crux of the dispute in this proceeding is whether Twin Lakes, through Middlesex, has the financial, managerial and technical capability to continue to own and operate the subject water system. *See* Aqua M.B., Sections V.B.1.b. and V.B.2.; Twin Lakes M.B., Section V.B.; OCA M.B., Section III.C.; I&E M.B., Sections IV.A.2. Twin Lakes advances several reasons why it believes the Commission cannot and should not consider the capabilities of Middlesex in its evaluation under Sections 529(a)(3) and 529(c)(1) of the Public Utility Code, 66 Pa.C.S. §§ 529(a)(3) and (c)(1). *See* Twin Lakes M.B. at 32-39. However, each of these reasons should be rejected.

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<sup>1</sup> *See also* Aqua M.B. at 8 (citing *Investigation Instituted into Whether the Commission Should Order a Capable Public Utility to Acquire Clean Treatment Sewage Company Pursuant to 66 Pa. C.S. § 529*, Docket No. I-2009-2109324, 2012 Pa. PUC LEXIS 879 at \*10 (Order entered May 25, 2012) (“CTSC Order”); *see also Investigation of W.P. Water Co., Inc. and W.P. Sanitary Co., Inc. Pursuant to Section 529 of the Pennsylvania Public Utility Code; W.P. Water Co., Inc. and W.P. Sanitary Co., Inc.; Application of W.P. Sanitary Co., Inc. For Approval of Abandonment of Service*, Docket Nos. I-00070114, P-00072313 and A-230550F200, at p. 12 (Order entered March 31, 2009) (“W.P. Order”); *Pennsylvania Public Utility Commission William E. Brown, et al. v. Sunshine Hills Water Company*, Docket Nos. R-912023, R-912023C001, 1992 Pa. PUC LEXIS 85 at \*138-139 (Order entered Aug. 5, 1992) (“Sunshine Hills”).

Twin Lakes raises three primary arguments that Middlesex is not the appropriate entity for evaluation under Sections 529(a)(3) and 529(c)(1). First, it asserts that Twin Lakes, unlike Middlesex, is a public utility corporation organized and existing under the laws of the Commonwealth of Pennsylvania. Twin Lakes M.B. at 33. Second, Twin Lakes claims it is the title owner of the assets comprising the Twin Lakes system. Twin Lakes M.B. at 34. And third, Twin Lakes claims it “has been recognized by the Commission as the jurisdictional utility since the acquisition of the Twin Lakes system in 2009.” Twin Lakes M.B. at 34.

Twin Lakes’ claims are little more than an attempt to use the corporate form to smokescreen the substance of the relationship between the subject system, Twin Lakes, and Middlesex, its parent. Aqua’s Main Brief detailed evidence presented by both I&E and Twin Lakes’ own witnesses that conclusively demonstrates Middlesex’s financial and operational support is the exclusive means that have allowed Twin Lakes to own and operate the system at all. Aqua M.B. at 24-25. Indeed, Twin Lakes witness Mr. Fullagar admitted on cross examination that Twin Lakes lacks, and would have lacked since its acquisition, the necessary financial, managerial and operational capabilities to provide water service without the support of Middlesex. Aqua M.B. at 33-34 (quoting Tr. 226:7-20). Moreover, Middlesex ultimately controls Twin Lakes and its operations. Aqua M.B. at 34. This fact was recognized by the Commission when it first approved Middlesex’s acquisition of the Twin Lakes system.<sup>2</sup> And, finally, Middlesex is the entity that would negotiate any agreement to acquire the system and ultimately be paid for such acquisition. *See* Aqua M.B. at 40 (citing Tr. 227:2-7). These critical facts regarding the substance of the

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<sup>2</sup> *Joint Application of Middlesex Water Company (Middlesex) and Twin Lakes Water Services, LLC (Twin Lakes) for approval of 1) the transfer by sale of Twin Lakes to Middlesex; 2) the right of Middlesex to begin to offer, render, furnish and supply water service to the public in the development of Sagamore Estates, Shohola Township, Pike County; and 3) the abandonment of public water service by Twin Lakes*, Docket No. A-2008-2050092, at p. 6 (Order entered March 2, 2009).

relationship between Twin Lakes and Middlesex make clear that it is appropriate and necessary for the Commission to analyze the capabilities of Middlesex, alongside Twin Lakes' capabilities, under Sections 529(a)(3) and 529(c)(1) of the Public Utility Code.

Once these facts are recognized, it becomes clear that this proceeding is not a typical Section 529 case, but instead is a case “where the current owner is going through a Section 529 proceeding in order to eliminate a financially poor performing segment of their overall strong business.” Aqua St. 1 at 8. As further explained by Aqua, Middlesex, a financially fit and capable owner, appears eager to sell the Twin Lakes system, but only if it can force another utility to purchase Twin Lakes at a price that cures Middlesex's mistakes in failing to undertake appropriate due diligence when it voluntarily acquired Twin Lakes. *See* Aqua M.B. at 36.

Aqua notes that Twin Lakes' Main Brief in fact highlights Middlesex's motivations in this regard. Despite three separate rate increases being filed in 2011, 2015 and 2019, the problems associated with the Twin Lakes system have not been corrected. *See* Twin Lakes M.B. at 7-8.

Twin Lakes further claims that the:

2019 Rate Case Opinion and Order led Middlesex – the sole source of financial and operational support to Twin Lakes – to conclude that no matter what level of investment is needed for, or expenses incurred for, improvements or operation of the Twin Lakes system, the Commission would not allow rates to be set at a level that would enable recovery of prudently incurred costs and expenses.

Twin Lakes M.B. at 8 (emphasis added). Twin Lakes effectively concedes that Middlesex is dissatisfied with the Commission's prior approvals of rate relief, and is seeking to divest this system because it is not profitable.

However, it is a critical tenet of the Pennsylvania Public Utility Code that a public utility cannot choose to provide service only when there is a chance for profit. *Colombo v. Pa. PUC*, 48 A.2d 59 (Pa. Super. 1946); *see also Borough of Duncannon v. Pa. PUC*, 713 A.2d 737, 740-41

(Pa. Cmwlth. 1998) (a public utility cannot expect to provide service only if that service is financially advantageous). The mere fact that a utility service fails to earn a return is not sufficient to justify its abandonment; the test is whether the loss to the utility is unreasonable under all the circumstances, having regard to the interests of the public as well as the utility. *See Borough of Carlisle v. PSC*, 81 Pa. Super. 475, 481-82, 923 Pa. Super. LEXIS 112 (Pa. Super. 1923); *Alabama PSC v. Southern Railway Co.*, 341 U.S. 341, 347 (1951); *Chesapeake & Ohio Railway Co. v. PSC of W. Va.*, 242 U.S. 603, 607-08 (1917). The Commission has already rejected Twin Lakes' prior request to abandon service<sup>3</sup> and, based on the representations that Middlesex is not satisfied with its return on investment, this proceeding appears to be little more than an attempt to accomplish what could not have been done in the context of a traditional abandonment proceeding.

Twin Lakes' claim that Middlesex is under no legal or regulatory obligation to provide financial or operation support to Twin Lakes also misses the mark. Twin Lakes M.B. at 40-41. The fact remains that since the acquisition of the Twin Lakes system in 2009, Middlesex was the exclusive financial and operational support for Twin Lakes and effectively owned and operated the water system on Twin Lakes' behalf. *See Aqua M.B. at 23-26, 33-35.* During that time, however, Middlesex apparently refused to provide sufficient financial support to enable Twin Lakes to address the service reliability and quality issues that plagued the system and to implement and complete the capital improvement plans identified in its 2015 and 2019 rate cases. *See, e.g., Aqua M.B. at 21-22.* These are actions that may be deserving of fines or required contributions to undertake the improvements that were expected, rather than allowing Middlesex to improperly use Section 529 to avoid its responsibilities as the owner of Twin Lakes.

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<sup>3</sup> Twin Lakes M.B. at 12; *see also Application of Twin Lakes Utilities, Inc. to Abandon Service to its Customers in Sagamore Estates in Shohola Township, Pike County, Pennsylvania*, Docket No. A-2018-3005590 (Opinion and Order entered Feb. 28, 2019) (denying request to abandon service).

Middlesex should not be permitted to evade its involvement in, and responsibility for, the operational and financial state of its subsidiary where the exclusive means by which its subsidiary can operate are with its support. Therefore, and for the reasons more fully explained in Aqua's Main Brief, the ALJ and the Commission should conclude that Twin Lakes, through Middlesex, has the necessary financial, operational and managerial capabilities to continue to operate the system. Twin Lakes has failed to satisfy the requirements of Section 529(a)(3) and its Petition should be denied.

**2. Twin Lakes' Discussion Of Considered Alternatives Is Misleading And Inaccurate.**

Aqua explained in its Main Brief that Twin Lakes has failed to satisfy Section 529(a)(4) and demonstrate that each of the alternatives to an acquisition set forth in Section 529(b) is uneconomic or unfeasible. Aqua M.B., Section V.B.1.c. Aqua has addressed each of the alternatives and arguments raised in Twin Lakes' Main Brief, but notes that Twin Lakes' description of its prior efforts with respect to one of these alternatives (*i.e.* merger with another utility) highlights and reaffirms the concerns noted in Aqua's Main Brief. *See* Twin Lakes M.B. at 9, 13 and 44 (describing Twin Lakes' prior efforts to negotiate an acquisition of the system).

As an initial matter, Aqua notes that Twin Lakes' discussion of its prior efforts to explore an acquisition of the water system by Aqua are incomplete and misleading. Twin Lakes M.B. at 9. While Aqua was approached in 2011 regarding a possible acquisition of the Twin Lakes system, it determined that:

“due to the poor condition of the system, [and] the investment required to remediate the system...it was not deemed be a viable acquisition opportunity at that time,” and that “Aqua concluded it was not in the best interests of its existing customers to acquire the system.” Aqua St. 1-R at 10-11. It is also for this reason that Mr. Packer testified “[t]he record shows that no other utility is interested in this system out of their own business interests.” Aqua St. 1-SR at 2 (emphasis added).

Aqua M.B. at 18. Essentially, there appears to be a substantial disconnect between the condition of the system, coupled with the cost of the necessary investments that a new owner would need to make in order to comply with the Public Utility Code and other Pennsylvania laws and regulations, and the purchase price apparently being sought for the system.<sup>4</sup> In this regard, it is misleading for Twin Lakes to represent that an alternative, voluntary acquisition is not economical or feasible.

In addition, Twin Lakes concedes that Aqua has already agreed to act as receiver for the Twin Lakes system. *See* Twin Lakes M.B. at 43-44. Indeed, Aqua has been acting as receiver since January 15, 2021. Aqua M.B. at 30-32. While Aqua remains the receiver, it will continue to ensure the safe and reliable delivery of water service to customers served by this system. Aqua St. 1 at 5. As such, it cannot be shown that this alternative is “not economical or feasible” and the Commission need not order a forced acquisition at this time. Twin Lakes should be directed to immediately undertake negotiations with potential buyers at a price that recognizes the distressed nature of the system, which Middlesex clearly failed to support with sufficient investment.

For these reasons, and the reasons more fully explained in Aqua’s Main Brief, Twin Lakes has failed to demonstrate that all of the alternatives to acquisition set forth in Section 529(b) of the Public Utility Code are impractical or not economically feasible. Therefore, Twin Lakes has failed to satisfy the requirements of Section 529(a)(4) and its Petition should be denied.

**3. OCA’s Claims Regarding The Costs To Drill Private Wells Highlight The Problems With Twin Lakes’ Petition.**

In its Main Brief, OCA specifically argued that there is no evidence that potential drilling of private wells for customers served by the Twin Lakes system is viable. OCA M.B. at 15-16. Aqua has already addressed OCA’s claims regarding the ability to drill these wells under Shohola

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<sup>4</sup> Aqua explained in its Main Brief that both the condition of the system and the cost of necessary improvements are relevant to the Commission’s consideration and approval of any purchase price of the Twin Lakes system. *See* Aqua M.B., Sections V.A., and V.C.

Township Ordinance No. 59. Aqua M.B. at 27-28. However, OCA also argues that “there is no evidence that customers would have the financial means to drill their own wells.” OCA M.B. at 15-16.

Aqua submits that this argument further demonstrates that Middlesex, through Twin Lakes, appears to be attempting to use Section 529 for an improper purpose. Traditionally, where a public utility seeks to abandon service, it may be required to contribute to a portion of the costs to acquire an alternative service. *See, e.g., Borough of Duncannon*, 713 A.2d at 740-741; *Application of Equitable Gas Company*, Docket No. A-2008-2027716, at pp. 15-18 (Initial Decision issued Jan. 13, 2009), *becoming final without further action* (Final Order entered March 9, 2009) (regarding allocation of conversion costs); *Application of Megargel’s Golf, Inc. and Hawthorne Inn, Inc. owners and operators of the “Wiscassett Water System” for approval of the abandonment of all water service to the public in portions of Pocono and Paradise Townships, Monroe County*, Docket No. A-00104225, 1985 Pa. PUC LEXIS 9, at \*16 (Order dated Dec. 3, 1985) (concluding the conditioning of an abandonment application on the contribution of costs to obtain adequate alternative water supplies was appropriate).

Considerations of whether, and to what extent, a contribution by the current owner of the Twin Lakes system to offset the customers’ costs of installing private wells—or obtaining an adequate alternative—have been avoided in this case because it has proceeded under Section 529 of the Public Utility Code, rather than Section 1102(a)(2). Importantly, when the Commission previously rejected Twin Lakes’ 2018 application to abandon water service, it noted:

Twin Lakes’ Application to abandon service was rejected for the following reasons:

1. The Petition did not provide evidence of an alternative buyer or receiver for its water system that is able and willing to provide service; and

2. The Petition failed to provide a process whereby customers receiving drinking water from Twin Lakes Utilities, Inc. may obtain water service via conversion to an alternative source such as individual wells.

Such information is also typically considered in Commission Orders evaluating a public utility's request for abandonment.[] Since the above information was not included in the Application for abandonment of service that was filed by Twin Lakes, the *October 2018 Secretarial Letter* provided the Company the opportunity to file an amended Application that contains the above information. More specifically, the *October 2018 Secretarial Letter* permitted Twin Lakes to file an amended Application that is perfected in accordance with the Commission's abandonment of service guidelines.

*Application of Twin Lakes Utilities, Inc. to Abandon Service to its Customers in Sagamore Estates in Shohola Township, Pike County, Pennsylvania*, Docket No. A-2018-3005590, at p. 6 (Opinion and Order entered Feb. 28, 2019) (emphasis added). Rather than perfect its prior application to abandon, which would have necessarily required a consideration of converting customers to an alternative service and the costs thereof, Middlesex voluntarily withdrew operational and financial support from Twin Lakes and terminated the Services Agreement between them, and forced the initiation of this Section 529 proceeding.

OCA's argument concerning the lack of evidence regarding the consideration of the costs of converting the customers served by the Twin Lakes system further highlights what appears to be an attempt to improperly use the Section 529 process by Middlesex, through Twin Lakes. There should not be a finding that the installation of private wells is not a viable alternative, satisfying Section 529(a)(4), where Twin Lakes has effectively avoided the traditional examination of the costs to convert to alternative service and contributions by the utility to defray the costs to convert, that are inherent in abandonment proceedings.

**4. Middlesex, Through Twin Lakes, Appears To Be Attempting To Use This Section 529 Proceeding In A Manner That It Was Not Intended To Be Used.**

It is for the reasons identified above, and in Aqua's Main Brief, that Aqua submitted Twin Lakes has not satisfied the requirements of Section 529 and noted its concern that Middlesex, through Twin Lakes, appeared to be attempting to use this proceeding for an improper purpose. *See* Aqua M.B., Sections V.B.2., V.C. and C.D. As explained by Aqua, where the current owner of the public utility remains financially solvent and operational capable, it appears that the owner is attempting to use Section 529 "force a potential acquiring public utility to pay more than it otherwise would agree to pay based upon arms-length negotiations between the parties." Aqua St. 2-R at 6. Aqua explained that these considerations are relevant to the Commission's evaluation of the Petition under Section 529(c)(6) of the Public Utility Code. 66 Pa.C.S. § 529(c)(6) ("[i]n making a determination pursuant to subsection (a), the commission shall consider...(6) Any other matters which may be relevant.").

In recognition of the unique facts of this proceeding and its concerns regarding how Section 529 was being used, Aqua proposed a reasonable and appropriate condition upon any forced acquisition order in this proceeding. Aqua M.B., Section V.D. Specifically, if the Commission were to order Aqua to acquire the Twin Lakes water system as a part of this proceeding, it should condition the acquisition upon Middlesex setting aside approximately \$1,675,000 in an escrow account to be used to offset the costs of replacing and remediating the existing infrastructure not covered by PENNVEST grant funds available and to cover the tax liability associated with the grant. Aqua M.B. at 38. This proposed condition would appropriately recognize that current ownership should be held responsible for the condition of the Twin Lakes system and also dissuade future attempts by financially and operationally capable water system owners to foist the costs of remediating or replacing a system's infrastructure onto another public utility while also extracting

additional value out of the system than the current owner otherwise may not be able to obtain during arm's length negotiations.

For these reasons, and the reasons more fully explained in Aqua's Main Brief, the ALJ and the Commission should either (a) decline to order Aqua to acquire the Twin Lakes water system as a part of this proceeding, or (b) condition such an order upon Middlesex contributing to an escrow fund in order to offset the costs of repairing and remediating the system.

**B. REPLY TO OCA'S ARGUMENTS REGARDING SECTIONS 529(F), (J), (K) AND (L).**

In addition to the considerations set forth in Sections 529(a), (b) and (c), OCA's Main Brief addressed the requirements set forth in Sections 529(e), (f), (j), (k), and (l). OCA M.B. at 20-22. Aqua has already addressed Section 529(e),<sup>5</sup> and briefly responds to OCA's arguments regarding the requirements set forth in Sections 529 (f), (j), (k), and (l) below.

As noted by OCA, Section 529(f) permits the establishment of a separate tariff for the acquired customers for a reasonable time after acquisition. 66 Pa.C.S. § 529(f). OCA proposes that this issue should be addressed after the purchase price and plan for improvements are known. OCA M.B. at 20. Aqua agrees that, at this time, it is premature to consider this issue and agrees that it should only be considered if the Commission orders a forced acquisition of the Twin Lakes system and after a purchase price has been determined.

In addition, Section 529(j) would require a capable public utility acquiring the Twin Lakes system to submit to the Commission a plan for improvement, prior to such acquisition. 66 Pa.C.S. § 529(j). OCA asserts that Twin Lakes previously discussed a plan for improvements to the system in its PENNVEST funding application and submits Aqua should "provide a similar plan for improvements to the Commission for approval." OCA M.B. at 21. Although Aqua agrees that it

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<sup>5</sup> See Aqua M.B. at 36-38.

would be necessary to submit a plan for improvements if it is required to acquire the Twin Lakes system, Aqua disagrees that such a plan necessarily should list improvements similar to those set forth in Twin Lakes' PENNVEST funding application.

As noted in Aqua's Main Brief and testimony, to the extent the Commission orders Aqua to acquire Twin Lakes in the context of this proceeding, any such order should be conditioned upon Middlesex depositing \$1,675,000 in an escrow account covering the loan portion of the PENNVEST award and the tax liability associated with the grant portion of the PENNVEST award, to be used to offset the costs of replacing and remediating the existing infrastructure. Aqua M.B. at 40. If a forced acquisition is ordered and if this condition is adopted, Aqua submits that any plan submitted to the Commission would need to reflect this condition, and permit Aqua to use the amount deposited into escrow to make certain of the identified reasonably and prudently incurred costs of improvements.

Furthermore, OCA correctly notes that Section 529(k), 66 Pa.C.S. § 529(k) would provide a dollar limit on the liability of Aqua as an acquiring public utility after approval of the plan for improvements submitted under Section 529(j) and after the acquisition occurs, if ordered by the Commission. OCA M.B. at 21. Although Aqua generally agrees with the proposition that the constraints on the limitations of liability can be addressed in a final order approving the acquisition of Twin Lakes by a capable public utility, Aqua submits that the record evidence already submitted in this proceeding demonstrates that any liability limitations should substantially insulate Aqua from the actions and omissions of the current owner of the Twin Lakes system if Aqua is ordered to acquire the system. Twin Lakes' witness confirmed that the "condition of the water system 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 operational due diligence work performed prior to

the purchase” and that, nevertheless, Middlesex voluntarily signed an agreement to purchase the Twin Lakes system after performing due diligence. Tr. 235:5-8. In addition, it is not disputed that current ownership failed to address the condition of the system. Aqua M.B. at 21-22. As a result, the system is currently in poor condition and has experienced several violations of the Public Utility Code and other applicable laws and regulations. Aqua M.B. at 21-22. The record supports a Commission determination that strongly insulates Aqua, its shareholders and its ratepayers from any liabilities arising from the actions and omissions of prior ownership, if the Commission orders Aqua to acquire the system.

Finally, OCA similarly notes that any limitations on enforcement actions under Section 529(l), 66 Pa.C.S. § 529(l), can be addressed after a final order approving the acquisition of Twin Lakes by a capable public utility. Although Aqua generally agrees with this proposition, Aqua submits that the record supports substantial limitations on any enforcement actions against Aqua that are attributable to the actions or omissions of the prior owner of the Twin Lakes system if Aqua is ordered to acquire the system. The above-described facts regarding the system’s condition and current ownership’s failure to improve the system’s condition strongly support limitations on enforcement actions against Aqua for the same reasons the Commission should limit Aqua’s liability if the Commission ultimately determines that Aqua should be ordered to acquire the system.

**IV. CONCLUSION**

WHEREFORE, Aqua Pennsylvania, Inc. respectfully requests that the Pennsylvania Public Utility Commission: (a) deny the 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, to the extent it seeks to require Aqua Pennsylvania, Inc. to acquire the Twin Lakes water system as a part of this proceeding; or, alternatively, (b) condition any grant of the Petition upon the requirement that Middlesex Water Company establish an escrow account in the amount of \$1,675,000 to be used to offset the costs of replacing and remediating the existing Twin Lakes water system infrastructure.

Respectfully submitted,



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Date: February 25, 2021

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## CERTIFICATE OF SERVICE

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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