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May 12, 2021

**Via Electronic Filing**

Rosemary Chiavetta, Secretary  
PA Public Utility Commission  
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

Application of Twin Lakes Utilities, Inc. For a Commission Order *Nunc Pro Tunc* of Service Agreement Between Middlesex Water Company and Twin Lakes Utilities, Inc. and Five Amendments to Service Agreement and Twin Lakes Utilities, Inc. Pursuant to 66 Pa. C.S. § 2102 – Docket No. G-2020-3020941

Affiliated Interest Agreement Between Twin Lakes Utilities, Inc. and Middlesex Water Company – Docket Nos. G-2020-3021018, G-2020-3021021 and G-2020-3021024

Dear Secretary Chiavetta:

Enclosed for electronic filing please find Twin Lakes Utilities, Inc.'s Exceptions with regard to the above-referenced matter. Copies to be served in accordance with the attached Certificate of Service.

Sincerely,

*/s/ Lauren M. Burge*

Lauren M. Burge

cc: Hon. Joel Cheskis w/enc. (via email only)  
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## CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of Twin Lakes Utilities, Inc.'s  
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52 Pa. Code Section 1.54.

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Dated: May 12, 2021

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Petition of Twin Lakes Utilities, Inc. for a	:	
Commission Order Authorizing the Acquisition of	:	Docket No. P-2020-3020914
Twin Lakes Utilities, Inc. by a Capable Public	:	
Utility Pursuant to 66 Pa. C.S. § 529	:	
	:	
Application of Twin Lakes Utilities, Inc. For a	:	
Commission Order <i>Nunc Pro Tunc</i> of Service	:	
Agreement Between Middlesex Water Company	:	Docket No. G-2020-3020941
And Twin Lakes Utilities, Inc., and Five	:	
Amendments to Service Agreement Between	:	
Middlesex Water Company and Twin Lakes	:	
Utilities, Inc. Pursuant to 66 Pa. C.S. § 2102	:	
	:	
Affiliated Interest Agreement Between Twin	:	Docket Nos. G-2020-3021018
Lakes Utilities, Inc. and Middlesex Water	:	G-2020-3021021
Company	:	G-2020-3021024
	:	

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**EXCEPTIONS  
OF  
TWIN LAKES UTILITIES, INC.**

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Dated: May 12, 2021

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## **I. INTRODUCTION**

Pursuant to the regulations of the Pennsylvania Public Utility Commission (“Commission” or “PUC”), 52 Pa. Code § 5.533, and the Secretarial Letter dated April 22, 2021 in the above-captioned proceeding, Twin Lakes Utilities, Inc. (“Twin Lakes”) submits these Exceptions to the Recommended Decision (“RD”). In the RD, Deputy Chief Administrative Law Judge Joel H. Cheskis (“ALJ” or “Judge Cheskis”) correctly found that Twin Lakes has met all of the necessary statutory requirements of Section 529 of the Pennsylvania Public Utility Code, 66 Pa. C.S. § 529, such that Aqua Pennsylvania, Inc. (“Aqua”) should be ordered to acquire the Twin Lakes system.

Twin Lakes fully supports this aspect of the RD. The ALJ reached the only correct result based upon the record and the Public Utility Code. The Commission now should order Aqua to acquire the Twin Lakes system and direct Aqua and Twin Lakes to proceed with purchase price negotiations consistent with Section 529.

The RD, however, takes a step too far by then conditioning the acquisition of Twin Lakes by Aqua upon the placement of \$1.675 million into escrow by Twin Lakes’ parent company, Middlesex Water Company (“Middlesex”). To this aspect of the RD, Twin Lakes takes exception.

Simply stated, the Commission has no jurisdiction over Middlesex, an out-of-state corporation and not a Pennsylvania public utility. Were it to order Middlesex to place \$1.675 million into escrow, the Commission would be illegally and inappropriately untethering itself from its authorized powers under the Public Utility Code in violation of both the Code and the United States Constitution.

The Commission is not a court of general jurisdiction that would evaluate a company's "contacts"<sup>1</sup> with the Commonwealth to determine whether the Company is subject to the Commonwealth's civil laws and may be sued in state court. The jurisdiction of the Public Utility Commission is limited to those entities, principally public utilities, over whom it is expressly authorized by its enabling statute to exercise administrative powers. Nothing in the Public Utility Code grants the Commission power over the parent of a regulated entity. Judge Cheskis' finding and recommendation should be rejected.

As to the escrow itself, the term is a misnomer. The RD specifies that the \$1,675,000 is to be used "to offset the costs of replacing and remediating the existing infrastructure."<sup>2</sup> In other words, it is a forced contribution that Middlesex must pay for system improvement without any expectation of future recovery. Once the Section 529 transfer to Aqua is accomplished, Middlesex's "escrow" becomes confiscated money.<sup>3</sup> This is a government taking and a violation of basic, long-standing constitutional law.

It is an axiomatic principal of utility rate regulation that the cost of system improvements is recovered from customers through return of and return on the investment – not from the shareholders. The total cost of remediation of the Twin Lakes water system is calculated to be \$4.8 million. It is projected that this amount could be raised, in part, from PENNVEST funding, with the remainder (the \$1.675 million) coming in the form of equity financing. In other words,

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<sup>1</sup> This is the criteria which appears to have been employed in the Recommended Decision to gain *in personam* jurisdiction. Even were this test appropriately applied by the Commission as an exercise of judicial power, Middlesex has not maintained a presence in Pennsylvania sufficient to meet that legal test.

<sup>2</sup> RD at 1.

<sup>3</sup> Speculation that Aqua and Twin Lakes (or Middlesex) will work it out in negotiating the final sales agreement is unfounded. There is no fair, arm's length negotiation if one party is put at disadvantage by a forced contribution. There cannot be any realistic expectation that Middlesex will get its money back, even a part. Nor does any party realistically suggest how such an opportunity would occur.

the Recommended Decision advises a forced, permanent equity contribution by Middlesex – not by Aqua as the soon-to-be owner of Twin Lakes.

On the other hand, recovery of the cost of remediation from ratepayers is problematic. In 2018, it was estimated that if the cost of improvements is recovered only from Twin Lakes' customers, the result would be a \$4,000 annual average end-user rate for water service.<sup>4</sup> In 2021, the average rate would be significantly higher due to the tax impact associated with the PENNVEST grant.<sup>5</sup> This is not a new development or realization. In prior Twin Lakes rate cases the parties and the Commission have consistently expressed concerns about affordability of such rates for the one hundred and fourteen households receiving service from Twin Lakes.

Forced equity contribution and very high customer rates are not the answer. These costs need to be spread across a larger group. The only viable option is for Twin Lakes to be acquired by a capable public utility with a much bigger customer base over which the costs of necessary repairs can be spread, a fact that has been well-documented throughout this Section 529 proceeding as the only way to ensure both continued reliable service and reasonable rates for customers.

Cross subsidies within water rates and even across water and wastewater lines of business are common, established practice for all companies. The costs of service for various operating water systems acquired over the years by, in this case, Aqua are averaged across its entire Pennsylvania customer base to avoid excessive rates for any one segment of customers. Over the years, many troubled company acquisitions have been made for this exact reason. In another

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<sup>4</sup> Twin Lakes M.B. at 11.

<sup>5</sup> *See* Twin Lakes M.B. at 12-13.

example, the cost of acquiring and operating wastewater systems can result in high rates and, frequently, the water side of the business absorbs some of these costs.

Neither Twin Lakes nor Middlesex should be punished for this inherently impossible situation, and nowhere in Section 529, the Public Utility Code or the U.S. Constitution does there exist any authority or justification for the Commission to mete out such misplaced retribution. Adoption of the conditions recommended by Judge Cheskis will invite further litigation while the customers of Twin Lakes wait in limbo for a long-term solution addressing the future of this system. Such an outcome does nothing to serve the best interests of the customers of Twin Lakes.

All of the necessary statutory requirements of Section 529 have been met. Therefore, Twin Lakes and Aqua should be directed to proceed with purchase price negotiations without the hindrance of the escrow condition and in full conformance with Section 529 so that Aqua can expeditiously acquire the Twin Lakes system.

## II. EXCEPTIONS

### A. Exception No. 1: The ALJ Erred In Finding That The Commission Has Jurisdiction Over Middlesex. (RD at 30-32).

The RD incorrectly concludes that the Commission can exercise jurisdiction over Middlesex, the out-of-state parent company of Twin Lakes. As has been well-documented throughout this Section 529 proceeding on strong legal foundation, Twin Lakes, not Middlesex, is the jurisdictional utility in Pennsylvania. The Public Utility Code does not provide authority for the Commission to assert jurisdiction over Middlesex and, therefore, the Commission has none. And even were it a court with such powers, the applicable legal standards would not allow the assertion of personal jurisdiction over Middlesex. For these reasons, the RD's conclusion that the Commission has jurisdiction over Middlesex must be rejected.

#### 1. Twin Lakes, Not Middlesex, Is the Jurisdictional Utility In Pennsylvania.

Middlesex is a New Jersey Corporation, incorporated under the laws of New Jersey, with its principal place of business in New Jersey.<sup>6</sup> Middlesex purposely established a Pennsylvania subsidiary company – Twin Lakes Utilities, Inc. – to incorporate in Pennsylvania, become the owner and titleholder of the Twin Lakes system assets, and serve as the jurisdictional public utility in Pennsylvania.<sup>7</sup> Twin Lakes is the entity that filed Articles of Incorporation and registered to do business in Pennsylvania with the Pennsylvania Department of State Corporations Bureau.<sup>8</sup> Twin Lakes is the entity that entered into the Asset Purchase Agreement to acquire the Twin Lakes system and became the titleholder of the system assets as set forth in

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<sup>6</sup> Twin Lakes M.B. at 35.

<sup>7</sup> Twin Lakes M.B. at 35-36.

<sup>8</sup> Twin Lakes M.B. at 33.

the Deed.<sup>9</sup> Twin Lakes is the entity that filed a tariff with, and was accepted by, the Commission in 2009.<sup>10</sup> It has been clear at all times that Twin Lakes, not Middlesex, both in form and substance, is the jurisdictional entity in Pennsylvania.<sup>11</sup> Twin Lakes is the entity that petitioned for, and received, three rate increases in 2011, 2015 and 2019 from the Commission.<sup>12</sup> After nearly 12 years of treating Twin Lakes as the jurisdictional utility in Pennsylvania, the Commission cannot justify choosing to now assert jurisdiction over Middlesex when it has never before done so, notwithstanding the fact that asserting such jurisdiction at this time would, on its face, be both illegal and a violation of the U.S. Constitution.

2. The Commission Lacks Authority Under the Public Utility Code to Assert Jurisdiction Over Middlesex.

The Commission is a creature of statute, which only has the powers and authority granted to it by the General Assembly and contained in the Public Utility Code. *See, e.g., Tod and Lisa Shedlosky v. Pennsylvania Electric Co.*, Docket No. C-20066937, Opinion and Order entered May 28, 2008; *Feingold v. Bell Tel. Co. of Pa.*, 383 A.2d 791 (Pa. 1977). The Commission is not a court of general jurisdiction. In concluding that the Commission can assert jurisdiction over Middlesex, the RD improperly applies anecdotal, not legal, jurisdictional concepts that are exclusively deliberated in courts of general jurisdiction, not in an administrative proceeding before the Commission. Nothing in the Public Utility Code gives the Commission authority to assert jurisdiction over an out-of-state, non-jurisdictional entity.

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<sup>9</sup> Twin Lakes M.B. at 34.

<sup>10</sup> *Id.*

<sup>11</sup> In April 2011, when an error in how the Commission classified the system was noticed, Middlesex wrote to the Commission to correct the Commission's records, and the Commission recognized that Twin Lakes is the jurisdictional entity. Twin Lakes M.B. at 38-39.

<sup>12</sup> *Id.*

Further, the RD includes no legal analysis and no findings of fact or conclusions of law to justify asserting jurisdiction over Middlesex, beyond simply stating that Middlesex has had “numerous and specific contacts” with Pennsylvania.<sup>13</sup> The RD does not point to any prior instances in which the Commission has employed these jurisdictional concepts to subject an out-of-state corporation to its jurisdiction.<sup>14</sup> None of the parties advancing this position cited to any such prior Commission orders. In fact, Twin Lakes has not been able to identify a single Commission order applying these concepts or statutes.

The RD glosses over the legal justification for asserting jurisdiction over an out-of-state company that is not a jurisdictional utility in Pennsylvania, and that also is not a party to this proceeding, when the Commission has never previously exercised such jurisdictional concepts or acted pursuant to Pennsylvania’s long-arm statute. Meanwhile, the Commission clearly has jurisdiction over Twin Lakes, which is the jurisdictional utility in Pennsylvania and the Petitioner here.<sup>15</sup> The Public Utility Code does not provide a basis for asserting jurisdiction over Middlesex, and this recommendation should be rejected.

3. The Commission Cannot Assert Personal Jurisdiction Over Middlesex.

Even assuming, *arguendo*, that the Commission has a statutory basis to assert jurisdiction over Middlesex, which it does not, the applicable case law does not provide a constitutional basis for the PUC to exercise jurisdiction over Middlesex. The RD generically adopts the Bureau of Investigation and Enforcement’s (“I&E”) arguments in finding that Middlesex has had “numerous and specific contacts” with Pennsylvania.<sup>16</sup> However, as noted in Twin Lakes’ Reply

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<sup>13</sup> RD at 31-32.

<sup>14</sup> Twin Lakes R.B. at 2.

<sup>15</sup> *See* Twin Lakes M.B. at 32-39.

<sup>16</sup> RD at 31-32.

Brief and discussed below, I&E’s legal argument is based on outdated case law. There is also a lingering question as to the constitutionality of Pennsylvania’s long-arm statute and business registration statute based on recent case law regarding personal jurisdiction, as the U.S. District Court for the Eastern District of Pennsylvania has recently found these Pennsylvania statutes to be unconstitutional. *See Sullivan v. A.W. Chesterton, Inc. (In re Asbestos Prods. Lia. Litig. No. VI)*, 384 F.Supp.3d 532, 537, 543 (E.D. Pa. 2019); *but see Kraus v. Alcatel-Lucent*, 441 F.Supp.3d 68, 73-74 (E.D. Pa. 2020). The discussion below describes the current case law regarding when courts can assert general or specific jurisdiction over an out-of-state corporation. Under these current standards, the Commission’s exercise of jurisdiction over Middlesex is unconstitutional.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution limits the power of a court to assert jurisdiction. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) (*International Shoe*). The U.S. Supreme Court has recognized two types of personal jurisdiction – general jurisdiction and specific jurisdiction. *See Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011). General jurisdiction applies to “any and all claims” brought against a defendant, and may only be exercised when a defendant is “essentially at home” in the forum state. *Id.* Specific jurisdiction, on the other hand, applies only to claims that arise out of a defendant’s contacts with the forum state, and requires that the defendant have purposely availed itself of conducting activities within the forum state. *See Walden v. Fiore*, 571 U.S. 277 (2014); *Bristol-Myers Squibb Co. v. Superior Court*, 137 S.Ct. 1773 (2017). An examination of the current case law demonstrates that the Commission cannot assert either general or specific personal jurisdiction over Middlesex.

a. *The Commission Cannot Exercise General Personal Jurisdiction Over Middlesex.*

The legal theory that the RD appears to rely on in asserting jurisdiction over Middlesex – the “sufficient business contacts” doctrine – is an outdated concept that was cast aside by the U.S. Supreme Court in *Daimler A.G. v. Bauman*, 571 U.S. 117 (2014) (*Daimler*).

The U.S. Supreme Court’s 2014 decision in *Daimler* represented a paradigm shift in the jurisprudence of a state’s exercise of personal jurisdiction over an out-of-state corporation. Prior to *Daimler*, courts upheld a state’s exercise of personal jurisdiction over an out-of-state corporation where the out-of-state corporation had substantial business activities within the state’s jurisdictional boundaries. The canonical opinion in this area was *International Shoe*, wherein the Supreme Court held that a state court could exercise personal jurisdiction over an out-of-state defendant if the defendant had “certain minimum contacts [with the state]” such that the exercise of jurisdiction did not offend “traditional notions of fair play and substantial justice.” *International Shoe*, 326 U.S. at 316. In 2014, *Daimler* replaced the “sufficient business contacts” doctrine with a bright-line rule that, absent a knowing and voluntary waiver, a state’s exercise of general jurisdiction over a foreign corporation is limited to instances where the foreign corporation is “at home” in the forum state. More specifically, the Supreme Court held that for purposes of a state’s exercise of general personal jurisdiction, a corporation is “at home” in only two places – its state of incorporation and the state where its principal place of business is located. *Daimler*, 571 U.S. at 137, 139, n. 19

In addition to articulating this new bright-line rule, the *Daimler* Court addressed the concept of a state’s assertion of personal jurisdiction over an out-of-state corporation based on the business contacts of that out-of-state corporation’s in-state subsidiary – even where such a subsidiary could be characterized as an “alter-ego” or “agent” of the out-of-state corporation.

The *Daimler* Court held that, absent a knowing or voluntary waiver, an out-of-state corporation could not be subjected to a state’s assertion of personal jurisdiction based on the minimum business contacts of an in-state subsidiary, or a theory that the in-state subsidiary constituted nothing more than an “alter-ego” or “agent” of the out-of-state corporation. *Daimler*, 571 U.S. at 134-135.

Under *Daimler*, the proper inquiry “is not whether a foreign corporation’s in-forum contacts can be said to be ‘continuous and systematic,’ it is whether that corporation’s ‘affiliations with the State are so ‘continuous and systematic *as to render [it] essentially at home in the forum state.*” *Daimler*, 571 U.S. at 138-139; quoting *Goodyear*, 564 U.S. at 919 (emphasis added). “*Goodyear* made clear that only a limited set of affiliations with a forum will render a defendant amenable to all-purpose jurisdiction there....With respect to a corporation, the place of incorporation and principal place of business are “ ‘paradig[m]...bases for general jurisdiction.’” *Daimler*, 571 U.S. at 137 (internal citations omitted).

When the current, post-*Daimler* case law is applied to Middlesex, it is clear that the Commission cannot assert general jurisdiction over Middlesex. Middlesex is incorporated in New Jersey and its primary place of business is in New Jersey, not in Pennsylvania.<sup>17</sup> Even though Middlesex’s subsidiary, Twin Lakes, is a jurisdictional utility in Pennsylvania, under *Daimler* this is not a basis for asserting general jurisdiction over the parent Middlesex. Middlesex is not “at home” in Pennsylvania and the PUC cannot assert general jurisdiction over Middlesex.

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<sup>17</sup> Twin Lakes M.B. at 35.

b. *The Commission Cannot Exercise Specific Personal Jurisdiction Over Middlesex.*

In contrast to general jurisdiction, specific jurisdiction “covers defendants less intimately connected with a State, but only as to a narrower class of claims.” *See Ford Motor Co. v. Montana Eighth Judicial District Court*, 592 U.S. \_\_\_, 5 (2021). For a court to assert specific jurisdiction, an entity must have “purposely availed” itself of the forum state. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985). This means that the entity must have taken “some act by which [it] purposely avails itself of the privilege of conducting activities within the forum State.” *Hansen v. Denckla*, 357 U.S. 235, 253 (1958). The courts have developed a three-part test for determining whether a court may assert specific jurisdiction:

First, the defendant must have “purposefully directed its activities” at the forum. Second, the litigation must “arise out of or relate” to at least one of those activities. And third, if the prior two requirements are met, a court may consider whether the exercise of jurisdiction otherwise “comports with ‘fair play and substantial justice.’”

*O’Connor v. Sandy Lane Hotel Co.*, 496 F.3d 312, 317 (3d Cir. 2007) (citations and internal quotations omitted).

In this case, Middlesex has not purposely availed itself of Pennsylvania’s or the Commission’s jurisdiction. To the contrary, the Twin Lakes subsidiary was specifically created to be the jurisdictional entity in Pennsylvania, and in creating the subsidiary Middlesex purposely did not avail itself of conducting activities in Pennsylvania. Middlesex made clear from its first filing concerning the acquisition of the Twin Lakes system that it intended to establish a wholly-owned Pennsylvania subsidiary to own and operate the water system serving the Sagamore Estates community.<sup>18</sup> It was Twin Lakes that filed Articles of Incorporation with

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<sup>18</sup> Twin Lakes M.B. at 3; Twin Lakes St. No. 2-R, Exh. ABO-1 at 1.

the Pennsylvania Department of State Corporation Bureau. As Middlesex is not, nor has it ever been, a duly authorized Pennsylvania corporation, the creation of Twin Lakes as wholly-owned Pennsylvania subsidiary company was necessary to ensure that the system could be operated by an entity incorporated in the Commonwealth of Pennsylvania.<sup>19</sup> It was Twin Lakes that entered into the Asset Purchase Agreement to acquire the Twin Lakes system.<sup>20</sup> Twin Lakes was also the entity that filed tariffs with the Commission,<sup>21</sup> and has since filed for and received approval for three rate increases from the PUC in 2011, 2015, and 2019. In all of these instances, it was Twin Lakes that had contacts with Pennsylvania and the Commission, not Middlesex.

The record here establishes that Middlesex purposely did not avail itself of Pennsylvania’s jurisdiction, but rather all of the relevant contacts with Pennsylvania were made by Twin Lakes. It does not comport with “fair play and substantial justice” for Pennsylvania and the Commission to interact with, set the rates of, and regulate Twin Lakes as a Pennsylvania utility for nearly 12 years, only to now attempt to exercise jurisdiction over Middlesex. Middlesex has specifically not availed itself of Pennsylvania’s jurisdiction, and it would violate the Due Process Clause of the U.S. Constitution for the Commission to exercise specific jurisdiction over Middlesex. Therefore, the RD’s finding that the PUC has jurisdiction over Middlesex must be rejected.

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<sup>19</sup> Twin Lakes M.B. at 3; Twin Lakes Petition at ¶¶ 4-6.

<sup>20</sup> Twin Lakes M.B. at 3-4; Twin Lakes Petition at ¶ 5.

<sup>21</sup> Twin Lakes M.B. at 4.

**B. Exception No. 2: The ALJ Erred By Conditioning Approval of Relief Under Section 529 of the Public Utility Code on Middlesex Placing \$1.675 Million in Escrow. (RD at 1, 63-64; Ordering Para. 1).**

1. Twin Lakes Has Met Its Burden of Proof That All Of The Statutory Requirements Of Section 529 Have Been Met, And The ALJ's Inquiry Should Have Ended There.

The RD correctly found that Twin Lakes fulfilled all of the statutory requirements of Section 529, regardless of whether Middlesex's role as a corporate parent is considered as part of that analysis, and concluded that Twin Lakes should be acquired by a capable public utility. The inquiry under Section 529 should have ended there. There is no basis in the Public Utility Code for conditioning the grant of Section 529 relief on surrender of money into an escrow account by an out-of-state corporate parent, or any other equity owner for that matter, and this condition should be rejected.

Section 529(e) states that "The price for the acquisition of the small water or sewer utility shall be determined by agreement between the small water or sewer utility and the acquiring capable public utility, subject to a determination by the commission that the price is reasonable."<sup>22</sup> The escrow condition would represent an inappropriate, predetermined condition on the purchase price that is not contemplated by the text of Section 529. The statutory language leaves it to the small water utility and the acquiring capable public utility to negotiate the acquisition price, subject to a Commission determination that the price is "reasonable."<sup>23</sup> The statute only anticipates the Commission stepping in if the parties are unable to successfully negotiate a price for the acquisition.<sup>24</sup> It is inappropriate for the Commission to presuppose how

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<sup>22</sup> 66 Pa. C.S. § 529(e).

<sup>23</sup> 66 Pa. C.S. § 529(e).

<sup>24</sup> *Id.*

the purchase price negotiations will proceed and to impose this very significant condition that is not contemplated by the Public Utility Code, notwithstanding the fact that the Commission has no jurisdiction over the New Jersey entity from which this escrow payment is being demanded. Nothing in Section 529, or any other provision of the Public Utility Code, permits the Commission to exercise such control over any party in connection with negotiations pursuant to Section 529, particularly given that Middlesex is not even a party to this Section 529 proceeding. Twin Lakes' witnesses testified on the record that Twin Lakes will negotiate the purchase price in good faith, and the parties should be directed to proceed with negotiations without any unjustified conditions imposed by the Commission.

As Twin Lakes witness A. Bruce O'Connor explained, "[i]f the Commission orders Aqua to acquire the Twin Lakes system pursuant to Section 529, Aqua will have an opportunity to request recovery of the system replacement and earn a reasonable return on the prudently incurred investments."<sup>25</sup> The ALJ, the parties and the evidentiary record are unanimously in agreement that the rate impact of the acquisition on Aqua's existing customers will be minimal.<sup>26</sup> There is no legally, ethically or morally justifiable reason to require Middlesex to set aside this sum in escrow. This condition will not result in sustainable service for Twin Lakes' customers, and the record shows that the rate impact of Aqua's acquisition of the system will already be minimal.<sup>27</sup> There is no basis for the escrow condition beyond imposing an unjustified punitive measure on Middlesex.

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<sup>25</sup> Twin Lakes St. No. 2-SR at 5.

<sup>26</sup> See RD at 49-51; Twin Lakes M.B. at 47-48.

<sup>27</sup> See RD at 49-51.

Of course, the purchase price negotiations will account for the condition of the system and other factors administered under PUC regulations without the need for this completely unjustified condition. There is no basis in the record in this proceeding to assume otherwise. The counter party to these negotiations, Aqua, has not suggested that the confiscated “escrow” money will be returned or accounted for in the negotiation of price.

The RD bases the escrow condition on the condition of the Twin Lakes system, and out of a concern that other out-of-state entities will somehow abuse this precedent. There is no basis in the record for this concern. As the RD repeatedly states, this is a unique situation that has not come before the Commission before, despite Section 529 having been part of the Public Utility Code for decades. Additionally, under Section 529, it is irrelevant that Twin Lakes has a parent company, as the statute does not provide for any different or special treatment in that situation. The RD correctly found that Twin Lakes is a small water utility as defined by the Public Utility Code, and the analysis under Section 529 applies to Twin Lakes as it would apply to any other small water system. As such, this concern is unfounded and does not provide an adequate basis for placing this extreme condition on the acquisition.

For these reasons, conditioning Twin Lakes’ acquisition by Aqua on a requirement that Middlesex set aside \$1,675,000 into an escrow account is impermissible, unjustified, and contrary to the statutory language of Section 529, and therefore must be rejected.

2. Financial Considerations Regarding Quality of Service are Appropriately Addressed in a Base Rate Case, Not in a Section 529 Proceeding.

Under the Public Utility Code, the proper forum for adjudicating a utility’s investment in and operational performance of a utility system is in a base rate case as provided in Chapter 13 of the Public Utility Code, 66 Pa. C.S. §§ 1301 *et seq.*, and not a Section 529 proceeding. The RD inappropriately imposes the escrow condition on Middlesex “based solely on the poor condition

of the Twin Lakes system that Middlesex as a corporate parent has allowed to develop over the past decade.” Despite being irrelevant to this Section 529 proceeding, the RD makes this claim without any recognition in the record of any direct knowledge of the improvements in service quality that had been made by Twin Lakes since it began operating the system, which despite any claims to the contrary, are substantial. The financial implications of quality of service issues are appropriately addressed in a base rate case, not in a Section 529 proceeding. In fact, these issues have been addressed in Twin Lakes’ past rate cases.

Twin Lakes’ rate cases have already taken into account concerns with quality of service to customers. For example, in Twin Lakes’ most recent rate case, the final Order stated that: “the ALJ considered the evidence relating to the various quality of service issues in this proceeding and factored such evidence as part of her overall determination of recommending a just and reasonable cost of equity for rate setting purposes in this proceeding...”<sup>28</sup> Thus, quality of service and the condition of the system are factored into Twin Lakes’ current PUC-approved customer rates. In addition, the Order stated that the Commission “acknowledge[s] that Twin Lakes has taken affirmative steps toward the necessary repairs and improvements to its system.”<sup>29</sup> It is highly inappropriate for the RD to now punish Middlesex by imposing the escrow condition outside of a rate case after the Commission has acknowledged Twin Lakes’ attempts to address quality of service issues as recently as one year ago in Twin Lakes’ most recent base rate case.

Further, in Twin Lakes’ three rate cases, neither the Commission nor any of the parties have ever attempted to join Middlesex as a party. Any concerns about the appropriate level of investment should have been and were, in fact, addressed in these rate proceedings. Choosing to

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<sup>28</sup> *Pa. P.U.C. v. Twin Lakes Utilities, Inc.*, Docket No. R-2019-3010958, Opinion and Order (Mar. 26, 2020), at 46-47.

<sup>29</sup> *Id.* at 65.

now fault Middlesex for the perceived state of the system and to criticize the level of investment is highly inappropriate outside the context of a base rate case, and did not provide Middlesex with adequate due process to defend itself against these claims.

3. Twin Lakes, With Support From Middlesex, Has Made Significant Efforts To Identify A Long-Term Solution To Sustaining The System's Quality Of Service.

The record in this proceeding directly contradicts the RD's false narrative that Twin Lakes or Middlesex sat idly by and allowed the system to deteriorate.<sup>30</sup> To the contrary, Twin Lakes made significant efforts to improve the system and to provide a long-term solution for sustainable quality of service for its customers.

First, the record shows that the poor condition of the distribution system existed when it was acquired by Twin Lakes.<sup>31</sup> Soon after Twin Lakes began operating the system in November 2009, it became apparent 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.<sup>32</sup> As a condition of its approval of the acquisition of the system, the Commission required the installation of water meters for all customers.<sup>33</sup> Twin Lakes complied with this requirement and after the meters were installed and an annual meter reading database was established, Twin Lakes was able to calculate a non-revenue, or unaccounted-for, water usage percentage<sup>34</sup> which was previously unknown by the former owner, or the Commission, or the Pennsylvania

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<sup>30</sup> See Twin Lakes M.B. at 5-6, 9-14.

<sup>31</sup> Twin Lakes M.B. at 4.

<sup>32</sup> Twin Lakes St. No. 2 at 2.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

Department of Environmental Protection. This critical metric revealed the true amount of leakage within the water distribution system, which was extensive, and provided a true indication of the poor quality of the system.<sup>35</sup>

Further, Middlesex has provided significant support in the form of financing and operational expertise to Twin Lakes as its corporate parent in its attempts to further improve the reliability of the distribution system. Middlesex has been Twin Lakes' sole source of equity capital, debt financing and primary operations support.<sup>36</sup> Twin Lakes is a classic small water utility challenge in that it has been unable to establish a credit arrangement at any reasonable cost with any financial institution as a stand-alone entity.<sup>37</sup> This is due to Twin Lakes' inability to demonstrate that it had the net income and cash flow to adequately support its financial obligations incurred in operating the Twin Lakes water system.<sup>38</sup> Beginning in 2009, Middlesex made equity investments in, and extended credit to, Twin Lakes in order to enable Twin Lakes to maintain service for its customers and pay for the necessary improvements given the poor condition of the system.<sup>39</sup> Specifically, Middlesex provided to Twin Lakes the needed working capital and funds for utility plant investment in the form of debt and equity capital under an assumption that Twin Lakes could obtain sufficient rate relief to not only sustain operations, but also to service Twin Lakes' debt and provide a fair return to the equity investor.<sup>40</sup> Since 2009, Middlesex has extended financial credit to Twin Lakes through three outstanding Unsecured

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<sup>35</sup> *Id.*

<sup>36</sup> Twin Lakes Petition at ¶ 9; Twin Lakes St. No. 1 at 9-10.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*; Twin Lakes St. No. 2 at 3.

Revolving Promissory Notes. Since that time, Middlesex has invested, loaned or advanced over \$2.4 million to Twin Lakes.<sup>41</sup> Middlesex also provided operational support to Twin Lakes through a Service Agreement executed between Middlesex and Twin Lakes.<sup>42</sup>

Additionally, as described in detail in Twin Lakes' Main Brief and as recognized in the RD, over the last ten years Twin Lakes has gone to great lengths to identify a long-term solution that would address the system's operational risks while also attempting to mitigate the need to significantly increase customers' rates.<sup>43</sup> The following is a summary of the steps Twin Lakes has taken:

- In 2011, Twin Lakes' management and Aqua America engaged in a discussion regarding the acquisition of the water system by Aqua that was unsuccessful.<sup>44</sup> On and off for the next four years, Twin Lakes officials contacted Aqua officials in an attempt to restart the acquisition dialogue without success.<sup>45</sup>
- In approximately 2013, a discussion was held between Twin Lakes' management and a representative of American Water Works Company ("American"), the parent company of Pennsylvania American Water Company, regarding any interest in acquiring Twin Lakes.<sup>46</sup> There was no interest expressed by American in performing due diligence or pursuing a transaction.<sup>47</sup>
- In late 2014, Twin Lakes officials investigated the possibility of installing individual wells for each of the then approximately 115 customers served by Twin Lakes at that time.<sup>48</sup> Because many of the lot sizes in the Sagamore Estates

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<sup>41</sup> Twin Lakes Petition at ¶ 11.

<sup>42</sup> Twin Lakes Petition at ¶ 12.

<sup>43</sup> Twin Lakes M.B. at 9-14.

<sup>44</sup> Twin Lakes St. No. 2 at 4.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

community did not allow for adequate clearance between the septic system and a well under Pennsylvania regulation, this solution was not deemed viable.<sup>49</sup>

- In April 2015, Twin Lakes senior executives travelled to Harrisburg to meet with the Chairman of the Commission to request assistance in identifying a system take-over solution that would mitigate the inevitable need for Twin Lakes to petition the Commission for another triple-digit increase in base rates for the residents of the Sagamore Estates community.<sup>50</sup> There were no remedies identified other than to seek an increase in base rates.<sup>51</sup>
- In August 2017, Twin Lakes met with the Pennsylvania Office of Consumer Advocate (“OCA”) to disclose the ongoing Twin Lakes system failure risk and to request assistance in identifying a long-term solution.<sup>52</sup> Subsequently, senior Twin Lakes officials held informal conversations with senior executives of Aqua and American.<sup>53</sup> These conversations failed to produce a successful outcome.<sup>54</sup>
- In November 2017, senior Twin Lakes officials met with Commission Staff to provide an update on the ongoing system failure risk due and again requested the Commission’s assistance in identifying a long-term solution.<sup>55</sup>
- On February 26, 2018, Twin Lakes issued a letter to the Commission’s Bureau of Technical Utility Services and the Bureau of Investigation and Enforcement, the Acting Consumer Advocate, and the Small Business Advocate informing them of the emergent need to undertake system improvements that would result in increasing Twin Lakes customers’ annual water bills to over \$4,000 and discussing Twin Lakes’ potential procedural options.<sup>56</sup>

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<sup>49</sup> Twin Lakes St. No. 2 at 5.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> Twin Lakes St. No. 2 at 5.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 5-6.

<sup>56</sup> *Id.* at 6.

- On October 23, 2018, Twin Lakes filed a Petition For Abandonment with the Commission.<sup>57</sup> On October 25, 2018, the Commission rejected Twin Lakes’ Petition For Abandonment.<sup>58</sup>
- On August 7, 2019, Twin Lakes submitted an application to PENNVEST to finance its five-year capital improvement plan.<sup>59</sup> On January 29, 2020, Twin Lakes was notified that PENNVEST had approved a grant of \$4.66 million.<sup>60</sup> Because of the income tax liability of \$1.358 million associated with the grant, Twin Lakes concluded the tax liability would increase customer rates significantly and may not be approved for rate recovery by the Commission.<sup>61</sup> As such, Twin Lakes was unable to formally accept the PENNVEST grant due to the added financial burden this would place on Twin Lakes’ customers and the history of inadequate rate relief awarded by the Commission.<sup>62</sup>
- In November 2019, senior Twin Lakes officials began a dialogue with Utilities, Inc.<sup>63</sup> Utilities, Inc. performed operational and financial due diligence on water system but did not move forward to pursue a transaction.<sup>64</sup>
- Twin Lakes considered interconnecting with the nearest public-community system of Milford Township.<sup>65</sup> This alternative was not deemed viable as a Twin Lakes interconnection with the Milford Township system would require a 5 to 6 mile long excavation in State Route 6 accompanied by the construction of booster pumping stations along this route due to the mountainous terrain.<sup>66</sup>
- On July 14, 2020, Twin Lakes issued a Request For Proposals (“RFP”) for the provision of contract operations, maintenance and management services for the

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<sup>57</sup> *Id.*; see Docket No. A-2018-3005590.

<sup>58</sup> *Id.*; 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).

<sup>59</sup> Twin Lakes St. No. 1 at 8.

<sup>60</sup> *Id.*

<sup>61</sup> Twin Lakes Petition at ¶ 20; Twin Lakes St. No. 1 at 8-9.

<sup>62</sup> Twin Lakes St. No. 1 at 8-9.

<sup>63</sup> Twin Lakes St. No. 2 at 6.

<sup>64</sup> *Id.*

<sup>65</sup> Twin Lakes St. No. 1 at 7.

<sup>66</sup> *Id.*

Twin Lakes system.<sup>67</sup> Only one proposal was submitted that did not provide the necessary services, so this proposal was deemed inadequate.<sup>68</sup>

These efforts represent a decade of diligent attempts to solicit support and recommendations by the Commission and others to identify a sustainable solution for the Twin Lakes customers, in order to resolve current and anticipated future problems that only came to light after Twin Lakes acquired the system. Twin Lakes filed for Section 529 relief only as a last resort after the foregoing efforts did not result in a long-term solution to the operational risks and affordability issues for customers with the Twin Lakes system. Therefore, the RD falsely accuses Middlesex of having done nothing to support Twin Lakes' efforts to maintain sustainable service for the current and future benefit of its customers, and the punishment of the escrow requirement is unfounded. This false narrative propounded by the RD, which serves as the basis for meting out misplaced retribution against Middlesex in the form of the escrow requirement, does nothing to serve the interests of the customers of Twin Lakes.

4. The Escrow Condition Amounts To An Unconstitutional Taking Without Just Compensation.

The RD's condition requiring that Middlesex forfeit \$1.675 million into an escrow account is an unconstitutional taking of Middlesex's property without just compensation in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution. The Fifth Amendment's Takings Clause applies to the states through the Fourteenth Amendment, and prohibits the government from taking private property for public use without just compensation. *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001), citing *Chicago, B. & Q.R. Co. v. City of Chicago*, 166 U.S. 226 (1897). The U.S. Supreme Court has found that a public utility "may not

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<sup>67</sup> *Id.* at 9.

<sup>68</sup> *Id.*

be required to use its property for the benefit of the public without receiving just compensation for the services rendered by it.” *Smyth v. Ames*, 169 U.S. 466, 546 (1898). Further, the Pennsylvania Supreme Court has stated that “the ‘just compensation’ safeguarded to a utility by the fourteenth amendment of the federal constitution is a reasonable return on the fair value of its property at the time it is being used for public service.” *Barasch v. Pa. P.U.C.*, 516 Pa. 142, 163-164 (1987) (citations omitted).

In this case, the RD’s requirement that Middlesex place \$1.675 million in escrow to fund repairs to the Twin Lakes system is a taking without just compensation, notwithstanding the fact that Middlesex vehemently denies the RD’s claim of any jurisdiction whatsoever by the Commission over Middlesex. The escrow funds are intended to be used to make improvements to the Twin Lakes system, which will eventually be used and useful in public service. However, Middlesex will never have the opportunity to earn a return on this property that it would be compelled to surrender under the escrow requirement. As such, the escrow requirement amounts to a taking of Middlesex’s property for public use without just compensation. This is unconstitutional and must be rejected.

5. Conditioning Section 529 Relief on Middlesex Placing Substantial Funds in Escrow Creates an Impermissible Unconstitutional Condition.

The requirement that Middlesex place \$1.675 million in escrow is a violation of the Doctrine of Unconstitutional Conditions. As a general principle, the U.S. Supreme Court has recognized that a state cannot condition a benefit generally available to others in the state on the surrender of a constitutional right. *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604, 606 (2013); *Frost v. R.R. Comm’n of State of Cal.*, 271 U.S. 583, 593 (1926); *cf Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 893-94 (1988). This principle is known as the unconstitutional conditions doctrine, and its logical foundation “applies with equal force in

any case in which the enjoyment of a government-sponsored benefit is conditioned upon a person's nonassertion of any constitutional right." *Wojtczak v. Cuyler*, 480 F.Supp. 1288, 1306 (E.D. Pa. 1979) (citing William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439, 1446 (1968)); see also Richard A. Epstein, *Unconstitutional Conditions, State Power and the Limits of Consent*, 102 Harv. L. Rev. 4, 7 (1988).

As discussed above, Middlesex possesses a constitutional right under the Due Process Clause to not be subjected to the personal jurisdiction of Pennsylvania as it did not knowingly or voluntarily waive that right by purposely establishing a Pennsylvania subsidiary company to own, operate and serve as the jurisdictional utility, and also is not "at home" in Pennsylvania. Conditioning the acquisition of the Twin Lakes system on Middlesex depositing \$1.675 million into an escrow account would require Middlesex to surrender its constitutional protections under the Due Process Clause in order for Twin Lakes to obtain relief under Section 529. This requirement conditions such relief on Middlesex waiving its due process rights and therefore violates the unconstitutional conditions doctrine.

Even assuming *arguendo* that Middlesex were subject to personal jurisdiction in Pennsylvania, which Middlesex is not, the Commission has not imposed any such escrow condition on any other small water system pursuant to Section 529. The Commission in this instance would therefore be impermissibly discriminating against Middlesex by conditioning a benefit (Section 529 relief) generally available to other small water systems without that condition.

Additionally, as discussed above, the escrow requirement would constitute a taking without just compensation. If Middlesex were required to put this amount in escrow, it would

require Middlesex to surrender its constitutional protection against such takings in order for Twin Lakes to obtain relief under Section 529. This would likewise create an unconstitutional condition.

Conditioning the acquisition of Twin Lakes by a capable public utility under Section 529 on a requirement that Middlesex set aside \$1.675 million into an escrow account, where Twin Lakes by every objective measure has met all of the statutory requirements of Section 529, is therefore unconstitutional as it would compel Middlesex to surrender its constitutional rights under the Due Process Clause and the Takings Clause. As such, the escrow requirement must be rejected.

### III. CONCLUSION

The ALJ correctly found that: (1) Aqua should be ordered to acquire Twin Lakes pursuant to Section 529 of the Public Utility Code, (2) Twin Lakes' Applications For Approval *Nunc Pro Tunc* of The Three Unsecured Revolving Promissory Notes between Twin Lakes and Middlesex should be granted; and (3) Twin Lakes' Application For Approval *Nunc Pro Tunc* of the Service Agreement between Twin Lakes and Middlesex and its five amendments should be dismissed as moot. The ALJ was incorrect in finding that Pennsylvania can exercise jurisdiction over Middlesex and conditioning the granting of Section 529 relief upon Middlesex placing \$1,675,000 into escrow to offset the costs of replacing and remediating the existing infrastructure of the Twin Lakes system. This finding and condition are both outside the scope of the Commission's authority under the Public Utility Code and unconstitutional. Twin Lakes, therefore, respectfully urges the Commission to modify the RD to reflect that the Commission does not have jurisdiction over Middlesex and to reject any condition requiring Middlesex to place any funds in escrow.

Respectfully submitted,



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